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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. X.

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COBBETT'S COMPLETE COLLECTION

OF

State Trials.

305. Proceedings* against JAMES HOLLOWAY,† in the King's-Bench, on an Outlawry for High Treason: 36 CHARLES II. April 21, A. D. 1684.

HIS majesty's Attorney General having, on Friday last, moved the court of King's Bench for an Habeas Corpus returnable this day, directed to the Keeper of his Majesty's gaol of Newgate, to bring thither the body of James Holloway, then in his custody, to shew cause

why execution should not be awarded upon an Outlawry for High Treason against him. The Keeper of Newgate, according to the command of the writ, brought him this day to the bar of the said court, where he was proceeded against in this manner.

* There is a short note of this case in 3 Mod. 49; which see, and the books referred to, in Mr. Leach's edition of that work.

† "Some time in the spring eighty four, Holloway was taken in the West Indies, and sent over. He was under an Outlawry for Treason. The Attorney General offered him a trial, if he desired it. But he was prevailed on, by the hope of a pardon, to submit and confess all he knew. He said, he was drawn into some meetings, in which they consulted how to raise an insurrection, and that he and two more had undertaken to manage a design for seizing on Bristol, with the help of some that were to come to them from Taunton: But he added, that they had never made any progress in it. He said, at their meetings at London, Rumsey and West were often talking of lopping the king and the duke: But that he had never entered into any discourse with them upon that subject: And he did not believe, there were above five persons that approved of it. These were West, Rumsey, Rumbold, and his brother: The fifth person is not named in the printed relation. Some said, it was Ferguson: Others said, it was Goodenough. Holloway was thought by the court not to be sincere in his confession. And so, since what he had acknowledged made himself very guilty, he was executed, and died with a firm constancy. He shewed great presence of mind. He observed the partiality that was evident in managing

this plot, different from what had appeared in managing the Popish plot. The same men who were called rogues, when they swore against papists, were looked on as honest men when they turned their evidence against Protestants. In all his answers to the sheriffs, who at the place of execution troubled him with many impertinent questions, he answered them with so much life, and yet with so much temper, that it appeared he was no ordinary man. His speech was suppressed for some days: But it broke out at last. In it he expressed a deep sense of religion: His prayer was an excellent composure. The credit of the Rye Plot received a great blow by his confession. All that discourse about an insurrection, in which the day was said to be set, appeared now to be a fiction; since Bristol had been so little taken care of, that three persons had only undertaken to dispose people to that design, but had not yet let it out to any of them. So that it was plain, that after all the story they had made of the plot, it had gone no further, than that a company of seditious and inconsiderable persons were framing among themselves some treasonable schemes, that were never likely to come to any thing; and that Rumsey and West had pushed on the execrable design of the assassination, in which, though there were few that agreed to it, yet too many had heard it from them, who were both so foolish, and so wicked, as not to discover them." Burnet, p. 576.

The return of the writ of Habeas Corpus was first read.

Cl. of Cr. James Holloway, hold up thy hand. [Which he did.] Thou hast been indicted in London, by the name of James Holloway; late of London, merchant, for High Treason by thee committed, touching the king's majesty's person, and the government of this his kingdom of England, and for not appearing and answering that indictment, by due process of law, upon the indictment thou standest outlawed, and upon that outlawry thou standest attainted of the same high-treason; What hast thou to say for thyself why execution should not be awarded against thee upon that attainder by this court according to law?

Holloway. My lord, I have been a great while absent, and know not what hath been done in this matter, or proved against me.

Lord Chief Justice. (Sir George Jefferies.) Yes, you have been absent so long it seems, that you now stand outlawed, and thereby attainted of high treason; there is nothing now remains with the court, but only to make a rule for your execution.

Holloway. If an ingenuous confession of the truth will merit the king's pardon, then sure I have done it.

L. C. J. For that matter we are not to dispose of the king's mercy, he will dispose of his own mercy as he shall think fit. Is Mr. Attorney in the hall?

Crier. Yes, my lord, he is.

L. C. J. Then pray send for him.

Which was done, and in a little time after he came into court.

L. C. J. Mr. Attorney, here is the prisoner at the bar, Holloway.

Att. Gen. (Sir Robert Sawyer.) Yes, my lord, I see he is. Sir Samuel Astry, have you the record there?

Cl. of Cr. Yes, Sir.

L. C. J. It has been read to him, Mr. Attorney.

Att. Gen. My lord, I would know what he saith that execution should not be awarded.

L. C. J. He talks of discoveries and confessions, which we, you know, cannot take any notice of; ask him again.

Cl. of Cr. Hast thou any thing to say for thyself why execution should not be awarded against thee, according to law?

Holloway. My lord, I know not what hath been proved against me, but I have made such an ingenuous confession to his majesty of what I know—

L. C. J. Proved against you? You are outlawed upon an indictment for high treason; what can you say against the court's awarding execution?

Att. Gen. My lord, has he heard the indictment upon which the outlawry was grounded?

Cl. of Cr. No, Sir, only the substance was told him, That he was indicted of high treason, and outlawed for it, and stands attainted by that outlawry.

Att. Gen. If your lordship please, the indictment may be read to him, that he may understand what it is, and may not go blind to execution.

L. C. J. Ay, Mr. Attorney, if you please, let it be so.

Cl. of Cr. Reads. "The jurors being sworn to enquire for our sovereign lord the king, and the body of the county of the city of London, upon their oaths present, That"—[And so the whole Indictment was read.]

Cl. of Cr. That is the Indictment, Mr. Attorney, and upon this he is outlawed.

Att. Gen. And so stands attainted. What hath he to say to it?

L. C. J. Ay, why should we not award execution against him according to law?

Cl. of Cr. Have you any thing to say?

Holloway. I have said what I have to say.

Att. Gen. Pray what is that, my lord, that he has said, for I was not here?

Holloway. I beg his majesty's mercy.

Att. Gen. If the king be so gracious as to admit you to your trial, can you make a defence against the indictment? Have you any thing to say that you can defend yourself by, if the king do admit you to be tried, and that is a mercy and a grace, for at law you are gone.

L. C. J. It is so, indeed, Mr. Attorney; if you will on the king's behalf indulge him so far, as I suppose you have authority from the king to consent unto, that if he has a mind to try the fact, and can defend himself, he shall have that liberty, that is a great mercy, I assure you.

Att. Gen. My lord, That is the only reason why I did cause the indictment to be read that he might hear it; that supposing he were not outlawed, but that were out of the case, if he hath any thing to say that could defend him from it, the king would not exclude him, but admit him to his trial, and extend his mercy so far to him.

J. C. J. Mr. Attorney, it is exceeding well. Now you understand what is said by the king's Attorney, you have heard the indictment read. It is an indictment of high treason, that you with other false traitors, Hone, Rumball, the Goodenoughs, and the rest, did conspire the death of the king. Now though you are in law actually attainted, as much as if you had been tried and convicted, and received judgment of death upon that conviction, to all intents and purposes, and there is no more for the court to do, but to award execution upon this attainder, and be dealt with as a false traitor. Yet however in as much as you have heard the indictment read, if you think you have any thing to say that would satisfy the world, or a jury, that you are not guilty of what you are indicted and accused of, it seems the king is pleased to signify his gracious intention towards you by Mr. Attorney General, that he is contented to wave that other part, the attainder by outlawry, and you shall have the liberty to try it, if you think you can defend yourself.

Holloway. My lord; I cannot undertake to

defend myself, for I have confessed before his majesty that I am guilty of many things in that indictment, and I throw myself on the king's mercy.

L. C. J. Then he confesseth it, and will not undertake to defend himself; as for the king's mercy, that we must leave to his majesty, who is the dispenser of his own grace, we are to execute his justice, and must give a rule accordingly.

Just. Withins. But I hope every body here takes notice of his open confession, when he might try it if he would. Surely none but will believe this conspiracy now, after what this man hath owned.

L. C. J. We were well enough satisfied about it before, and so was every honest man, I dare say.

Just. Withins. Yet, perhaps, though he saith it, and others have confessed it, and the evidence hath been made public, there are many people that say they will not believe it.

L. C. J. We do not mightily concern ourselves what the people say. I am sure not one of all that were concerned in this conspiracy, have dared to deny it absolutely, though some have been prevailed upon by ill advice, to prevaricate about it, and shuffle it off. But none of them have had the confidence absolutely to deny the truth of the fact, notwithstanding all the calumnies and reproaches cast upon the government, and all the arts that have been made use of to stifle it.

Just. Withins. My lord, I speak it the rather because we see what work sir Samuel Barnardiston has made of it in his Letters, where he calls it a Sham-Plot, and says it is lost, except it be found among the Abhorers and Addressers.*

L. C. J. But now the Plot is found among the conspirators and traitors, he may write to his correspondents in the country the next time, it is found among the reformers of government, and religion, that can swallow all things, that can kill kings and levy war, and do the worst of villainies to promote religion and reformation, as they call it.—Let us think of some convenient day, and give such order that the sheriffs see execution done according to law.

Att. Gen. You must first pronounce the judgment, my lord.

Just. Withins. It is never pronounced in such a case, Mr. Attorney.

L. C. J. No, we only give a rule for execution, the outlawry is the judgment, and that is upon the record already†.

* See his Case, vol. 9, p. 1334, of this Collection.

† See, in this Collection, the Cases of Sir Thomas Armstrong in this same year, 1684, Ratcliffe, A. D. 1746, and of Dr. Cameron, A. D. 1753, and the authorities referred to in those cases. The Stat. 7 W. 3. c. 3. s. 3. saves the benefit of the regulations thereby enacted on trials for treason, to such as, having been out-

Cl. of Cr. Yes, my lord, we always enter it so.

L. C. J. Captain Richardson, I think, Wednesdays and Fridays are your usual execution days in London, are they not?

Capt. Richardson. Yes, my lord, either of them.

L. C. J. Then Wednesday seven-night.

Capt. Richardson. Does your lordship appoint Wednesday next?

L. C. J. No, that will be too quick; Wednesday seven-night.

Capt. Richardson. What day your lordship pleaseth, I suppose I shall have a rule.

Cl. of Cr. You shall have a rule, and an Habeas Corpus to deliver him, as the course is.

L. C. J. In the mean time take your prisoner back again.

And accordingly he was carried back to Newgate.

After which he sent the following Petition to the King for mercy:

‘ Most great and gracious Sovereign,
 ‘ I your majesty's now close prisoner in
 ‘ Newgate, and condemned for my crimes,
 ‘ which I have confessed myself guilty of, in a
 ‘ paper of my own writing, delivered to the
 ‘ right honourable the lords of your majes-
 ‘ ty's privy council, in which is a true and
 ‘ faithful account of all that I know con-
 ‘ cerning the late Plot, with the manner how I
 ‘ was drawn into it, and the reasons why I did
 ‘ not come in at the first discovery, and cast
 ‘ myself at your majesty's feet for mercy,
 ‘ which I hope your majesty hath perused, and
 ‘ find no cause to think I have reserved any
 ‘ thing undiscovered; for when I was first
 ‘ taken, I resolved to declare the whole truth,
 ‘ and nothing but the truth, which I have here
 ‘ done, and will own to be true, before any that
 ‘ shall offer to contradict it, or say there was no
 ‘ Plot; and if any thing more occurs to my
 ‘ memory, will not fail to declare it. I have
 ‘ now nothing to say for myself why I should
 ‘ not be executed, according to condemnation,
 ‘ but do most humbly prostrate myself at your
 ‘ majesty's feet for mercy, acknowledging my
 ‘ hearty sorrow for all that I have been guilty
 ‘ of, and remain in hopes, that that fountain of
 ‘ mercy which hath so abundantly flowed from
 ‘ your majesty's sacred breast, ever since your
 ‘ happy restoration, is not yet dry, but that
 ‘ there are some drops left for me, which if I
 ‘ may be so happy as to obtain, I shall always
 ‘ whilst I live, endeavour to approve myself
 ‘ your majesty's most true and faithful sub-
 ‘ ject; and, I hope will answer the ends of a
 ‘ pardon. Which that I may so do, and for
 ‘ your majesty's long life, peaceable and happy
 ‘ reign, shall ever pray, &c. J. HOLLOWAY.’

His Petition being rejected, he was executed April 30th, 1684.

lawed, do afterwards intitle themselves to a trial on the merits. See East's Pleas of the Crown, ch. 2. s. 69.

Being come to the place of Execution, he spoke to the sheriffs as follows:

Holloway. May I have liberty, Sir, to speak what I desire to speak?

Sheriff *Daniel*. Yes, Sir, you may. What you have, I suppose, will be by way of discovery to the world of what you are brought here to die for.

Holloway. You have my Paper, captain.

Capt. *Richardson*. Yes.

Sheriff *Daniel*. Have it you about you?

Capt. *Richardson*. I have it in my pocket.

Sheriff *Daniel*. Shew it him (which he did.)

Is it your own hand-writing?

Holloway. Yes, Sir.

Sheriff *Daniel*. Is it your own hand-writing?

Holloway. That is my own hand-writing. A discovery of what I knew, I made to his majesty, but a great many people think that I have not discovered what I knew: but I have discovered what I knew of the Plot, and I am heartily sorry I was any way concerned in that way: as to the endeavouring any thing by arms. I do think several things have been managed in England, there have been many things done against the king and the kingdom's interest, and I wish the king was well satisfied of it, and that a course might be taken to prevent it. And, I think, one way to prevent plotting (according to my weak capacity) is, that his majesty would be pleased to call a parliament, and pass an Act of Oblivion for all plotters whatsoever. There was a damnable Popish Plot, and I look upon the stifling of that, to be the only cause that any man did any thing in this. Had all the Popish Plotters been—

Sheriff *Daniel*. By the way, Sir, how do you know it was stifled?

Holloway. Sir, we have known that the laws could not be suffered against them, and the parliament could not be suffered in the prosecution of them. I wish the king would consult his own safety, and the safety of the nation, and that an Act of Oblivion might pass, for I believe there are many concerned; and that there might be an end put to all news-mongers, that write into the country letters of news; I look upon that to do the king and the kingdom more hurt than any thing else.

Capt. *Richardson*. Mr. *Holloway*, I beg one thing, have you discovered all? I desire you would declare those (you did not name their names) that, if occasion were, would be ready; but that you had not spoke to them. Wade and others were to maintain their posts.

Holloway. No, Sir, I had not spoke to them.

Capt. *Richardson*. This you did say.

Holloway. Yes, Sir.

Sheriff *Daniel*. And that you promised a number of men in this design.

Holloway. Promise it! I did propose I might do it.

Capt. *Richardson*. What do you know of the contriving the business of the Rye, for lopping, or taking off the king and the duke?

Holloway. I was not with them till after the time a good while; till about a month or six weeks after the time I was not acquainted with them. I looked upon it as a business not likely to take any effect at all, for I could never find above five that were concerned in it.

Sheriff *Dashwood*. But did they not tell you at some one time, they were concerned in such a thing?

Holloway. Yes, Sir, they did so. They told me more than once.

Sheriff *Daniel*. In Bristol, or in London?

Holloway. In London.

Sheriff *Dashwood*. Mr. *Holloway*, you have a liberty to say any thing you have a mind to.

Holloway. I have little to say more upon that account. I am sorry I was concerned in that way, to do such a thing as to take up arms. But as to the design I had, and the Plot I was acquainted with, it was nothing against the king's life.

Capt. *Richardson*. Sure it was the same Plot, while there was a design to seize the king, and take him from evil company.

Holloway. We had a design to take them that were guilty of the Popish Plot, and were enemies to the privileges and liberties of the subject.

Sheriff *Daniel*. And as a thing that tended to that, the king was to be seized till he consented to these things.

Holloway. It was supposed by them that told me of it, that many things that have been acted of late, were done contrary to the king's knowledge, and that the king knew nothing of it; and I am perfectly of that belief too, that many things are done contrary to the king's knowledge. And I was farther informed, that if the king could be but once acquainted with these things, that the king would presently come in to those that should stand for his assistance, and give up all those offenders to justice.

Sheriff *Daniel*. And if you could not tell him otherwise, you would take him first, and tell him afterwards.

Holloway. You may interpret it how you please, Sir. It was that all such differences amongst the king's subjects might be prevented for the future; for I believe there were never greater differences in the spirits of men, though some think the times were never better than now, because all things go according to their own humour; but I suppose many in the nation are satisfied that many things have been done contrary to law.

Sheriff *Daniel*. Was it fit you should set up for a politician, or a statesman?

Holloway. No, Sir, I did not take it upon me; that was for the scribblers that write news. I do not reckon myself worthy to direct in such a case.

Sheriff *Daniel*. Mr. *Holloway*, you do not remember to give the names of those persons you spake of.

Holloway. It would be a folly for me, Sir,

to go to abuse men that I did not know whether they would be concerned or no.

Sheriff Dashwood. But that there were persons that would be concerned, you say.

Holloway. That we did think so; and if we should name every one that we thought would be concerned, I believe we might name three parts of London.

Capt. Richardson. I hope you are in a great mistake there.

Holloway. For that design, I believe above three parts would be for. I never had any design but for the king and the kingdom's interest; though I know that design that was carried on by Rumsey and West was a very heinous design, but I believe they would not have found many in England that would have been for it; I never heard of above five for it.

Sheriff Daniel. Were you acquainted with Walcot?

Holloway. I was in his company once or twice, but I heard him speak against it.

Sheriff Daniel. Was you ever with my lord Shaftesbury?

Holloway. No, Sir, I was never with my lord Shaftesbury but once, and that was about a design I was promoting in parliament, about the linen-manufacture.

Sheriff Daniel. Was you ever with my lord of Essex?

Holloway. Never but once, and that was about that business.

Sheriff Daniel. Were you ever acquainted with my lord Russell?

Holloway. Never with him at all.

Sheriff Dashwood. You were saying you knew the names of five; who were they that were to be concerned in that matter?

Holloway. I have declared them to his majesty.

Sheriff Daniel. Did you know Ferguson?

Holloway. I knew him, Sir, but I know Ferguson to be against any such design, and, indeed, we did look upon it to be a thing that would come to no effect.

Sheriff Dashwood. Do you mean the seizing the king?

Holloway. I mean the insurrection.

Sheriff Daniel. Did you know of any money raised or promised to buy arms?

Holloway. No, Sir, never. I heard of money that was to be raised, but I did not know who was to raise it.

Sheriff Daniel. It is not our business to ask you many questions, if you have any thing to say you may.

Sheriff Dashwood. If you have any thing to say for the discharge of your conscience, do it.

Holloway. I thank God, I never had any design against his majesty's person; what I intended was only for the good of the king and kingdom, and I did take it that it would have been so; and I am very sorry that any things should have gone contrary to law, as they have done; and I hope care will be taken to prevent any such things for the future.

Sheriff Dashwood. The king hath said he will govern according to law; he hath done so, and will do so.

Holloway. That I leave to the judgment of all; many know better than I.

Sheriff Daniel. Such glossy pretences are very strange, to carry on such a design, for the seizing a sovereign prince, that you have sworn allegiance to, or ought to have done.

Holloway. I think those pretences, the grounds that we went upon, were no glossy pretences at all.

Sheriff Daniel. I think it is, that when things are not done as you would have them, you must immediately rebel.

Holloway. No, Sir, not that; we did not design a rebellion.

Sheriff Daniel. The seizing the king is certainly a rebellion, and one of the highest steps of rebellion.

Holloway. We say this, that all ways were used against Protestants; several Sham-Plots; but no justice could be had against Papists.

Sheriff Daniel. Several of them were executed here.

Holloway. There were some executed at first, Sir; but afterwards, when so many great persons came to be concerned, there was nothing could be had against them.

Sheriff Daniel. There were mighty searches made about London, for that great number of Papists talked on.

Holloway. There was a great many seized, Sir; but what became of them?

Sheriff Daniel. Generally tried, and brought to condign punishment. You would not have had every Irishman believed against honest men. Some people were called papists in masquerade.

Holloway. Irishmen were believed against Protestants; after they had turned about, and had sworn against papists, they were believed then. It was well observed, that while the Irish evidences did continue in the first discourse of the popish plot, and in the first evidences, then, it is well known, they were slighted, and all cried out against; but when they came to swear against Protestants, then things were altered presently.

Sheriff Dashwood. I pray God all men's eyes may be opened to see what is done.

Holloway. I would not advise any one to go that way to work, to do any thing by force of arms; and I wish the king's eyes may be opened, that he may see his enemies from his friends; and I think he hath cause to look for them near his home.

Sheriff Dashwood. Have you any papers to deliver?

Holloway. I have no other papers; what paper I wrote, the council had. I did write a paper, that it might be some satisfaction to the opinions of people of what I knew, that care might be taken to prevent other opinions, if there were an error. And that paper the council had; though they took it very heinously of me that I should presume to write such a thing. I

looked upon it that I could not do more for the king, than to acquaint him of what I knew, that if they were misinformed, these might be care taken to alter the opinion.

Sheriff Dashwood. You have delivered no paper to your wife, or to any friends?

Holloway. That, I suppose, is well known to the gaoler.

Sheriff Dashwood. You know better than any body whether you have or not. You may say Ay, or No.

Holloway. I could not be admitted to write any, for I could not have pen and ink to write any thing but this.

Sheriff Dashwood. And you have not delivered any paper?

Holloway. I have written to some friends. I know it is supposed that I had delivered a copy of that paper that the council had; and, I think if it had been known publicly, it would have done no great hurt.

Sheriff Daniel. You speak of several peoples opinions; what do you mean?

Holloway. As concerning the times, Sir, the management of affairs.

Sheriff Daniel. Pray, Sir, under what denomination do you reckon yourself?

Holloway. I reckon myself a Protestant.

Sheriff Daniel. Of what sort? Of the church of England, or of the Dissenters from them?

Holloway. I am not a Dissenter from the church of England.

Sheriff Daniel. Nor joined with them?

Holloway. Nor joined with them altogether. But I thought that if any good had been designed for England, that I had done enough to merit a pardon; for I had wrote so much of truth, and was so fair and plain in it, that I thought it would have merited a pardon, if any good were designed. If I could have discovered more, that had been for the king and kingdom's interest, I would have done it; for I did not do it rashly, but considered of it some time before I gave it in. I hope it will be a satisfaction that there was such a plot; what other men's opinions might be of it I cannot tell, but leave every one to their own judgment. It was feared that arbitrary government and popery was designed: and truly, I think, at this present time, by what I can understand, that there is little better designed.

Capt. Richardson. This is reflecting upon the government.

Sheriff Dashwood. This is not fit.

Holloway. I say it is contrary to the king's knowledge, Sir.

Sheriff Daniel. Sir, we have neither a reprieve nor a pardon for you.

Holloway. I do not expect it, Sir; if truth and plainness would have merited a pardon, I might have had it.

Capt. Richardson. The king is the best judge of his own mercy.

Holloway. Had the law been executed against popish offenders, I had never been concerned in any Plot.

Capt. Richardson. You know the king was

very earnest in that, to have the laws put in execution against them; and that he moved it to the parliament to have it done. Have you any thing else to say that more nearly concerns you?

Holloway. I wish I could have been any otherwise serviceable to the king and kingdom, before I left them. I should have been very willing; and it was always my design to promote the king and kingdom's interest more than my own.

Sheriff Daniel. Well, Sir, you say some things very well; but others ill.

Holloway. What I say, Sir, I leave to people's judgments; if I am mistaken, I hope they will be otherwise.

Sheriff Daniel. Well, Sir, have you any thing farther to say?—*Holloway.* No, Sir.

Sheriff Dashwood. I suppose you used to keep a meeting, or club, at Bristol, with several there.

Holloway. I know some have represented a club very bad in Bristol. A club we had about the choice of parliament-men.

Sheriff Daniel. The Horse-shoe club.

Sheriff Dashwood. Or the Mermaid-club.

Holloway. The Horse-shoe club, it was only for carrying on the election of parliament-men. If all such things should be called clubs, there were great clubs kept by another party.

Sheriff Daniel. Well, Sir, you had best fit yourself for death, you have no long time to live.

Then he opened his Bible and read the 62nd Psalm, and part of two chapters in the Hebrews, and afterwards asked the Sheriffs if he might have liberty to pray; which being granted, he prayed as follows:

“Blessed and holy Lord our God, thou art before all men, thou art the only true God, the Almighty God, the fountain of all goodness. Thou art the discernor of all hearts, the secret thoughts of men are not unknown to thee. Oh Lord, what am I that thou shouldst be mindful of me, or that thou shouldst suffer me now to call upon thee, when thou mightest have taken me away in the commission of some sin against thee? But thou hast been a merciful God, a long-suffering God, a patient God. O Lord, I trust it is for my soul's welfare in bringing me to this, though it is an untimely end, for thou cuttest off my days in the midst, but Lord, I trust it is for my soul's saka. Our times are in thy hands, and it is my sins that have brought me to this. Oh give me a true sense of them, as I trust thou hast done, and that thou hast heard my prayers, and wilt be my God, my comforter, and receive me in and through the merits of Jesus Christ our Lord, who offered himself a sacrifice for our sins, even for the sins of the whole world, and now sitteth at thy right hand interceding for us. Lord, hear me, in and through him. Lay not any of my sins to my charge; let not the least sin be unpardoned. The least sin deserveth damnation; Lord, I trust thou hast pardoned them all, and

that thou hast heard my prayers, and the prayers of others for me. Lord, in mercy look down upon me; in mercy look down upon this nation; pardon the crying sins thereof. Lord, thou seest to what a height of sin it grows, and thou seest what wickedness is promoted in all places, and what little encouragement there is to that which is good. Lord, bless the king, and keep him from all conspiracies. Lord, give him a sense of his condition, and make him know his enemies from his friends. O Lord, let him look close about him, to see who are about him; and Lord put an end to all plottings. O Lord, make him a happy prince, give him a sense of his sins, and a sense of whose servant he is. Lord, make him thy true and faithful servant. Lord, bless all thy people wheresoever they are, and continue thy Gospel every where, let it not be rooted out. O Lord, thou knowest what contrivances have been made against it. Lord, continue it here; let it flourish more than ever it hath done. Lord, make England a place thou wilt delight to dwell in, and make them know thou hast not dealt so with every nation. Lord, hear the prayers of all thy people. Lord, continue the Gospel in England; Let not popery, let not arbitrary government come in. O Lord, there are good laws in England, Lord, let them be put in execution. Lord, hear me for thy mercies sake. I am now coming unto thee. Lord, I have but a minute or two to be here, let thy spirit receive me, to thee I commit my spirit. Lord, hear me, and answer me for thy Son's sake, who is at thy right hand interceding for me, to whom with thee and thy eternal Spirit be all honour, and glory, and praise, both now and evermore."

(Then being asked, Who was in council at the delivery of the letter? He answered.)

Holloway. There was the duke of York, and the lord keeper; I did not deliver it: It was intercepted in a letter, or given in. I did not know how it was; for I have been kept, so that I had not the liberty to see any friend, till yesterday in the afternoon I had the liberty of two or three hours with my wife.

Capt. Richardson. You had your wife with you before, and your sister, and some other friends.

Holloway. But that was never without a keeper, Sir.

Capt. Richardson. You are in the right.

Sheriff Daniel. They do not use to allow men under your circumstances such a liberty as you talk of.

Holloway. I pray God that no other people may concern themselves with public affairs, out of their own way; and that the scribblers might be put down, for they do more hurt to the kingdom than any thing else.

Sheriff Daniel. Have you any thing more to say?—*Holloway.* No, Sir.

Sheriff Daniel. Then God have mercy upon your soul.

Soon after which he was turned off.

The PAPER delivered to the Sheriffs.

April 26, 1684.

To stop the mouths, &c. of all pamphleteers, and news-scriblers, who have done more prejudice to his majesty and kingdoms, by their impudent endeavours to sham all plots, and to fill the country with false news, than they will ever be able to retrieve; and to satisfy all I leave behind me, I thought good to draw up a short account of what I knew of the late Protestant Plot, how I came to be concerned, what induced me to it, and how far I was concerned, also my now opinion of it, &c.

It was my unhappiness to have too public a spirit for one of my capacity, and as soon as I came to be a free man, to prefer the king's and kingdom's interest before my own; for having some knowledge in linen-cloth, upon the prohibitions of French linens, &c. I thought the linen manufacture might be brought to perfection in England, to the very great advantage of the poor, and so made some trial of it in Warwickshire, where I employed some hundreds of poor, and in about eighteen months time brought it to such perfection, that I could make as good cloth as the French, and so well imitate it, that few could know it from French; but the prohibition being not so strict as at first seemed to be, French cloth was brought in cheaper than ever; so that I was forced to leave off with loss; but considering, that by an act of parliament for its encouragement, in a method I had thought upon, it might be settled much to the king's and kingdom's interest, advancing the king's revenue near two hundred thousand pounds a year, and would have employed about eighty thousand poor people, and about forty thousand acres of land; concerning which I was, about June 1680, brought acquainted with the earl of Essex, to whom I related the business, who immediately had me to the (now) earl of Rochester, then President of the Treasury, and he had me to sir Edward Deering, who (when they understood my proposals) gave me something to bear my charges, and encouraged me to attend the next parliament, to endeavour the promotion thereof; which I did almost the whole sessions, and brought to the Speaker's chamber some of the cloth, which was compared with French, &c. and the design well approved of by all; which brought me into too large acquaintance for one of my capacity; from whom I heard too much (as hath proved, for my interest) of things that were in hand concerning the Popish Plot, which prevented the doing any thing as to my design. So that after I was encouraged to attend the Oxford parliament, which I did; and was desired there by the earl of Oarendon, and others, to prepare a bill; the heads of which I drew up, though it proved to no purpose but my ruin. I wish my king and country might reap the benefit of what I pay so dear for. The more I knew during my attendance on those two parliaments; the more I was desirous to know; and did by some scribblers and news-mongers

constantly knew most public affairs that were acted, which they undertook to represent according to their own humour; many actions being represented very illegal, much against the protestant interest, in favour of papists, &c. shamming the Popish Plot, and laying sham plots upon protestants; abusing the rights and privileges of the subject, the truth of which I leave to the judgment of all; but hearing many such like things, was easily prevailed with to be concerned in the plot, according as it was proposed to me; viz.

About July 1682, I met with a person who then being come from London, gave me a relation at large concerning the election of sheriffs that had been in June, the manner of which is well known to all; he represented it to me as a very illegal action, and that there was a devilish design of the papists in it, to cut off the king's friends, the stirring men in both the last parliaments, as to the prosecution of the Popish Plot, who I always took to be both the king's and the nation's friends. That there were witnesses had been ready a long time, to swear against them, but they could not get jurors to believe them, but now they had by force of arms, &c. got sheriffs who will find juries to believe them, and so hang them up at their pleasure; that there was none but had council about the king, who kept all ill actions from his knowledge; and if they proceeded to swear North and Rich at Michaelmas, and to choose lord-mayor, as they had done sheriffs, the Protestant gentry were resolved (naming some) to remedy what was designed, by an insurrection in several parts of England; and, if possible, to get the king off from his evil council, and bring all popish offenders to justice, saying, that they were sure that, when the king knew the occasion of their rising, he would presently give up all offenders, and come in to them. That it should begin in November in London, Bristol, Exeter, Taunton, Chester, York, Newcastle; and that we should hear more of it in a month's time: therefore desired we might consider how it might be managed in Bristol; which we did; and concluded, that Bristol, with about 350 men, might be easily secured by a surprize, without the bloodshed of one man. About a month after that, came the person he mentioned we should hear more by; but he could declare no more than the former did, only that the design went on, and there would be timely notice given to all parts; but we hear of nothing but disappointments and delays, putting it off from time to time. In April I heard of another design against the king, and duke of York, as they were to come from Newmarket, some time in March; but when I enquired into that, found it was carried on by three or four; and never could hear the names of above five that were for it. When I heard it, I declared my abhorrence of any such thing, and that I was confident none in our parts would be for such a base action. After that, I enquired further into it, and could find, that although it was intended

to be done six weeks before, that they had only a parcel of arms ready, and that they had neither men nor horses; but one said if they could have raised 6 or 800*l.* to have bought horses, and also something to encourage men, they should have found men enough; so that I looked upon that only to be the design of five or six persons, and no way likely to be acted; but the general design for the insurrection was carried on by others; who, though they had made a great stir in the nation, trying the inclinations of people, and had treated with the Scots and Irish, as I heard, who were to be ready at the same time, yet were never come to any resolution, as to any time or method, before all was discovered; though they had been eleven months contriving of it, from the time I first heard of it. This, I hope, will be enough to satisfy all people that there was a plot; I mention no names here, having given his majesty a more large account of what I knew of it, mentioning the names of all that I knew concerned. The arguments before mentioned, with many others to the same effect, not only soon prevailed with me, but made me indeed think it my duty to do what I could for my king and country's safety; being then fully persuaded, that not only popery, but arbitrary government was intended; not then considering, (as I have since considered) how much bloodshed it might have caused in the nation; for then I thought all would have been ended in little time, supposing things to be as to me was reported. But I do now declare my hearty sorrow for my yielding thereto, and acting therein; though I can safely say, I was not for taking the king's life, but wholly for his preservation, yet am satisfied that it might have caused very much bloodshed in the nation, and am glad it did not take effect. Also I declare, that I am satisfied it was a very great sin against God, not only in distrusting his Providence, but in offering to take the work out of his hand, who knows the hearts, thoughts, and actions of all, though never so secret; whose mercy and pardon I most humbly beg, and trust shall have; and in confidence thereof, (through the merits of the blood of our Lord and Saviour Christ Jesus) can willingly die. Nothing (next to this and all other my sins) is more trouble to me than the thoughts how (dying) I shall leave my relations and friends in trouble, concerning my worldly affairs; being by reason of this unhappy concern, not in such a posture as they should be: So that by my death, my dearest friends will not only be left in great trouble, but lie under the censure of many, none understanding how things are; my wife and children ruined, and my creditors great losers; whereas might I have been thought worthy to live, I should have taken the trouble of them all, and hope in time to have paid every man to a penny; for I can from my heart say, that as I hope for salvation, I never designed any fraud to any man; but to pay every man his due. I have heard that some should say, I took up

money at interest to carry on the plot; which I disown; for I never was at any charge therein more than common expences, nor never heard of any money raised upon that account; though I heard of 10,000*l.* that were to be raised for the Scots, but suppose it was not done. I bless God I am pretty well satisfied, and hope shall be fully, as to my future state, and can willingly leave the world; but upon the account of my friends and creditors, considering the condition they will be left in, could gladly have lived some time, that I might have taken off that scandal that I fear will be laid upon me when I am gone; but God knows my heart, I am free, and always was from any thoughts of fraud or deceit.

I am satisfied that all means that could be thought on have been used to get as much out of me as possible, but had it not been my resolution to declare all that I knew concerning the plot, and also to do what in me lay to prevent all plottings for the future, that there might be an end put to such heats, differences, and heart-burnings, that is, one against another; that his majesty and his subjects might live in such love and union, as ought to be between a prince and his people, I had not wrote what I did; for I was never a man to be wrought upon by severity, and what I wrote was not without due consideration, being nothing but truth. I do suppose, that making such a full and large confession at first, and some expressions that might be observed in my letters which I perceive were intercepted, may cause some thoughts that I still reserve some persons undiscovered; but as to my confession, it was not rashly done, I had had some weeks at sea to call things to mind, and as for persons, I gave a true account, and of all passages I could remember, though others do and may come into mind. What I suppose was observed in my letters, might be some foolish expression concerning some of my acquaintance, and that I would betray no friend, meaning, that no severity should cause me to accuse any friends falsely to save myself, although (if I had thought the accusing of a number of persons would have saved my life, and had been one that would do any such thing to save life) I had the most cause of any man; for when I first absconded, those in Bristol, and elsewhere, that were my most intimate acquaintance, refused to do any thing for me; nay, would not receive letters when I wrote to them, fearing they should be found to hold correspondence with me. When I gave in my confession, I stood not upon terms of a pardon, being confident, if truth would merit mercy from the king, I should have his pardon, and that it was the only way to gain mercy with God. I find it already that people are passing their censures upon me, some one way, and some another, for my not pleading, and accepting of another trial when it was offered, saying, that I confessed the whole indictment; which I disown; for I said thus, What I was guilty of I had confessed to his majesty, and

wholly depended upon his mercy; besides, I had some other reasons why I did not plead, which at present I conceal; and also why I did not speak what I intended. More I may say at the place of execution, before I leave the world, which will be according as I find things; but as to a discovery of any more persons (I cannot) than has been already mentioned. Should I mention any whom I thought would have been concerned, I may much abuse them, though I believe many thousands in the nation would have appeared, for the reasons aforementioned, which caused me to be concerned. I doubt not, but several that were concerned, who are or may be cleared, for want of sufficient proof against them, or by his majesty's mercy, will blame me for confessing what I knew; and not much grieve that I failed of a pardon, or at my death. But I repent not my confession; and could I discover more, would do it willingly, though I find no mercy with man.

JAMES HOLLOWAY.

In the Year 1684 were published, in a folio Pamphlet,* "The free and voluntary CONFESSION and NARRATIVE of JAMES HOLLOWAY: (Addressed to his Majesty). Written with his own Hand, and delivered by himself to Mr. Secretary Jenkins; as also the Proceedings against the said James Holloway in his Majesty's King's-Bench Court, Westminster; and his Petition to his Majesty. Together with a particular Account of the Discourse as passed between the Sheriffs of London and the said James Holloway, at the time of his Execution for High Treason at Tyburn, April 30, 1684. With his Prayer immediately before, and the true Copy of the Paper delivered them at the same time and place. London: Printed for Robert Horn, John Barker, and John Redmayne." This Pamphlet contains all the Matter here printed, together with the following

CONFESSION OR NARRATIVE.

Great Sir,

I your majesty's most humble, but too much misled, and disobedient subject, do here most faithfully, according to the best of my remem-

* At the end of the pamphlet is the following Imprimatur: "We appoint Robert Horn, John Baker, and John Redmayn, to print these papers, and that none other print the same.

PETER DANIEL.
SAMUEL DASHWOOD."

C

brance, give you an account of what I knew concerning the late discovered conspiracy, how I came to be concerned, how far I was concerned; how it was so have been carried on in Bristol; why I did not come in at the first discovery, and cast myself at your majesty's feet for mercy; how I made my escape, and where I was 'till taken. If I shall through forgetfulness omit any thing that it may be thought I am privy to, I shall be ready and willing truly to answer any question that shall be asked by your majesty, or any your most honourable privy council, no way despairing of your majesty's mercy, but remain in hopes, that that fountain of mercy which hath so abundantly flowed from your sacred breast ever since your happy restoration is not yet dry, and that there is some drops left for me, who doubt not but to serve your majesty both at home and abroad, much more living than my death will.

That which I have cause to impute the occasion of my being concerned, was my too public spirit, preferring your majesty's and my country's interest much before my own, but especially in attending the two last parliaments, promoting an act, for the encouragement of the Linen Manufacture, and the preventing of frauds in your majesty's customs, &c. which would have brought in, and saved to your majesty near 200,000*l.* per ann. and employed many thousands of poor, &c. as is well known to many worthy persons about your court, and indeed proved my ruin, otherwise than in this concern by bringing me into too great acquaintance for one of my capacity, and by that to be concerned as I was. My attendance on those two parliaments I doubt have been misrepresented.

How far I was concerned.

After the dissolution of the two last parliaments, I observed a great dissatisfaction in people, in most parts where I travelled, but heard nothing of any design till July 1682, when one Mr. Joseph Tyly, of Bristol, came from London; I meeting with him, asked what news, he answered to this effect, all bad, and if some speedy course be not taken we shall be all undone, for by their arbitrary, illegal ways, and by force of arms, they have got sheriffs to their minds, witnesses they had before, but wanted jurors to believe them, now they have got sheriffs, naming Mr. North and Mr. Rich, who will find jurors to believe any evidence against a protestant, and so hang up all the king's friends by degrees; I then told him that I thought it was impossible such things could be done, but the king must hear of it; no, said he, there is none suffered to come near the king, but those who have been declared enemies to the king and kingdom by parliament, naming some that were mentioned in the printed votes, who to save themselves do endeavour to keep all such things from the king's knowledge, and persuade him against parliaments, with much more such like dis-

course, by which I found the same was discoursed throughout England, Scotland, and Ireland, as a means to engage people. At length he told me that the protestant gentry, naming the earl of Shaftesbury, lord Howard of Escrick, and others were come to a resolution, seeing fair means would not do, but all things on the protestants' side are misrepresented to the king, by such great criminals, and none more in favour than those, to take the king from his evil council, and that by an insurrection in several parts of England at once, viz. London, Bristol, Taunton, Exeter, Chester, Newcastle, York, and some other places in the north, and that there would be a considerable party ready in Scotland, and another in Ireland, therefore, said he, we must consider how to manage affairs in Bristol, for if they proceed at Michaelmas, in choosing lord-mayor as they did sheriffs, and to swearing of North and Rich, it must begin in October or November, otherwise there will be some sham plot contrived to take off most of the stirring men in the last parliaments; with much other discourse to the same effect; adding, that Mr. Wade would come down very suddenly, by whom we might expect a full account of all. About the end of August, as near as I can remember, Mr. Wade came down, who confirmed what Mr. Tyly had said, but could say little as to any farther resolution they were come to above, either of any time or method agreed upon, but that the design went on, and men were employed in all parts to try how people were inclined, who found enough ready, and that there would be no want of men, if it was once begun. Then we considered how it might be managed in Bristol, and what number of men might be needful for the first onset; towards which he said, we might depend on 150 men from Taunton or thereabouts, and concluded that 350 might be sufficient to secure it without the bloodshed of one man, it being our design to shed no blood if possible; but this we resolved not to acquaint any of our friends with it, till the day and method was resolved, of which he said we should have ten or fourteen days notice; and having soon considered of a method, waited in expectation of further advice, but none came till November; then we heard that some disappointment happening they were forced to delay it, though there was more and more cause for it. The end of December or beginning of January had advice that it was deferred to the beginning of March. The third of March I came to London, and meeting with Mr. Wade, asked him how things went, who answered that he could not tell what to make of it, for he could find nothing done, more than was nine months before. The great persons who were the managers, having done nothing but talked of things. But now there was some others appointed to manage it, who were men of business, naming them to me, viz. the earl of Essex, the lord Howard of Escrick, the lord Grey, the lord Russell, col.

Sidney, major Wildman, Mr. Hampden the younger, and Mr. Charlton, who he did suppose would make something of it, and not do as the others had done, make a year's talk to ensnare many thousands of people to no purpose; for these had already sent messengers into Scotland and Ireland, to know their minds, naming one Aaron Smith, sent into Scotland, and at the return of the messengers, would come to a resolution as to time and method, but he was confident they could not be ready before Midsummer, by reason they had done so little in order to it. Mr. Wade was then designed into the west, upon the earl of Stamford's business, and said if he could understand any thing more before he left London, he would take Bristol in his way, and acquaint us with it. This journey he brought me to col. Rumsey, with whom we had little discourse, he being going forth with his lady. The sixth of March I left London, and went directly for Bristol; about the 12th of March Mr. Wade came to Bristol, but then could say no more than as above, the messengers being not come back from Scotland nor Ireland, and was of his former opinion, that if any thing were done, it could not be before Midsummer, he then expected to be about two months in the west, and said that if any thing was agreed upon sooner, one Mr. West, a counsellor, had promised to write to him in the name of Inglesstone, and direct his letter to be left at his brother's in Bristol, who Wade ordered that if any such letter came, to open it, and if any thing material in it, to send it by a messenger to him into the west. About the 17th of March came a letter for him from West, in the name of Inglesstone, which his brother opened, and not understanding the stile, brought it to me, but I know not the meaning thereof. The contents was to desire Mr. Wade to get his clients together the next Saturday come fortnight, for that was the day appointed to seal the writings, and neither of us understanding it, his brother sent it by a messenger after him, who found him at Taunton, and his answer by the messenger was, that he knew not the meaning of it, but should be within ten miles of Bristol the next Saturday, desiring that if any other letter came, to send it to him. About three days after came another letter as above, desiring him not to call his clients together, for the time of sealing was put off, which letter was also sent to him, but he understood it not, saying, it was some rash business or other, and so went back again.

The fifth of April I came to London, and that evening went to Mr. West's chamber in the Temple, where I found him, who then did not know me, but when I told him my name, from whence I came, and mentioned the two letters Mr. Wade received from him, he began to be somewhat free in discourse with me. I then told him that Mr. Wade and his friends were surprised at the letters, not knowing what he meant by them, and did desire to know, concerning which he seemed a little shy, but after little discourse, began to tell me, saying, there was a design to take off the king and

duke, coming from Newmarket, which they expected would have been that Saturday mentioned in his letter, had not the fire happened, which caused them to come sooner; nay, said he, had we known they would have stayed so long as they did, their business should have been done: I then asked him what he meant by desiring Mr. Wade to get his clients together by that day, and what he could propose they should have done, to which he could say little, only that they might be ready. I then told him, that I thought it a very rash thing, and that few in England would approve of it, that I was sure none about us would, being a most cowardly, dishonourable action, besides the basest sin of murder; then, said he, what is designed by the general design but to take them both off, and if it had been done that way, it would have prevented a great deal of bloodshed in the nation; no, said I, no such thing is designed as I know of, the general design being only to get the king off from his evil counsels, who had advised him to put a stop to proceedings against Popish Plotters, by dissolving of parliaments, &c. and to bring all Popish offenders to justice, and such who had betrayed the liberty of the subject: and this I think was all the discourse we had at that time, being the first of my acquaintance with him: that night I went with him to a tavern in Fleet-street, where was captain Norton, Richard Goodenough, and one Mr. Aylif, who, to my knowledge, I never saw before nor since; whilst I was with them there was no discourse of any business, but I soon left them together. The next day Mr. Roe of Bristol, brought me to Mr. Ferguson, at the house of one Mr. Bourne a brewer, but was not admitted to see him himself. Ferguson then went by the name of Roberts, who when I had told my name and from whence I came, was pretty free in discourse with me, and told me the design went on very well, that there were some Scottish gentlemen come up, who were treating with the managers, and did hope they would agree in a few days, and come to a resolution both as to time and method, of which we should have timely notice, but by all his discourse at that time, I could not perceive that he knew any thing of the Newmarket design.

That day I had some discourse with colonel Rumsey at his house, who I found was privy to the Newmarket business, and his opinion was, that the Newmarket design would come to nothing, for he did not approve of the managers acting, and said there was nothing like the other design, for that would put an end to all in a little time, then I told him, that none in our parts would be for it; which I think was all the discourse we then had; only he promised, that if any thing was agreed before Mr. Wade came up I should hear of it, so I took leave and went for Bristol the next morning. About ten days after, hearing nothing from them (Ferguson having told me that he thought all would be agreed in four or five days, and promised to advise) I wrote to Mr. West, desiring

to know how they went on, who wrote me, that they still met with delays, and were come to no conclusion; after that, I heard no more until May. About the beginning of May I came up to London again, in company with Mr. Wade and some other Bristol men, but when we came up, my business being in the city, and theirs about the Temple, we parted; after two or three days, I met with Mr. Wade, and asked how he found things, who told me, he doubted all would prove a Sham, for he thought there was nothing intended, finding nothing materially done in order to what had been so long discoursed. Then we went to Mr. West, and discoursed him fully about the contents of his letters, who told us, they were resolved to kill the king and duke as they came from Newmarket, in order to which, he had provided arms for fifty men, pistols, carbines and blunderbusses, and that they were promised the house of one Rumbald a maltster, which lay in the road, and the king must come by his door, there the men should have been lodged. Then we asked who was to have acted it, to which he could give but a slender answer, and could or would name but two men, who were Rumbald and his brother, saying, if they could have raised six or eight hundred pounds to have bought horses, and something to encourage men, they should have had men enough; so that we found they had few men, if more than two, and no horses, only a parcel of arms; which afterwards he shewed us at a gunsmith's house, in a little lane near Temple-Bar. Then we asked him what they designed if it had taken effect, to which he answered, that the men should have come up with all speed to London and dispersed themselves immediately, declaring for the duke of Monmouth, and that the king and duke being dead, no opposition could be made; then we asked who were for this design, he named col. Rumsey and Richard Goddenough, and, as far as I can remember, no more; so we found it was carried on by them contrary to the knowledge, or approbation of those who managed the general design: then we declared our great dislike of it, telling him, it was a base, dishonourable and cowardly action, and would seem odious to all the world, that any pretending themselves Protestants, should be concerned in such a bloody action, and that we thought it was his cowardice put him upon it, to which he said, that he could not fight, but would be as forward with his money as any one of his capacity. Then we went to col. Rumsey, who we found to be wholly of West's opinion, saying, that except something be done that way, I know nothing will be done at all, for he knew the other managers would do nothing; so we had little discourse at that time. After this we went to Ferguson, who told us how things stood; we then found that he knew of both designs, but was only for the insurrection, and told us, that the managers had been treating with some Scotch gentlemen; that they were almost agreed, and that the money they were to be

supplied with, would be ready in three or four days, being ten thousand pounds, which was to be returned to Holland to buy arms, &c. for Scotland. He after told us that the Scotch gentlemen had made another proposal to the managers, thus, if they would supply them with thirty thousand pounds, they would begin it in Scotland first, which they could soon have, and then would invade England, desiring the managers only to get a party in the North of England, ready to oppose any force from coming out of England against them, before they had settled Scotland: but this was not approved of, the managers chusing rather to supply them with 10,000*l.* and to begin it in England the same time. Then we daily expected to hear when the money would be paid, but still found nothing but delays, the managers not agreeing how to raise the money, and that if the money had been ready, they were come to no conclusion, as to any method more than they were nine months before, having done nothing but talked to ensnare people, reporting about in all parts, how the liberties of the people were daily more and more infringed, and that arbitrary government and popery was coming in apace, which incensed people very much, and made such a grumbling in all parts that we feared longer delays would make the common people in many parts mutiny, it being as we thought so generally known, except something was suddenly done, it was impossible it should remain undiscovered, so the next time we met with Rumsey and Ferguson (though never together) we declared our dissatisfaction by reason of such long delays, and spoke it so that it might come to the managers ears, as we suppose it did, being to this effect, That we thought they had only a design to betray people, drawing many thousands into a snare, for their actions shewed little otherwise, being so long discoursing a thing of that nature and done so little towards it: few days after meeting with Rumsey again, he told us they were of different opinions concerning a method, some for beginning the insurrection only in London and Scotland, some for it in all places at once as at first proposed, others for several places in England and Scotland, and not in London, saying that if it was not begun in London, but in other places, there would be forces raised in London to send out against them, which would take out most of their strength, and that then London might be easily secured; sometimes they were for beginning it only in London and Scotland, and to have people come up to London from all parts of England, to which we answered that we thought no way better than what was first proposed, (*viz.*) the beginning of it in many places at once, as before mentioned, for although we had engaged none in or about Bristol, nor should not endeavour it till all things were concluded, yet with the assistance we were promised from Taunton, did not doubt but to get men enough to secure it, and that we knew not where to get ten men that would come for London, and sup-

pool it might be so in other places, men might be willing to secure their own country who would not be willing to leave all and come for London. Rumsey then said if he knew where to get at the head of 1,000 men he would begin it presently, and desired that we might meet the next night with some others and consider of things, so the next afternoon we met at Richard's coffee-house near Temple-Bar, and from thence to a tavern near, I think called the Little or Young Devil Tavern, where met eight persons, (viz.) colonel Rumsey, Robert West, capt. Norton, capt. Walcot, Richard Goodenough, Francis Goodenough, Nathaniel Wade and myself, this was the first time I knew Walcot. When we were all sat, colonel Rumsey spoke to this effect, as near as I can remember the same words; Gentlemen, if we can raise three thousand men in and about London, there is a person of honour will appear at the head of them and begin the business; which we supposed to be the duke of Monmouth, and do not well remember whether he mentioned his name or not. Which proposal much surprised Mr. Wade and I, that he should then question the raising of 3,000 men; whereas when it was first mentioned to us we thought they had been sure of many thousands in London, at an hour's warning. Then it was considered how 3,000 men might be raised, and how they might do something to the purpose: then we declared what method we had concluded on, for the management of affairs in Bristol, which was as followeth, and they could think of no better way, so it was concluded that London and the suburbs should be divided into twenty parts, and one man made choice of in each division, who should chuse out ten in his division that he could trust, and each of those ten to find out fifteen, which would make 161 in each division, so that twenty divisions would produce 3,220, in order to which a map of London was to be bought the next day, and each division drawn out in a particular paper, mentioning every street and lane of note in it, with the North, East, South and West bounds thereof, and to be brought the next meeting two or three nights after; at the first meeting it was agreed that none should know of this design, viz. (of the chief managers) till all the men were secured, and that these seven, I being not to stay long in London, should meet every two or three nights till all was completed. At this meeting Rumsey and West would be often saying, there was nothing like the lopping business, meaning the taking off the king and duke, and that it might be easily done, as they went to or from the Play-house, but I never heard any agree with him in it. Next day a map was bought, and brought to West's chamber in the Temple, where some met to divide it, and draw out the divisions against the next meeting. The next place we met at, I think was the Castle-tavern in Fleet-street, where some of the divisions were brought, all being not done, and then it was considered how they should be distributed, being we were

most strangers, and agreed that Richard Goodenough, who had been under-sheriff, and so had a general acquaintance, should do it, who was willing to undertake it, the rest of the divisions to be ready against the next meeting, which was two or three nights after, at the Green-dragon tavern upon Snow-hill, where when Mr. Goodenough came he told us, That he had disposed of some of them, and did hope it would take effect, and that in a week or ten days he should have fixed the twenty men; the consideration how things should be managed, was deferred till they were sure of the men, only some mentioned their opinions how the Tower, Whitehall, and other places might be best surprised. The Tower was thought might be best gained in the day time, Whitehall and other places in the night, with many such things in way of discourse: Rumsey was still upon the old strain of killing the king and the duke, saying, at this the last meeting I was at, going for Bristol next morning, that it might be done in Windsor-park, and that he would undertake it, but not except every one there present would go with him, to which not one consented; I replying that I was for no such thing, but seeing the other business had gone so far, and was known to so many, if they could bring it to bear in London and other places, I rashly said, rather than fail of Bristol we will undertake it at noon day with an hundred men; to which Rumsey said I was a bold fellow; they then promised, when they were sure of the men, to advise and take care for some arms for us at Bristol, and that we should have some great person come down to head us; but I heard no more till the news of the discovery came in public letters; I remember one time when Wade and I was with Ferguson, he told us that the duke of Monmouth was brought to a low condition, all his places being taken from him, and his tenants in Scotland (being so severely dealt with upon account of their religion) was not able to pay rent, so that his estate there, which was accounted worth 10 or 12,000*l.* per ann. did not yield him the last year 2,000*l.* that he was not well pleased with the management of affairs, and desired Mr. Wade to appoint a place where he would meet the lord Gerrard, and sir Thomas Armstrong, to discourse them, to which Mr. Wade replied, he would meet none of them, for such great men had betrayed the nation already, and ensnared too many thousands to no purpose.

How it was to have been acted in Bristol.

We concluded that the only way to secure Bristol would be by a surprize, which with about 350 men (150 of which we depended on from Taunton, the other 200 to be raised in and about the city) might easily be done about four o'clock in the morning, as soon as the watch were gone off, without the bloodshed of one man, thus, dividing the city into 14 parts, so making 13 posts besides the main guard, which should at first have been at the Toulzy,

(which is in Bristol as the Exchange here) we supposed 20 men might be sufficient for each post, and the remainder for the main guard, out of which might be spared four or six files to be constantly marching about, and to assist where there might be occasion. The method we designed for the raising of 200 men in and about the city was thus, first to find out 30 men, two for each post, and four for the main guard, who might be able each of them to procure six, and to command them, which would have made 14 for each post, and 28 for the main guard, to whom the Taunton men should be added, viz. six to each post and the remainder to the main guard, who should have come in the day before, some at every entrance of the city, and lodge themselves at inns and ale-houses as near the posts they were appointed for as they could: each man being to know his post and commanders before they came, the Bristol men to lodge themselves and arms, with arms for the Taunton men, in an house as near as possible to their posts, and to send one out from each post between three and four o'clock in the morning to observe the motion of the watch, and to advise as soon as they were gone off, that they might all immediately repair to their respective posts, calling the Taunton men, and as soon as they had gained their posts, to send out a file of musketeers to fetch in such and such men in each of their divisions as they should have had an account of before, and convey them to the main guard, which in the 14 divisions would have been about sixty persons, commission-officers and others; then to fetch in all the arms and ammunition they could find, which two things being done (as we supposed might be in a little time, and without any opposition, the posts being so near each other, that it would have been impossible for any number to get together) we resolved next to declare the reasons for our taking up arms, and to encourage all to come in to us that we could trust, not doubting but we should soon have had many thousands in the city, and out of the adjacent counties, Gloucester, Somerset and Wilts.

The Reasons why I did not come in, &c.

When the news of the discovery first came to Bristol, and some time before, I was in some trouble by my creditors, and forced to abscond, though thought I had sufficient to pay them, only desired time to get in my effects, their mercy I feared more than your majesty's, and thought if I should come in and find mercy with your majesty, I could at first expect no better than a prison, and if from it discharged by your majesty, to be kept in by them upon account of my debts. Secondly, hearing there was very many, in and about Bristol, supposed to be concerned, and I, though knowing so much, being able to prove so little against any man, but such against whom there was sufficient proof without me, feared that if I should come in more would be expected from me than I could prove, and so might fail of

mercy, it having been our resolution not to discover the design to any of our friends till the managers had agreed both upon time and method, therefore considered how to make my escape, there being then a strict search in all ports, thought best to continue in England for some time, till the heat might be over, and so got an ordinary habit and a little horse about 40s. price, and travelled the country as a man dealing in wool, in Gloucestershire, Oxfordshire, and Somersetshire, till about the middle of August, then repaired towards Bristol, and by letter, with my wife's assistance (all other friends thereabout fearing to act for me) prevailed with a poor man who had a small boat about ten tons, for 20l. reward, and the like per month, for six months, to go with me for France, and from thence to the West-Indies, or where I would, my name being then in no proclamation or declaration, if it had I should not have prevailed with the man to go with me. So the 23rd of August sailed from King's Road for Rochell; the 25th proving bad weather, cracked our mast, and so put into St. Ives, in Cornwall, where we staid till the 4th of September, then put out again for Rochell, but meeting with contrary winds was forced into several places in France, and gained not our port till the 17th. In Rochell, I loaded her with brandy and other goods, and the 4th of October sailed from thence for the West Indies (being willing to know how my concerns lay there, that my creditors might have their own, though I knew I might be much safer in France) and arrived at Barbadoes the 11th of November, there I heard of my name being in the Gazette, therefore staid but two days landing part of my cargo, from thence I went to Antigua, where I landed and disposed of the remaining part, staying there about 10 days; but it being too soon for the crop, and my charge being the same, lying still or going farther, also thinking it not safe to lie long there, resolved to see the rest of the Carriby Islands, and so went down to Mounserat, Nevis, St. Christopher's, St. Eustatia and Anguilla, and so back again to St. Christopher's, supposing that to be the safest place, I being known to none there, where I staid about three weeks. About the 14th of January I wrote to my factor in Nevis about what was due to me, who on receipt of my letter discovered me, so that sir William Stapleton presently sent his warrant to St. Christopher's to apprehend me, but before it came I was gone down to St. Eustatia, expecting to meet my vessel there, which I had sent up to Barbadoes, and it being known where I was gone, the deputy governor of St. Christopher's sent five men with his warrant after me, to whom on sight thereof I submitted, though had an opportunity and might have escaped, but was rather willing to cast myself at his majesty's feet for mercy, than live such a life any longer, not daring to appear where there was need of me (among my factors) who I doubt will take too much advantage by my troubles for my creditors' interest. In Nevis I

was kept a prisoner 13 days, where I promised *Mr. William Stapleton* that I would make what discovery I could; giving him the names of some who I had acquainted with it in Bristol, which I suppose he hath given an account of, desiring him that it might be kept private, for if it was known they would have advice of it; but it was not kept so private as I expected, for the night I came off I was told of it, therefore suppose they were advised by a Bristol ship that came away before us, by which I wrote not a word, I suppose she might be at home long before us, we being nine weeks and five days. All that I can say against any of them, except *William Wade* who is before-mentioned, is that I acquainted them with the business, as I believe many thousands in England were, and do suppose they would have been concerned. Hereunder is an account of many other persons that I have heard was concerned in the design for an insurrection, which is all that I can call to mind of any thing material that ever I heard concerning the Plot.

Here be mentioned the names of several Persons.

Now if your majesty is graciously pleased to spare me, it will be a sufficient warning to me for ever meddling in things of that nature again: and I hope I shall have the opportunity

of serving your majesty and my country in the promotion of that which brought me into this, and cost me many hundred pounds, with some years' pains to bring it to that perfection I did, viz. the kinnen manufacture, which many honourable persons about your court have heard of, and I can make it appear that it will employ near 80,000 poor people and 40,000 acres of land, and bring in and save your majesty near 200,000*l* per ann.

Another thing which I think I may serve your majesty in (abroad) is this, when I left England I knew there was many who were in trouble about their opinions would willingly have left England if they knew where to go, that they might have liberty. There is a very fine island in the West-Indies, good land and well watered, which, by such people, would be soon settled and prove a great advantage to your majesty and successors, for it would soon exceed any island, except Barbadoes and Jamaica, it lies so near a bad neighbour, the Spaniard Portrico, that except a considerable number go together, it will be dangerous living there; but if no great alteration in affairs since I left England; with your majesty's leave, enough might be prevailed with to go and settle it at once, which will not only serve your majesty as before, but clear the nation of some hundreds of disaffected people.

306. The Trial of WILLIAM SACHEVERELL, and Nineteen others, at the King's-Bench, for a Riot committed at Nottingham: 36 CHARLES II. A. D. 1684.*

THE Defendants having before pleaded Not Guilty, were brought to their Trial on the 2nd of May, 1684.

Cl. of Crown. Call the defendants, William Sacheverell, esq. and others.

Mr. Pollexfen. We appear.

Cl. of Crown. 'Gardez vostres challenges.' Swear sir Humphry Miller.

Which was done, and the twelve being sworn to try the cause, being gentlemen of the county of Kent, were these following: Sir Humphry Miller, sir Henry Bosvile, William Lambert, Charles Wheeler, Richard Marsh, Edw. King, Humphrey Stiles, Walter Hooper, James Masters, Richard Britton, Ralph Petty, and Edward Bathurst.

* This was one of the numerous litigious proceedings, which arise out of the attacks upon the Charters of Corporations throughout the kingdom, to which attacks the crown was encouraged by the success of the Quo Warranto against the City of London. (See the Proceedings in that Case, vol. 8, p. 1039). Perhaps the object which originally excited that attack, was the power of nominating Jurors, by means of the right to appoint sheriffs. (See Note to lord Shaftesbury's Case, vol. 8, p. 785). But it must have been very soon perceived that the nomination of the whole magistracy of the kingdom, and of a majority of the House of Commons, might be secured by the same means.

Roger North (*Life of Lord Keeper Guildford*, vol. 2, p. 104, 8vo edit. of 1308) tells us, that "this trade of Charters ran to excess,

and turned to an avowed practice of garbling Corporations, in order to carry elections to the parliament, and a Committee of Council was appointed to manage the Regulations as they were called; and there was an itinerant crew of the worst of men that wrought in the towns to be regulated under the direction of the committee. These were termed Regulators, and according to their characters and designations, mayors, aldermen, recorders, common councils and freemen, were modified and established."

See, also, sir John Reresby's Memoirs to which Mr. Hume (Note to p. 263, vol. 8, of his History, edition of 1807) refers, when he admits that the transfer of the right of election from the people to magistrates named by the crown, was in reality nothing different from the king's naming the members; and he notices that the same act of authority had been

Cl. of Cr. Gentlemen of the Jury, hearken to the Record:

‘ Sir Robert Sawyer, knt. his majesty’s Attorney-General, has exhibited an Information in this court against Wm. Sacheverell, esq. George Gregory, esq. Richard Mansfield,

employed in all the boroughs of Scotland. Yet has the Prince of Orange been blamed for not summoning to the Convention the members of king James’s Parliament.

In the Cases of the Quo Warranto against the City of London, already referred to, and that of Pilkington and others (vol. 9, p. 187), and in the Notes to those Cases, are mentioned many particulars of the distractions which prevailed in the metropolis. (See, too, as to Southwark, the Case of Slingsby Bethel, vol. 8, p. 747).

The following Extracts from Narcissus Luttrell’s “Brief Historical Relation,” MS. in the library of All-Souls’ college, Oxford, throw farther light on the proceedings against Corporations in general, and the distractions of the city of London in particular:

“ Nov. 1682. Some days since, a person unknown, came to the house of Mr. John Dubois, who stands in competition to be one of the sheriffs of London, and left there a packet for him, wherein were inclosed several treasonable and seditious libels; a while after, the same fellow came again and brought another packet, and then he was served and carried before the lord mayor, who, on proof, committed him to the Counter; about two or three days after, he was admitted to bail, himself in 200*l.* and his bail in 100*l.* each; two or three days after, the sessions coming on, a bill was found against him, and he and his bail being called for, neither of them are since to be heard of: this is looked upon by some as a happy deliverance to Mr. Dubois, for undoubtedly had the papers been lodged there, Mr. Dubois should quickly have been searched for the same, and it would have been construed to be a new design against the government, for the papers contained matters of dangerous importance, some were libels against the king and others, and there was, as is said, a paper of advice to Mr. Dubois, as sheriff, to raise the *posse comitatus* to meet an army to have come out of, &c. to oppose a arbitrary power. The Dissenters have been prosecuted lately more violently than ever; for now the churchwardens of most parishes have presented them to the ecclesiastical courts, who have proceeded against them even to excommunication, whereby several hundreds in London have been sent to the Devil; but this is made use of only as an engine to serve a turn, which is, St. Thomas’s day approaching, whereon the common council men for the city of London are chosen; this, as is said, is to incapacitate Dissenters to vote for any one, whereby if the Tory-party can procure such a common council as is fit for

‘ esq. Henry Plumtree, esq. Charles Hutchin-son, esq. John Greaves, gent. Wm. Greaves; ‘ gent. Samuel Richards, Rob. Green, Francis ‘ Salmon, Arthur Richards, Ralph Bennet, ‘ John Sherwin, William Wilson, clerk, Sa- ‘ muel Smith, Thomas Trigg, Richard Smith,

their turn, having the mayor and major part of the court of aldermen for them already, they intend to surrender the Charter of the city of London.

“ Sir George Waterman, alderman of the Bridge-ward, being some time since dead, the lord mayor gave out summons for the choice of an alderman in his stead. The competitors on one side were deputy Daniell and sir Wm. Russel, on the other Mr. Papillon and Mr. Shute; but the majority being greatly for the two last, the lord mayor was pleased, in the midst thereof, to adjourn the poll.

“ Mr. Pilkington, alderman of the ward of Farringdon, having laid down his gown, the lord mayor was pleased to issue out his precept for a new election of an alderman of that ward; the competitors were the lord mayor and sir William Turner, on part of the aldermen on one side, and sir John Lawrence and sir Robert Clayton, on the part of the aldermen on the other side. In behalf of the commoners on one side, were Mr. North and Mr. Rich, the two sheriffs; on the other side, were Mr. Dubois and Mr. Hawkins, a scrivener; the choice being doubtful, they came to a poll, and there was six or eight commissioners appointed to inspect the same, who would admit no one to poll that was excommunicated, or that would not take the oaths of allegiance and supremacy, which were tendered to them; a thing much wondered at by some, as new and without any precedent in such cases; how the choice will fall is yet uncertain, though most think the Tory party will carry it, having by this new device excluded all the Quakers, who will not swear at all, and several of the most moderate persons will not poll at all, as not liking such impositions.

“ The election for the alderman of the ward of Farringdon Without being over, and Mr. North, one of the sheriffs of London, being returned to the court of aldermen, as duly chosen, and sworn accordingly, these things are remarkable in the management of the affair: the oaths of allegiance and supremacy imposed on every voter; the commissioners that tendered them notoriously known to be violent persons for the Tory party: then the several days adjournment and delaying of the poll, and keeping the poll-books open, whereby at first the Tories finding the Whigs had much the majority, they delayed the poll to seek for unknown persons to balance the poll, whereof there were several of the inhabitants of White-fryers, attorneys of Clifford’s-inn, who never used to vote, and divers who live not in the ward, nor pay to church and poor: the Whig party finding things thus managed, several of them went and petitioned the lord mayor and

John Hce, William Smith, Joseph Turpin, Nathaniel Charnell, Humphrey Barker, and Joseph Astlin; for that whereas the 29th day of September, in the 34th year of the king, there was an Assembly at Nottingham, in the county of the said town, duly summoned and called, and met before Gervas Wild, then mayor of the said town, for the electing and swearing of a mayor of that town, for the execution of the office of mayor of that town for the year then next following, according to the effect and tenor of certain letters patent

in that behalf before granted, by our sovereign lord the king that now is, unto the mayor, aldermen, and burgeses of the town of Nottingham, in the county of the said town; and that in that Assembly the said Gervas, being then, as aforesaid, mayor of the said town, began to proceed to such election; and that then and there the said mayor made, and caused to be made, a public proclamation for the departure of all persons from that election that were unconcerned therein, and for keeping the king's peace; and that nevertheless,

court of aldermen for a scrutiny of the poll; (which was denied though hardly ever known before); by these practices Mr. North had the majority by about 30.

“ His majesty hath been pleased to make an order in council against merchants' spiriting or kidnapping away young children, and directing them how to proceed for the future in taking any persons they send beyond sea.

“ The election for an alderman of Bridgewater, in the room of sir George Waterman, deceased, is at last, after several adjournments, come to a decision: It was by most persons thought the choice would fall on Papillon or Stone, but by their excommunications and calling in divers to poll who had no right, the choice is said to fall on deputy Daniell, by seven persons only; though others say, notwithstanding such irregular proceedings, the two first had the majority by 25; however, Daniell is alderman *de facto* of that ward.

“ 1683. Mr. Thomas Hunt, a gentleman of Gray's-inn, having writ a pamphlet intitled, 'A Defence of the Charter of the City of London,' &c. showing that neither the charter of the city of London, or of any other corporation, is forfeitable by law, wherein are several bold passages, it has been censured as a libel, and he absconds.

“ Mr. Sacheverell hath preferred an information against the persons that surrendered the Charter of the town of Nottingham, but Mr. Attorney General would not at first allow it should be received.

“ Feb. 1683. The Corporation of the city of Norwich, having some time since surrendered their Charter, have, as is said, lately petitioned his majesty to have it again.

“ June 13, 1684. The Nottingham Rioters came to the court of King's-bench to receive their judgment: Wm. Sacheverell was fined 500 marks; Mr. Gregory 300; Mr. Hutchinson 200; and the rest according to the value of their estates, and that all of them find sureties for their good behaviour for a twelvemonth.

“ July, 1684. The mayor, aldermen and common council, of the city of Durham, have surrendered their Charter into the hands of the bishop of Durham, who has reserved to himself and his successors in that See, the power of approving and confirming the mayor, recorder, aldermen and common council of the city. *Oh, tempora!*

“ May, 1685. About this time, persons were very busy in elections of members of the House of Commons to serve in the ensuing parliament; great tricks and practices were used to bring in men well-affected to the king, and to keep out all those they call Whiggs or Trimmers. At some places as Bedford, &c, they chose at night, giving no notice of it; in other boroughs, as St. Alban's, they have now regulated the electors by new charters, in putting the election into a selected number, when it was before by prescription in the inhabitants at large. In counties, they adjourned the poll from one place to another to weary the freeholders, refusing also to take the votes of excommunicated persons, and other dissenters; noblemen busying themselves with elections, getting the writs and precepts into their hands, and managing them as they pleased; King commanding some to stand, and forbidding others, polling many of his servants at Westminster to carry an election: foul returns made in many places, and where gentlemen stood that they called Whigs, they offered them all the trick and affronts imaginable.

“ June, 1687. The Lord Chancellor died lately in the city, and was pleased to discharge three aldermen on their own desire, sir Thomas Griffith, sir Benjamin Newland, and Mr. Peter Pallavicin, and he told them his majesty had given the city the privilege to choose their sheriffs as formerly, and that the lord mayor might drink to one as Sheriff, free or unfree of the city, and that he should either fine or hold.

“ June 17. The lord mayor and aldermen have been at Windsor to thank his majesty for his grace and favour to them, in permitting them to choose their sheriffs.

“ July 12. The city of London have received lately above 8,500*l.* for fines for sheriffs and aldermen.”

Sprat (in his Second Letter of Excuse to the Earl of Dorset, edit. 1711, 8vo. pp. 16, 17, as cited in the Biographia, article Sprat) says, as I understand him, for his language is not so unequivocal as might be, “ that under king James a Quo Warranto was actually issued out against the Royal Church and School of Westminster.” See some account of Sprat in the Introduction to the Trials for the Rye-House Plot, vol. 9, p. 362, of this Collection.

they the said William Sacheverell, and the rest of the defendants, being persons well knowing the premises, and unconcerned in that election, but being ill-disposed persons, and to disquiet, molest, and trouble the peace of our lord the king that now is, and the common tranquillity of that town, and the aforesaid election wholly to hinder, did during the time of the said Assembly, and after public proclamation made as aforesaid, viz. the said 29th day of September, in the aforesaid 34th year of this king, at the aforesaid town of Nottingham, in the county of the said town, with force and arms, &c. riotously, routously, unlawfully, and seditiously, together with many other ill-disposed persons, and disturbers of the peace of our said lord the king, to the number of 500 persons, to the said attorney-general as yet unknown, assemble, congregate, and unite themselves together, and themselves together continued, to disturb the peace of our lord the king that now is; and that then and there the said William Sacheverell, and the other defendants, the aforesaid unlawful and ill disposed persons so assembled, congregated and united then and there, with force and arms, &c. riotously, routously, unlawfully, tumultuously, and seditiously, by the space of 7 hours, to disturb the peace of our said lord the king, and to continue the said riot, did excite, move, persuade, and procure, and then and there, by the whole time aforesaid, made, and caused, and excited to be made, great rumours, clamours, terrible shouts, and unusual noises; and then and there, with force and arms, &c. riotously, routously, unlawfully, and seditiously one mace, being the ensign of office to the sheriffs of the county aforesaid belonging, from one John Malin, the said John Malin being then one of the sheriffs of the town and county of the town of Nottingham, against the will of the aforesaid John Malin, took, had, carried away, and detained, to the inciting of great danger, and moving of tumults, and effusion of much blood, to the great terror, disquiet, and fear of all the liege subjects of our said lord the king, to the evil example of all others in like case offending, and against the peace of our said lord the king, that now is, his crown and dignity.' To this Information all the Defendants but Richard Mansfield and Henry Plumtre, have pleaded Not Guilty, and for trial put themselves on the country. But the defendants have alleged that the inhabitants of the town and county of the town of Nottingham ought not to be drawn out of the said county, and that the county of Kent is the next county to the county of the town of Nottingham, and therefore have prayed that a jury of the county of Kent might try the issue; to which the king's attorney has agreed: and you being freeholders of the county of Kent, and returned, and sworn to try this cause, your charge is to enquire whether the defendants, or any of them, are Guilty of the offence in this information, or Not Guilty, and if you find

them, or any of them guilty, you are to say so; and if you find them, or any of them not guilty, you are to say so; and hear your evidence.

Then Proclamation was made for evidence in the usual manner.

Mr. Holloway. May it please your Lordship, and you Gentlemen of the Jury, This is an Information preferred by Mr. Attorney General, against William Sacheverell and others, for a most notorious riot: and it sets forth, that upon the 29th of September, in the 34th year of this king, at the town of Nottingham, there was an assembly duly summoned before Gervas Wild, then mayor of the said town, for the election and swearing of a new mayor of the said town for the year ensuing: that the mayor began to proceed to election, and made proclamation for all persons to depart that were not concerned in the election, that the defendants being no way concerned in the election, but being ill disposed persons, to disturb the peace of that place, and set the town together by the ears, did in a riotous manner assemble themselves with many other ill-disposed persons, to the number of 500, and continued in their riot for the space of seven hours, with a great deal of noise and tumult, and with force and arms did riotously carry away and detain a mace from one John Malin, then one of the sheriffs of the town, against his will, to the great terror of his majesty's subjects, and to the evil example of all others in the like case offending, and against the king's peace. If we prove all or any of these defendants who have pleaded Not Guilty, to be Guilty, you will find them so.

Mr. Recorder (sir Thomas Jenner). May it please your Lordship, and you Gentlemen of the Jury; I am of counsel in this cause for the king: This is an Information against a matter of 21 persons for being in a notorious riot, and continuing in it for two days together. If it please you, Mr. Sacheverell he is in the front of them, and he and seven more of these defendants, very considerable persons, were not at all concerned either by any old charter, or by the new charter in this election, but were strangers, and yet they must needs come on purpose to inflame and set on the others. I shall name them that were not concerned in the election, William Sacheverell, George Gregory, Charles Hutchinson, William Wilson, clerk, Joseph Turpin, Nathaniel Charnell, Humphrey Barker, and Joseph Astlin. These persons, gentlemen, had no manner of pretence to be at this place upon the account of an election. The matter of it was thus: Michaelmas-day, 1682, the mayor that then was, Gervas Wild, was at his own house, with some of his brethren, in order to go to church that morning, according to the usual custom of that place, at the day of election; but having notice that there was a charter coming down, and expected every moment, truly the other side, Mr. Sacheverell, and the rest that were there, for he was present himself, were very zealous

to go to church very early, but I believe not so much out of zeal to go to church, but more to come to a speedy election, if possible, before the new charter come down. The mayor at the same time desired them to stay a little, but could not prevail, and thereupon they go to church, and while they were there, the new charter comes, and then the mayor having got the new charter, goes into the council-hall, and sends for the books from the clerk, who was then in the church, and he came and brought them. When they came to the council-hall, the mayor was proceeding in order to have himself sworn upon this new charter, and they having some notice what was doing at the council-hall, were willing to make all the haste they could out of the church, and came down to the council-hall: and when they came there, the mayor tells them his business, that he had a new charter, and was going to be sworn according to the king's express commission; and Sacheverell stands up in the front of them, and says, We will have no new charter; we will have no such mayor as you would have; but we will have a Greaves mayor, and that was the outcry; A Greaves mayor, a Greaves mayor; to that degree, that all the mayor and sheriffs could do, could not pacify them. But thus they made a tumult and an uproar, by the help of a person, Wilson, who I believe will give an account by and by, what he had to do there, and how he was concerned in the election of a mayor. At length the mayor was forced to withdraw, and did go down out of the council-chamber into the common-hall, where he got himself sworn; and by that time he had got that done, they came out of the council-chamber into the common-hall, and acquaint the mayor, that truly they had chosen Greaves mayor in the council-chamber, and required him to swear him. Mr. Mayor said, they had nothing to do to choose a mayor, it was no election, and they would proceed to election according to the charter, he having now taken the oath. This raised the tumult higher, and now there were got together about 500 persons, so that at last some of the aldermen that attended the mayor, were fain to withdraw for fear of mischief, the tumult was so outrageous, some crying out the new charter was not worth one groat, others crying out, No new charter! and all crying, A Greaves! a Greaves! and thus they stood upon. The mayor withdrew to his own house, with much ado he got out of the hall, and when he was got thither, there he proceeds to an election, and while he was doing that, truly they having gotten one of the maces away by force, they went to the cross, and there they proclaimed their mayor, with great shoutings and outcries, rejoicing for the new mayor they had gotten, and the new charter that they have defeated. While they were there, the mayor having chosen another according to the new charter, regularly came down, and proclaimed that mayor at the market place, as is usual in such cases, and made pro-

clamation that the rest should depart; but instead of that they withstood him, and would not suffer the cryer to make proclamation, that any body could hear him; but a great riot they committed in an outrageous manner, resisting authority, defying it, and despising it. After this, this would not satisfy them yet, but the next day, being market-day, they must proclaim their mayor again, which is a practice never known upon any election; but at the open market there before all the people they proclaim him, with great rejoicings for the new mayor they had gotten, and wishing the people to stand by them: and for their parts, if they had not right done them now, they did not doubt but to meet with a parliament that should do them right. In this great disorder was this town by this tumult, which was thus headed by persons of eminency, and popular persons, who helping to carry on such a faction as this was, it was great odds there had not been real fighting, and battle in good earnest; but it did happen to be better appeased, and they went home, but ever since their whole business has been to uphold this power, and attend him up and down constantly since as as their mayor, and opposing the authority of the mayor by the king's new charter. We will call our evidence, my lord, and they will every one of them speak to the several defendants, and the several parts of this famous riot; and when we have done this, we hope you will be satisfied, gentlemen, to find them guilty.

Mr. North. Will your lordship please to spare me a word of the same side for the king? My lord, this is a proceeding of an extraordinary nature, and if not taken notice of, it will be thought there is no law in England; for it is a method to have authorities questioned, not in Westminster-hall by the rules of law and justice, but decided by noise and rabble, and going together by the ears. My lord, this surrender of the old charter, and the sending down of a new one, was not secret, but well known, and that occasioned the great congregation of these gentlemen that had nothing to do in the town, and so it was a premeditated design to give a disturbance in the place, in opposition and affront to his majesty's charter. My lord, I do suppose they very well knew that matters of that nature were properly determinable in a way of law; and if the mayor had no authority by the new charter to do what he did, they knew very well how to question him, and them that joined with him, for it: but they did not think that so effectual for their purpose; they did not think fit to take that course, but rather chose to proceed in the methods of disturbance, and that occasioned all that Mr. Serjeant has opened. The first step they made, my lord, was to appear in the town-hall, there to make an election of their own, and there to cry up a mayor of their own choosing, without the authority of the present mayor; which was all irregular from the beginning to the end. When they had done that,

then this mayor must be proclaimed up and down the town upon market-days, when the country came in, with great noise and great rabble. We shall call those that were present, who will give you an account of the proceedings of all this matter, and shew it to be a thing so enormous, that there has not been the like, nor can be paralleled by any thing, unless by that not far off the common-hall, at London.

Mr. Jones. My lord, if the persons that had been concerned in election (for the town of Nottingham consists of particular persons that are to come and act in this matter of the election of the mayor) had been the only persons that were met in this assembly, possibly it might have had some sort of mitigation and excuse; but, my lord, here are mere foreigners, people that have nothing to do in the matter nor in the corporation, but gentlemen that come out of the country with an armed multitude, and for them to come where they had nothing to do, and make such a riot, in such an outrageous tumultuous manner, is the next act I know to the highest rebellion. For they knew very well what the matter was, by the cries of A Greaves! a Greaves! No Toplady! no Toplady! No new Charter! and you, see who were the abettors. In truth, the insurrection spread so far, that if the duke of Newcastle, who is lord lieutenant of the county, had not come with force, they had gone down-right to blows, and been all in blood. And if such proceedings be not publicly punished, the king's authority, and the peace of corporations can never be preserved. We shall call our witnesses to prove it; Sacheverell was the captain of them, and we shall begin with him.

Mr. Powis. My lord, we shall make it short, for we shall shew without meddling with the old charter or the new charter, it was a riot.

Recorder. Swear Mr. Wild, Mr. Edge, and Mr. Hall.

Mr. Pollexfen. There will be one thing necessary to be settled in this case, my lord, concerning the witnesses; they call Wild and other persons, they are members of the new corporation, and we object against them as being witnesses in this case, and our objection, my lord, arises thus: It will appear in this case, that there is a controversy betwixt the old charter and corporation, and this, that the information is brought upon the new corporation, whether the old corporation be still in being, or was at this time in being; and whether this new charter be a good charter in law: the matter depends both in this court and in chancery; a Scire Facias is there brought against the new charter, and a Quo Warranto here against the old. Now, my lord, it will so fall out, that if so be the new charter, upon which this information is founded, be not good in law, we think it goes with the defendants. So now they call the members that claim under the new corporation to be witnesses, and thereby they would have a privilege by their own testimony, to maintain their interest in the new charter, which we think by law they ought not to do,

L. C. J. (sir George Jefferies). Look you, Mr. Pollexfen; though it is not fit for us to interrupt gentlemen when they are making harangues, yet we must tell you, we do not take notice much one way or other of the difference between the old charter and the new; for our business is to mind that which is before us upon the information, and we must set by all things that are not before us, and not take notice of them one way or other. Do you think we intend to try the new charter or the old charter upon an information for a riot? If in case there were a doubt whether the old one be gone or still in being, take the proper way for the determining those things. You shall not think to be let in upon the business of a riot, to try the validity of your charter; if you have a Scire Facias to repeal the new charter, or if you have a Quo Warranto against the old charter, in God's name go on in a regular way. But do you tell me that supposing the new charter is an ill charter, and the old one a good one, that right or wrong is to be tried by rabble and noise? No, the business we are to try is whether here were a riot committed by these defendants against the public peace or no.

Mr. Holt. My lord, we are upon the point of exception to the witnesses; and they open it themselves that there is such a controversy in the town.

L. C. J. We will not try that controversy here at this time.

Mr. Holt. My lord, the information is special, it is grounded upon the new charter, and sets forth that this Wild being mayor by virtue of this new charter—

L. C. J. He was mayor *de facto*, and I do not know but he was so *de jure*. But suppose a man do take upon himself to be mayor, and it may be according to the rules of law he is not mayor, the way to know whether he be mayor or no by law, is to take the methods and proceedings that the law has appointed; but not by tumults and riots, we must have none of those things to decide controversies, there must be nothing of plucking out one another's throats.

Just. Withins. Pray, Mr. Holt, if the king sends down a charter to make a corporation, shall all the people rise in a body against it? No, satisfy yourself for that; if the king sends down his charter, the people shall not fly in the face of them that bring it. It is not come to that yet, nor I hope never shall.

L. C. J. No, no, for the matter of right, we are not upon this information to determine whether the old charter be in being, or the new one be in being; but for that you must go according to the rules of law, and take your regular course; and I will tell you by the way, it is not he that has the most company, that has always the greatest right: we all know very well, and I have been in a place that has been hinted at the bar, and there indeed he that had most noise, had always most right, as they thought; but we will have none of these things, go on for your right in a regular way

in God's name; we must keep to the business before us, this riot.

Mr. Pollexfen. My lord, we are in a place now where we hope such things will not be, and we desire to have right settled by law.

Recorder. Swear Mr. Wild. [Which was done.] Pray give my lord and the jury an account what happened at Nottingham upon Michaelmas-day, 1682. Tell the whole matter of it.

Wild. My lord, and you gentlemen of the jury, I was then mayor when this business happened: when the king's new charter came down, as soon as it came to my hands, I went straight to the town-hall, thinking to be sworn by the new charter, that so I might be capable of swearing others in their rooms that were turned out. When I came there, I desired alderman Parker and Rippon to go for alderman Edge, who was at the church, that we might be sworn regularly, he being town-clerk, who sent me word that he would not come; but in some little time afterwards he came, with a great many persons with him, as Mr. Sacheverell, and a great many others that had no business there.

Recorder. Pray name as many of them as you can.

Wild. Mr. Sacheverell, Mr. Hutchinson, Mr. Plumptre, Mr. Geo. Gregory, Mr. Green, Mr. Sherwin, sir Thomas Parkyns.

Mr. Pollexfen. He is not named here.

Recorder. Do not disturb him, pray let him go on.

Mr. Pollexfen. We only take notice he names some that are not down in the information.

L. C. J. Cannot you be contented, what if he does name others that are not there, what hurt is that to you?

Wild. There were several others, but these gentlemen did not belong to the town, nor had no business there; some of them were no burgesses, and they that were burgesses had no votes there. Sir, as soon as these gentlemen came into court, I was a little amazed to see so many gentlemen; I took the king's new charter out of the box, and alderman Rippon took it by one side and I by the other. Gentlemen, said I, here is the king's new charter, which he has been pleased to grant to the town of Nottingham; and, said I, Mr. Serjeant Bigland, will you be pleased to cast your eye upon it, and satisfy these gentlemen whether it be a new charter, and what are the contents of it? Sir, says he, do you ask my opinion as recorder, or as a counsel? Says I, I ask your opinion as a friend. Then said he, I will not give you my opinion. Then said I, Mr. Alderman Edge, will you look upon it, and give your opinion, it is your duty to read it as town-clerk. Sir, says he, I know what I was by the old charter, but I do not know what I am by the new. Says I, it is your duty so to do. No, says he, I will not; so, my lord, and gentlemen of the jury, the rest of the people that were in the room, cried out, No New Charter!

No New Charter! Then spoke Mr. Sacheverell, Sir, says he, this is not our business here now, we come here for the election of a mayor by the old charter. Sir, said I, I know not any business you have here, nor a great many gentlemen that are here; it would better become you to be in another place. Sir, says he, will you proceed to election or no? Sir, says I, I have a great deal more to do before I can proceed to election; I was to be sworn myself, and to swear half-a-dozen, before I could proceed to election, in the room of those that were turned out, to make them capable of electing. And so they cried, No New Charter! No New Charter! A Greaves mayor! A Greaves mayor! Then they cried, Mr. Alderman Edge, take your book, and proceed to election. Who are you for, Mr. Mayor? Said I, you cannot proceed to any election without my consent, and I disclaim it; and so, gentlemen, farewell. My lord, that was in the Council-house next to the Guildhall.

L. C. J. What day was that?

Wild. It was Friday, Michaelmas-day, 1682.

L. C. J. Well, go on.

Wild. So, my lord, I adjourned the court into the Guildhall, which was a room adjoining to that where this matter happened, and we sat a while upon the bench, and made a little speech to the burgesses of the town, and told them the king had granted a new charter, and if they pleased to be silent, they should hear it read. This was after I was sworn; for as soon as I came there, they gave me my oath, and swore me mayor by the new charter. We commanded silence there several times, but the burgesses were very tumultuous, and it was occasioned, as I believe, my lord, by the coming in of two gentlemen, Mr. Gregory and Mr. Hutchinson, who came to tell me, the gentlemen in the other room had elected Mr. Greaves mayor, and desired me to come and hear him sworn. Said I, they cannot elect without my consent, and I disclaim it, I will have nothing to do in the business. With that the burgesses began to be so extraordinary tumultuous and outrageous, and keep such a noise and a stir, that we were afraid they would have plucked us off the bench; insomuch, as one that was by, my brother Parker, whispered me in the ear, says he, will you stay here to be knocked on the head? I told him, I hoped there was no danger of that. We commanded silence again and again, for the reading of the new charter; and there was an honest gentleman in court, one Mr. Bawd, a barrister at law, that took it and read it very distinctly to the burgesses and the company, as far as they would give him leave. I made proclamation for silence, and keeping the peace divers times, and for all, that had no business there, to depart; but they were so outrageous, that alderman Parker went away: he was afraid of his life, as he told me. I staid some little time after alderman Parker went away; but finding there was nothing to be done for the noise, I adjourned the court to my own house, and did

all the rest of the business there, electing and swearing the mayor and other officers. My lord, presently after I was come to my own house, comes Mr. Charles Hutchinson, Mr. George Gregory, Mr. Samuel Richards, and Mr. Arthur Riccards; and they came very impudently and saucily to demand the mace. They said they were sent to demand the mace. Said I, I think you have nothing to do with it.

L. C. J. Were they concerned in the election by the old charter?

Wild. No, my lord, they were not by the old nor new, nor none at all. Said they, will you please to give us your answer, whether you will give us the mace or no? Said I, I received it from a very good authority; I received it by the king's authority, and to the king's authority I will give it again. Said they, Is that all the answer you will give us? Yes, said I, that is my answer: so they went away. After we had sworn all the men that were in the new charter, we went to the election of a new mayor, and we chose Mr. Toplady; and when we had chose him, we went to proclaim him, as the usual manner was, and proclaimed him at the market-cross, the weekday-cross, as we call it; and as we were proclaiming our new mayor, there comes Sherwin and Green, with a great many more, about 40 I believe, or thereabouts; and as it grew towards night, they shouted and threw up their hats, and we thought they would have run in upon us, and they cried out, No New Charter! No New Charter! A Greaves mayor! A Greaves mayor!

Mr. North. What became of the mace?

Wild. I kept it.

L. C. J. What is this gentleman's name?

Mr. North. Mr. Wild: he was mayor then. Have you no more to say, Sir?

Just. Withins. Pray, who was at the head of all this rabble? who was the chief of them?

Wild. I believe if Mr. Sacheverell had not been there, and those other gentlemen, we had had no disturbance.

Mr. Pollexfen. Pray, Sir, let me ask you, had these gentlemen their swords on?

Wild. Yes.

Just. Withins. Did they abet and countenance the tumult?

Wild. Yes, they did abet it.

Mr. North. Did any body strike or threaten?

Wild. There are some in court can tell you something of that, I know nothing of it.

L. C. J. I would know of you how many persons were present at this time when this tumult was. Pray name as many of them as you can. You have named Sacheverell, Gregory, and Hutchinson for the first part: you have named about the business of the mace, Samuel Richards and Arthur Riccards.

Wild. And Mr. Green and Mr. Sherwin were there at the market-cross.

L. C. J. Who else?

Mr. Powis. Was Mr. John Greaves there?

Wild. Yes.

Mr. Powis. Was William Greaves these?

Wild. Yes.

Mr. Powis. Was Ralph Bennet there?

Wild. He was there.

Mr. Powis. Was William Wilson there?

Wild. I can say nothing to him.

L. C. J. Was Samuel Smith there?

Wild. Yes.

L. C. J. Was Thomas Trig there?

Wild. Yes.

L. C. J. Was Richard Smith there?

Wild. Yes, he was there too.

L. C. J. Was John Hoe there?—*Wild.* Yes.

L. C. J. Was William Smith there?

Wild. Yes.

L. C. J. Was Joseph Turpin there?

Wild. He was in the hall throwing up his hat, but I did not see him in the council-house.

L. C. J. Did he abet the tumult?

Wild. Yes, he cried out, No New Charter! No New Charter! A Greaves mayor! A Greaves mayor!

L. C. J. Was Nathaniel Charnell there?

Wild. Yes.

L. C. J. Was Humphry Barker there?

Wild. I can say nothing to him.

L. C. J. Was Joseph Astlin there?

Wild. I can say nothing to him neither.

L. C. J. Then these three you say nothing to; William Wilson, Humphry Barker, and Joseph Astlin.

Mr. North. Pray, Sir, favour me with one word; I would ask you this question: Was there any proclamation made by your order to have those depart that had no business?

Wild. My lord, I did order it so; and I think the serjeant is in court; I sent him into the other room, and did order him to make proclamation; he will give you an account of that.

Recorder. How came it about they were got to church before you came from your own house? Pray tell us what you said to them before they went to church. Were there any of them before that at your house that morning, and what did you say to them?

Wild. May it please your lordship, my lord, and gentlemen of the jury, the new charter was not come till something late in the day; they had been at my house about eight or nine o'clock, to have me go with them to church, and they were impatient of staying, but I persuaded them to stay; for, said I, we shall have a new charter by and by. Some of them were my friends, and I spake to them to persuade the rest to stay. I did persuade them to stay a great while, and went out from them, and came to them again. At last news was brought me, that the new charter was within the limits of the town (for we had a spy at the top of the houses) and that half a score were come with it; so I went to alderman Edge, and told that now the new charter was come within the bounds of the town. When they heard me say so, they cried, Away! Away! let us go to church; and they said Mr. Sacheverell was in the street, and so they followed him to church. Away they went from my house; but a little

before they went, I said to them, Gentlemen, if you will give but a little time, the charter will be here in a quarter of an hour or less, therefore pray be pleased to stay and see it before you go, for I tell you I must act by the new charter, and not by the old.

Just. Withens. When you ordered them to make proclamation of silence, how did they behave themselves?

Wild. They were as tumultuous as ever they were.

Just. Holloway. If you have any thing more, speak your full knowledge of it.

Wild. My lord, I did perceive a great deal of danger there was; I knew not how it would be the next day, we were afraid of being knocked on the head, so I dispatched a messenger on Saturday to my lord duke of Newcastle, that he would please to come to us and assist us, for I believed we were in a great deal of danger. My lord came to us on Saturday night, and staid there till we were pretty quiet again.

Recorder. What did they do on Saturday, the next day?

Wild. It was the day of proclaiming the mayor at the other cross, the malt-cross, it being upon the market-day, when the country people came in, that so they may be satisfied who is mayor of the town.

Recorder. Did they proclaim their mayor that day?—*Wild.* Yes.

Recorder. Pray speak out, and tell how that was?

Just. Holloway. Pray, Mr. Mayor, by the custom and usage of your corporation, is the mayor proclaimed any other day than when he is elected?

Wild. Yes, the next day after, to satisfy the country who are mayor and sheriffs of the town.

L. C. J. Were both the mayors proclaimed that day?

Wild. Yes, after we had proclaimed our mayor, presently there came a great many gentlemen, and proclaimed their mayor.

L. C. J. Name them who they were?

Wild. My lord, I was not so near them, as to tell particularly who they were; but they threw up their hats, and made a great noise: there are enough in court can tell who they were.

Mr. Lovell. Pray, Mr. Mayor, will you tell us by whose authority and direction this assembly was called?

Mr. Thompson. Sir, he asked you a plain question, pray answer it; by whose direction was the assembly called?

Wild. Sir, I do not know; they had no summons from me.

Mr. Holt. Is it not usual to meet of course, without summons, on the day of election?

Wild. Never that I knew of without summons; but our new charter not being come, I durst not give any summons.

Mr. Lovell. Is it not usual for the burgesses to go and wait upon the mayor to church?

Wild. Yes, those that are summoned; but not without summons.

Just. Withens. Is it usual that the multitude should make the mayor go to church before he has a mind to it?

Mr. Lovell. Did you make any summons at all for that meeting?

Wild. I sent no summons.

Mr. Pollexfen. It is all laid in your information, that the assembly was summoned by you.

Wild. All that I ever sent for, as I know, was Mr. Serj. Bigland. There were two or three gentlemen at my house that asked me to send for him, he having been Recorder by the old charter. Said I, if Mr. Serjeant Bigland has a mind to come, he may come if he will; so I sent for him; but there were none of those gentlemen that I named before, that I sent for.

Mr. Pollexfen. I think you say that you went from the council-house, and afterwards went into the hall, and there you were sworn, and then you did proceed to read the charter; pray, were any of the defendants, or which of them, in the hall?

Wild. Sir, I told you that Mr. Gregory and Mr. Hutchinson came into the hall, and Mr. Charnell, and Mr. Turpin were there in particular.

Mr. Pollexfen. What did Mr. Gregory and Mr. Hutchinson do there?

Wild. They came, Sir, to desire me to go into the council-house, for the gentlemen had chosen Greaves mayor, and desired me to hear him sworn.

Mr. Pollexfen. Was Mr. Sacheverell, or any there, but those that you say came to tell you what they had done in the council-house?

Mr. Holt. Who staid behind in the council-house?

Wild. All but those that came out with me.

Mr. Jones. Pray, to satisfy them, tell them how far the council-house and the hall stand at a distance: how far asunder are they?

Wild. But just over the door threshold from one another.

Mr. Jones. Are they contiguous to one another?—*Wild.* Yes, Sir.

Mr. Jones. Can they come into the council-house, but they must go through the hall?

Wild. No, no, they must come from the hall first, and so go into the council-house.

Mr. Pollexfen. You were speaking of some of the company that had swords by their sides.

Wild. Yes, the gentlemen had.

Mr. Stanhope. Did you observe Mr. Sacheverell and Mr. Gregory had their swords by their sides?

Wild. Yes, to the best of my knowledge they had.

Mr. Stanhope. To the best of your knowledge; do you swear they had or no?

Recorder. Would you have him swear beyond his knowledge?

Mr. Stanhope. Had Mr. Plumtree a sword when he came from church to the hall?

Wild. I see his face among the rest, but they were so many, I cannot speak particularly who had their swords on, and who not; I believe they might have all their swords on.

L. C. J. Pray, Sir, what do you mean by that question? Plumptre is not here before us.

Mr. Stanhope. He is in the information.

L. C. J. You had as good ask if Mr. Pearce was there.

Mr. Stanhope. My lord, he said he was there, and his name is in the information.

L. C. J. You had best ask us, whether every man in the town had his sword on. Let us keep to the thing before us, and not ask such impertinent idle questions of people we have nothing to do with.

Mr. Stanhope. Is Mr. Sacheverell a burges of the town?

Wild. Yes, he was a burges by the old charter; but though he was a burges, he was not one of the electors. He had nothing to do there, nor Mr. Gregory, nor Mr. Plumptre.

Mr. Fuller. Who are the electors?

Wild. The electors are the mayor, aldermen, coroners, and the rest of the council, by both charters, and so he had nothing to do there.

Just. Withens. He was not concerned in the corporation, but only a gentleman burges.

L. C. J. How long have you been of the council of that town?

Wild. I have been there a great while, a dozen or 16 years.

L. C. J. Have you been present at the election of mayors before that time?

Wild. Every year.

L. C. J. Who were the persons that used to come to elect mayors before that time?

Wild. The old mayor, the aldermen, the council, the coroners, and the sheriffs, and those that have been sheriffs.

L. C. J. Did the other burgeses use to come?—*Wild.* No.

L. C. J. Did Mr. Sacheverell and Mr. Gregory use to appear for the election of mayors before that time?

Wild. No, my lord, they had no business there.

Recorder. At this time they had, it seems.

Wild. They made themselves business.

Mr. North. Prayswear John Malin. [Which was done.]

Mr. Stanhope. Mr. Wild, pray be pleased to tell the court how Mr. Hutchinson expressed his sauciness, for you are pleased to say, he and Mr. Gregory came saucily to you?

Wild. So he did, Sir, he came saucily to demand the mace, which he had nothing to do withal.

L. C. J. Is Mr. Hutchinson here?

Mr. Stanhope. Yes, he is: did he demand it himself, pray, or did he tell you the other mayor demanded it.

Wild. He came to demand it.

Mr. Stanhope. Did he tell you from whom he came?

Wild. He said he came from Mr. Greaves.

Mr. Stanhope. Then he did not demand it for himself?

L. C. J. And if Mr. Greaves had demanded it, he had talked saucily; for it was not in his

power to demand it. If he had any right to it, there was a proper place for him to apply to, if it were detained from him.

Mr. Stanhope. My lord, with submission, I understand no such great sauciness in it, to make a demand of an ensign of office.

L. C. J. But I say it was saucy, and I tell you you had been saucy if you had done it; for every man that meddles out of his province is saucy: you may carry that away with you among your other observations. Every little prickeared fellow, I will warrant you, must go to dispose of the government. Let Mr. Hutchinson and Mr. Gregory be as good men as they will, they had better have studied to have been quiet, and meddled with their own business. And I will tell Mr. Gregory 'ad concilium ne accedas antequam voceris,' is a rule, and ought to be observed: but we are wonderfully afraid, forsooth, to tell our minds: no, I tell you it was saucy, and if you had gone upon that errand, you had been saucy.

Mr. Stanhope. It may be I should have known better than to have gone on such an errand.

L. C. J. So you would have done well to do, and you should know better than to ask such insignificant impertinent questions as you do. It was very saucy, I tell you; and if the best man of your party had gone, it had been saucy. You shall know our minds, if you put us upon it, because you are so big of it. We are come to a fine pass, that every little prickeared fellow must come to demand maces that are the badges of authority, and they must not be told, forsooth, that they are saucy.

Mr. North. Pray, Mr. Malin, will you give an account what you know of this matter?

L. C. J. We are trying people's rights by club-law: but by grace of God it shall not be so, so long as I sit here.

Malin. I was then sheriff at that time.

L. C. J. What time?

Malin. The time of the riot, on Michaelmas-day. I then being sheriff went out to meet the charter that was coming at that time, and I went as far as Leicester, and came back with it about eleven o'clock, as near as I can guess. I came with the charter on the one side of him that brought it, and another that is concerned with us that we left behind, on the other side: I met these gentlemen that stand in this cause; I will name them if you please.

L. C. J. Do so.

Malin. Mr. Sacheverell, Mr. Gregory, Mr. Hutchinson, Mr. John Greaves, Mr. William Greaves, Samuel Richards, Robert Green, Francis Salmon, Arthur Riccards, Ralph Bennet, John Sherwin, Samuel Smith, Thomas Trig, William Smith, Joseph Astlin, and Nathaniel Charnell; I met these men.

L. C. J. Where did you meet these men?

Malin. At the gate called Rye-Smith-Gate. They were a-coming with a great many more, and I suppose they went before; for I went forward to Mr. Mayor by the new charter and by the old charter too, and I met him, and de-

livered the charter to him, and staid there, and the rest of the gentlemen that were concerned of our party by the king's new charter, and we went from thence to the Guildhall, and from thence we went into the council-house, and when we were in the council-house, Mr. Mayor sent for Mr. Edge, as town-clerk. They were gone then to church; I was one that went. He was concerned in the new charter, both as alderman and town-clerk. I went for him to come to see the charter read, and that was all. I see them sit in order, in that manner and form as they had used to do before in former times, ready to go to the election in the vestry after the way it used to be in, by the old charter, for I have been concerned in elections the former way six or seven years; but I never saw any gentlemen in all that time appear there. There used to be none but the mayor, the aldermen, and the clothing. There were none of these gentlemen, as ever I saw, and I am of seven years standing, six I am sure, I suppose seven, but only one gentleman once, which was a gentleman that alderman Edge brought in to see the formality, a gentleman of the Six-Clerks' Office, as I remember. This being done, I acquainted Mr. Alderman Edge with our errand, but he did not come to us; but some time after we had sat there in the council-house, these gentlemen came with a great many, I know not how many hundred came there, and when they saw the mayor was going to read the new charter, these gentlemen began to stir; and when they came in, we wondered to see such a bustle of those that had nothing to do there: and the first thing that was said, was spoke by Mr. Sacheverell, as I do remember, for I saw him there; We come here to elect a mayor by the old charter. Says Mr. Mayor then to them, I know no business you have here gentlemen, any of you; and upon that he made proclamation, and told them they had nothing to do there, and he would have nothing to do with them. So then they called out for a poll, and did proceed on as far as their party went, and one or two of those that were concerned in the new charter, but not as to any of their party. There was one of them, Mr. Hardy, that gave a vote for Mr. Edge, and this was all. But they would not depart at all; but Mr. Mayor told them they had no business there, and he had nothing to say to them: and with that he took up the mace, and went with some of the aldermen into Guildhall. And when they saw him going away, they began to cry out, and he had much ado to escape, they were so busy to keep him in there. And as they laid their hands upon the mace to stop it, the serjeant got away with it, and went out with the mayor. Then says Mr. Sacheverell, Stop the books, stop the books, two or three several times. With that there was one of the coroners, Mr. Woolhouse, laid hold on one of the books; and whether there was any pulling or tugging, I cannot tell; but I suppose some of the books were stopped.

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Mr. Powis. Then what was done as to the mace that belonged to you as sheriff?

Malin. I was crowded out, and I could not lay hands on my mace; but the mace lay upon the board, and was left there among them; and I was crowded out, and followed Mr. Mayor, for there was no quietness there, unless you would stay to be knocked on the head.

Mr. Powis. What became of the mace?

Malin. I sent the serjeant for it, and he told me he demanded it, and they would not let him have it.

L. C. J. But speak your own knowledge, not what another told you.

Malin. I came in afterwards there; when he told me he had been there, and laid his hand upon it, and they rescued it from him, and he could not have it, I went in myself, and demanded the mace of the gentlemen. There was Mr. Salmon, Mr. Richards, Mr. Arthur Riccards; there were four of them that told me they had as much right to the mace as I had. Gentlemen, says I, that is strange, I am by your charter sheriff still, there is no body elected in my room, and our usual way is to deliver our maces, you know, in another place, and not to rescue them away, and detain them by violence. Likewise the mace was a thing that I paid for; I was so much money out of pocket upon it; for that is our usual way, it being bought lately, every sheriff lays down such a sum, and loses 10s. by it at the year's end. I told them then, too, I was sheriff by the king's new grant, and therefore the mace belonged to me.

Mr. Powis. What is that Arthur Riccards?

Malin. An attorney at law.

Mr. Powis. He is none of the aldermen, is he?—Malin. No, no.

Mr. Powis. What is Salmon?

Malin. He is a feltmonger, or a glover; he makes gloves.

Mr. Powis. What had he to do there? was he one of the aldermen?

Malin. He was one of the old council. And there was one Bennet too.

Mr. Powis. What is Richards?

Malin. He is a bookbinder. He was one of the old council. He was coroner.

Mr. Powis. What did you say of Bennet?

Malin. Ralph Bennet was one that told me he had as much right to the mace as I.

Recorder. Well, go on to what was done the next day, the market-day, Saturday.

Malin. I cannot say much to that; for I was with Mr. Mayor making proclamation of those that were by the new charter, but I did not see them proclaim any thing.

Recorder. Was you by when proclamation was made?

Malin. I was by when we were all proclaimed, but not when they were; but then—

L. C. J. Brother, let him go on to tell us what happened on the Friday.

Malin. Then Mr. Alderman Wild, who was the mayor, when he came out thence, went into the Guildhall, where there were abundance

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of burgeses gathered together; and seeing them so unquiet, he was satisfying them as far as he could; says he, if you will hear, you shall have the charter read, either in English, or as it is in Latin, and then you will see that some of your privileges are diminished from you, but increased rather; and he was about to read it, and shewed the broad seal to them; when in comes Mr. Hutchinson and Mr. Gregory, to desire, or request, or command, or something, Mr. Mayor to come into the council-house; they told him they had chosen Greaves mayor, and he was to come to hear him sworn. With that the burgeses that had been quieted before, and was so civil as to hearken, and were about to hear the new charter read, flung up their hats, and cried out, No new Charter! A Greaves mayor! A Greaves mayor! Then alderman Parker durst not stay any longer; says he, I will not stay to be knocked on the head. Then every one was frightened, and the mayor took up the mace and ran away.

Recorder. How many might there be in the hall?

Malin. I believe three or four hundred.

Recorder. Did they restore the mace to you?

Malin. They came the next day, and would have tendered me money for the mace.

Recorder. What did you say to them?

Malin. I told them, I knew no right they had to the mace, and I would take no money for it. It was one Rayner that came and tendered me money for it.

Just. Holloway. Pray, Sir, let me ask you, in the electing of your sheriffs, do the sheriffs return the mace; or can any body require the mace before the gaol is turned over?

Malin. Yes, my lord, the gaol may not be turned over in a month; but the ensigns of authority are delivered to them presently after they are sworn.

Mr. Holt. Pray, Mr. Malin, do you know which of these defendants were there at that time when there was tossing and throwing up of their caps, as you say?

Malin. A great many of them were in the council-house; they had taken that room to themselves, and thrust us out, and none of them came into the hall but Mr. Hutchinson and Mr. Gregory; and the burgeses were very quiet till they came and demanded Mr. Wild to come and hear their mayor sworn.

Mr. Holt. How long did Mr. Gregory and Mr. Hutchinson stay in the hall?

Malin. I do not know; they staid so long as to demand the mayor to come.

Mr. Holt. Did they carry themselves peaceably and civilly while they were there?

L. C. J. What had they to do there? I ask you that, Mr. Holt; and in case you have a mind to have some questions asked and answered, I will put you in mind of a case of a parcel of apprentices in London, that were met together about pulling down some houses in Moorfields: and in case you ask me another

question, I can tell you the resolution and opinion of all the judges about that case. There is law for recovering every man's right; but club-law is not the way to determine right.

Recorder. Swear Mr. Rippon. [Which was done.]

L. C. J. You know what became of some of those apprentices, Mr. Holt.

Mr. Jennings. Mr. Rippon, pray will you tell the court what you know of this riot at Nottingham?

Rippon. Upon Michaelmas-day, 1682, about eleven o'clock, the charter came to town; I was then with Mr. Mayor, Mr. Wild, so we went straight away to the hall forthwith, and we desired that he would be sworn by Mr. Beverly that was steward. No, says he, I have no mind to it, till Mr. Edge, that was town-clerk, came to do it according to his office; so he desired me and alderman Parker to go to the church to desire him to come and do his office. We did so, and spake to Mr. Edge: Says he, if they will please to come hither, well and good, I shall not concern myself any further. Then, said we, will you give us the books that concern us; they are there, said he, what would you have more? Nay, said I, I am satisfied; so we came away. As soon as we came back to the hall, we told him the message that Mr. Edge had sent; so Mr. Wymondsell that was deputy recorder, was reading the charter. Says Mr. Mayor, if you please, I will be sworn, and proceed to election. Presently comes a great company, Mr. Sacheverell, Mr. Hutchinson, and a great many; if you please to give me leave to look upon my paper I can tell you; there was Wm. Sacheverell, esq. George Gregory, esq. Charles Hutchinson, esq. John Greaves, gent. William Greaves, gent. Samuel Richards, gent. Robert Green, gent. Francis Salmon, gent. Arthur Riccards, gent. Ralph Bennet, gent. John Shervin, gent. Wm. Wilson; I do not know, I must beg your pardon, I cannot speak particularly to him; Samuel Smith, Thos. Trigg, Richard Smith, John Hoe, William Smith, Joseph Turpin, gent. Nath. Charnell: I cannot say any thing of Humphry Barker, but there was Joseph Astlin, taylor. These gentlemen came in with swords by their sides, several of them really to the terrifying of those that were there; I was very much afraid myself. So Mr. Mayor looked upon Mr. Edge, and, says he, Mr. Alderman Edge, will you take the charter, and read it, for the satisfaction of yourself and these gentlemen? Says Mr. Edge, I do not know what I am by that charter, whether I am any thing or not; I knew what I am by the old charter. Says Mr. Sacheverell, that is not our business at present, we come to elect a mayor by the old charter; and very hot they were, and called out To election, To election, Salmon and these fellows; so that Mr. Mayor could not be heard, and to election they went; and I asked Mr. Wild, who was then mayor, who he was for? Says he, I do not understand by what autho-

ry name of these gentlemen come here: they are excluded by the old charter, and I think it were better for you to be elsewhere: they then asked who he was for? Says he, I am for none: then they asked alderman Parker, and he said the same; and when we see they would have nothing done but that, we withdrew into the hall, and fell upon swearing the mayor. We swore him, and just finished the oath, and the people were very silent, and he drew out the charter, and shewed the broad-seal, and said, Here is the king's new charter, I am very confident none of your immunities and your privileges you are deprived of: and there being some little stir, said I, pray be quiet and silent, while you hear it read; at last they were very silent and quiet, and we thought it would have been a very fair business; when in comes Mr. Hutchinson and Mr. Gregory, to tell Mr. Mayor that they desired his company, as the custom was, to be at the swearing of Mr. Greaves, mayor, for so the old mayor ought to be, or else he is no mayor, unless he be sworn by the preceding mayor. Says he, I have nothing to say to him, I know no mayor that he is; we are about our own business, obeying the king's authority and his charter. This was no sooner said, but they had animated the multitude of people that were there, that they flung up their hats in a very irreverent posture, as I never saw the like, shouting and crying out, No new Charter! A Greaves mayor! I was fain to secure the charter; and a farren-dine waistcoat that I had on, was all rubbed to pieces to save the charter, and I had much-ado to save it. My brother Parker he was so afraid, he got off the bench; Prithee, said I, stay; for certainly they dare not do these things; says he, I am afraid of my life, and fare you well. Mr. Mayor and I sat a-while, for we knew not which way to take, but at last we got away through them: but if I touched ground, I wish I might never see my wife again.

L. C. J. Now whether that be a curse that thou layest upon thyself or no, I cannot tell.

Rippon. Had you been there, Sir, you would have been afraid too.

Recorder. Pray speak that again.

Rippon. I say again, when I went away down with Mr. Mayor, I did not touch the ground for eight or nine yards together; for they would not make way, and they pulled me by the gown, several of them; and if any body else had been there, he would have been affrighted.

Mr. Powis. How long did they continue the rabble up?

Rippon. So, Sir, we got straight away to Mr. Wild's house, that was then mayor, and we did swear him accordingly as the usual way was: for the charter impowered us, as Mr. Wymondsell told us, that we might elect any where; so we fell to the business of the day, and by that time we had three parts done, they had done, and proclaimed their mayor: but then they come and send Mr. Hutchinson, and Mr. Gregory, Samuel Richards, and Arthur

Riccards, to demand the great mace for Mr. Greaves, as he was mayor: Said Mr. Wild, what shall I do? Why, said I, go down and give them their answer; tell them they are saucy fellows to do any such thing: Says he, they are gentlemen; why then, said I, tell them they might know better than to do so. So he went down and told them; said he, I received it by good authority, and will never part with it, but to as good an authority as I received it. So we staid, and went on and did the business of the day; and afterwards, between five and six o'clock, we went to the cross, and there proclaimed the mayor by the new charter, according to the custom, and returned every one to our own houses. The next day we were afraid of making a disturbance; but about nine o'clock we went and proclaimed the mayor, and about eleven there came all these gentlemen, and there they proclaimed Mr. Greaves mayor, which was upon the Saturday, accompanied by all these persons, as near as I can say.

Mr. Powis. Was Mr. Sacheverell there then? Rippon. Yes.

Mr. Powis. Were all the rest there?

Rippon. To the best of my knowledge they were.

Mr. Holt. Can you say Mr. Sacheverell was there?—Rippon. Yes, he was.

Mr. Holt. Who was there?

Rippon. There was the two Greaves's, and Green, and Richards, and Bennet.

Mr. Holt. Did you see them there?

Rippon. Yes, I did.

Recorder. Rippon, pray will you recollect yourself, and tell the court who was there on the Saturday?

Rippon. Mr. Sacheverell, Wm. Greaves, John Greaves, Samuel Richards, Salmon, Arthur Riccards, Ralph Bennet, John Sherwin, William Wilson.

Recorder. Was Wilson there?

Rippon. Yes, I see him myself.

Recorder. What, rejoicing?

Rippon. Yes, he was rejoicing as the rest did, to the terrifying of us all.

Recorder. Was he in the crowd?

Rippon. Yes.

Mr. North. Will you ask him any thing, gentlemen?

Rippon. I know nothing, if it please your lordship.

Mr. Holt. Pray, Sir, this; can you say that Mr. Sacheverell had his sword on, on Michaelmas-day?

Rippon. Yes, certainly he had one on.

Mr. Holt. Can you take it upon your oath he had?

Rippon. Nay, there will be several that will swear it, I will warrant you; and I am sure you would have been afraid if you had been there.

L. C. J. Were Mr. Hutchinson, or Mr. Gregory, burgesses, either by the new or old charter?—Rippon. No, they were not.

L. C. J. Were Mr. Sacheverell, and any of

these gentlemen ever present at any other election?

Rippon. It is possible, after the election is over, they might invite gentlemen to feast at their houses, but never to have any concern in the election in the least.

L. C. J. How many elections have you been present at?

Rippon. I came into the council at the king's coming-in, and I have been alderman five or six years.

Mr. Powis. He came in by the regulation.

Mr. Pollexfen. Pray, whereabouts was it the mayor was sworn?

Rippon. At his own house.

Mr. Pollexfen. Whereabouts were the sheriffs sworn?—*Rippon.* What sheriffs?

Mr. Pollexfen. Malin, the witness that was before.

L. C. J. He was the old sheriff.

Mr. Holt. And where were the new sheriffs sworn?—*Rippon.* At the mayor's house.

Mr. Pollexfen. Was Mr. Malin sheriff by the new charter?

Mr. Holt. Was it before the election of Mr. Greaves mayor, or after?—*Rippon.* After.

Mr. Pollexfen. Was Mr. Malin by the old charter, or by the new, sheriff?

Rippon. By the old.

Mr. Pollexfen. And not by the new?

Rippon. No.

Mr. Pollexfen. He says he was, and you say he was not.

Rippon. For that day he was so, but then he went out.

Mr. Pollexfen. Did the mayor return to the hall after he was sworn, or after you left the hall in the fright?

Rippon. We went straight to Mr. Wild's before he was sworn, and then we swore him there.

Mr. Pollexfen. But the question asked you is, Did Mr. Wild return back to the hall after he had taken his oath, and was sworn in his house?

Rippon. No, he staid in his house; it is not usual for the mayor to go back to the hall.

Mr. Pollexfen. Did he go to the cross afterwards?—*Rippon.* Yes.

L. C. J. It was on Michaelmas-day that he was sworn; and it was by their proclamation made at the cross, that he was sworn mayor that day?—*Rippon.* Yes, my lord.

L. C. J. And was it the day after that they proclaimed Greaves to be mayor?

Rippon. Yes, my lord; it is true, to the terror of us all; I will assure you it was a wonder there was no more mischief done.

Mr. Pollexfen. These gentlemen were not in town that day.

L. C. J. Take you your liberty to make your defence afterwards; but you must distinguish, there are two days, and some people were one day, and some the other; some people were at the time of the election, that were not at the market-place; and some were at the market-place, that were not at the election.

Just. Holloway. That day Greaves was thus chosen mayor in that tumultuous manner, did any of these persons take upon them to swear Greaves, when they had thus chosen him?

Rippon. We went out into the hall, and in that time they did swear him.

Recorder. Was Mr. Greaves sworn that day by the pretended election, Malin?

Malin. Yes, by the coroner.

L. C. J. But I perceive by their old charter there was no mayor to be sworn, but by the old mayor that went out.

Mr. Stanhope. Did not the coroner use to swear the mayor by the old charter?

Rippon. Yes, but in the presence of the new mayor; he was by always.

L. C. J. What do you mean by swearing of him by the coroner? Hark you, upon your oath, was there ever any mayor of Nottingham, in your time, sworn but in the presence of the old mayor?—*Rippon.* No, never, my lord.

L. C. J. Do you call that swearing, because he reads the oath to him?

Mr. Holt. The coroner has authority so to do, as we shall shew you by-and-by.

Mr. Powis. Then swear Reynolds. [Which was done.]

Reynolds. I brought down the charter, my lord.

Recorder. I would ask Rippon a question before he goes out: Let us know of you when the old mayor was sworn by virtue of the new charter?

Rippon. I cannot tell that; the new mayor was sworn by the new charter, at the old mayor's house.

Recorder. The other two witnesses did swear, that the old mayor was sworn in the hall; but he says he was by, when the new mayor was sworn in the old mayor's house.

L. C. J. It is understood upon the receipt of the charter, Wild, who was the present mayor, was sworn in the hall; but afterwards, by reason of the hurly-burly, and noise, they went away, and chose the new mayor at Wild's house; that is the fact that is sworn.

Recorder. It is right, my lord.

Powis. Pray, Reynolds, will you tell my lord the whole story; for you it seems brought the charter down.

Reynolds. My lord, I brought the charter from London; and when I brought the charter, I was sent by Mr. Mayor, to acquaint Mr. Edge, that the charter was come, and the mayor desired him to come and hear it read; Mr. Edge asked if the mayor would not come to church; I told him he was at the town-hall. When we came to the council-house, proceeding to have the charter read, and all those things, Mr. Sacheverell, and a great many others, came to the council-house; and there the mayor offered to Mr. Bigland the new charter, that if he would, he might read it. Mr. Sacheverell, after some little discourse, told him that was not their business, they were come to elect a mayor by the old charter: Says Mr. Mayor, I do not know any authority

you have to elect a mayor. Says he to me, make your proclamation for all those to depart that have no business; which accordingly I did; and then came along, and caught up the mace; and Mr. Alderman Rippon, and Mr. Mayor, came into the common-hall; and there told the burgessees that were met, that the king had granted them a new charter, and there was none of their privileges diminished; and if they would, they should have it read in English or in Latin. Then they went to swear Mr. Alderman Wild, according to the new grant. Presently Mr. Hutchinson and Mr. Gregory came in, and told him they had elected Mr. Greaves mayor, and if he would, he might come and hear him sworn: he said, he knew no authority they had for it, and denied any such election. Then there were such shouts, as soon as ever the mayor had given him that answer, No new Charter! No new Charter! A Greaves mayor! A Greaves mayor! that though silence was proclaimed divers times, yet there was no hearing him speak: whereupon he adjourned the court, and we went to the mayor's house, and there they chose the new mayor, Mr. Toplady, and he was sworn; and then we came to the cross, where they used to proclaim the new mayor, and then came down Mr. Sherwin and Green, with a great many others, shouting, No New Charter! No new Charter! A Greaves mayor! A Greaves mayor! The next Saturday following, a great many of them went to proclaim him at the cross again, among the rest Mr. Pierpont.

Recorder. Was Gregory there, too?

Reynolds. Yes, I think so.

Mr. Jones. Did you make proclamation at the common-hall, for all to depart that had no business?

Reynolds. At the council-house I did, before we came to the common-hall.

Mr. Jones. Do you remember who was there?

Reynolds. Mr. Sacheverell and Gregory, and others.

Mr. Jones. Did they continue there?

Reynolds. Yes.

Mr. Pollexfen. Did Mr. Sacheverell make any noise there?

Reynolds. There was a great noise in the hall.

Mr. S. Ward. Did you hear any thing concerning the stopping of the books?

Reynolds. I heard Mr. Sacheverell cry out, Stay the books! Stay the books!

Mr. Fuller. What books did he mean?

Reynolds. They were some of the books that belonged to the town.

Mr. Stanhope. Were they the poll-books?

L. C. J. What do you mean by poll-books? There was no need of a poll that I can hear of.

Mr. Powis. What do you know about their coming to demand the mace?

Reynolds. Yes, there was Mr. Gregory, and Mr. Hutchinson came to the mayor's to demand the mace, and he asked them who sent them; they said, Mr. Greaves, the mayor that was chosen, had sent them,

Mr. Holt. You speak of a proclamation, where was it?

Reynolds. Yes, I did make proclamation in the council-house, to bid all depart that had no business.

Just. Withens. How came you to make that proclamation?

Reynolds. The mayor bid me, and I did it.

Mr. Holt. Was the mayor sworn then?

Reynolds. It was before any thing was done.

Mr. Holt. Was it before he was sworn upon the new charter, upon your oath?

Reynolds. It was in the council-house.

Recorder. It was when you were crying up your Greaves mayor.

Mr. Powis. Afterwards, did you observe they headed the rabble at any time afterwards?

Recorder. Swear alderman Parker. [Which was done.]

Mr. Jones. Are you sworn, Sir?

Parker. Yes.

Mr. Jones. Why, then, will you please to give my lord and jury an account of what you know of this matter?

Parker. At Michaelmas-day was twelvemonth, I came to Mr. Gervas Wild's house, who was then mayor. It was about 11 o'clock that I was there. There were a great many met that used to meet that day, in order to the choosing of a new mayor, and there were a great many others that the mayor did not know of their coming there; for he gave no order, he said, for several of them that came, to appear there. They did importune him very much to be gone, in order to the election of a mayor. Said I to the mayor, we do expect a charter, and if we should go on to the choosing of a mayor, we should be all in confusion. So after a while, the dissenting party withdrew out of the house. Some gentlemen, it seems, met with them, and went forward towards St. Mary's church. Immediately after came the charter down by him that was last sworn. We were sent up to the church to desire alderman Edge, that was the town-clerk, to come and read the charter, and to let us know how we were to proceed in relation to the work of the day. He said, he would not come. Afterwards we went to the town-hall, into the council-chamber; and after some little time, says Mr. Mayor to me, brother Parker, I would desire you and Mr. Rippon, and Mr. Sheriff Malin, to go up to the church, and desire and command my brother Edge to come down, and assist us in this business; so we did go up and spake to my brother Edge; said I, Mr. Mayor desires you to come down, the charter is come, and he would have you come and read it; and said I, if Mr. Serjeant Bigland, and Mr. Alderman Greaves will come down, they may be satisfied there is a charter, and we cannot act otherwise than by that charter. Alderman Edge said, He knew there was an old charter, and what he was by that charter; he did not know of any new one, and would act by the old charter, and not by the new one. When we came down to Mr. Mayor, said I, my bro-

ther Edge will not come down among you; here is a special commission in the charter directed to four of us, or any two of them, to swear you mayor; we must do that the first thing we do, and go forward in that; for we can do nothing till you are sworn mayor. By and by comes down a great many persons, Mr. William Greaves, my brother Edge, Mr. Sacheverell: if you please, I will look in my paper, and read their names, that I may be more certain.

L. C. J. Ay, look upon your paper, to refresh your memory.

Parker. There was Sacheverell, Gregory, Hutchinson, the two Greaves's, Samuel Richards, Robert Green, Salmon, Arthur Riccards, John Sherwin, Ralph Bennet, and Wilson, the rector of St. Peters—

Recorder. Was he there?

Parker. Yes; Samuel Smith, Rd. Smith, Trigg, Hoe, Barker, Charnell?

L. C. J. Was Barker there?

Parker. Yes, I have his name down in this note.

L. C. J. Well, go on.

Parker. First they forced into the council-house, and forced us out: so I told Mr. Sacheverell, said I, you have nothing to do here.

Recorder. What said he?

Parker. Said he, I have to do here, I am concerned if I am a burghess. Said I, no burghess acts here but a gown-man; for it is only the mayor, aldermen, and clothing that are concerned in the election, and we never have any gentlemen among us.

Mr. Powis. Did they behave themselves so, as that you were afraid of mischief?

Parker. Said I to some of our friends, gentlemen, take the mayor's mace into your hands, for they were for seizing the great mace that belongs to the mayor. And, said I, take care of the books. Said Mr. Sacheverell, Stop the books. There was coroner Woolhouse taking them in his hands. Said I, take notice who dares take the books; and said I to Mr. Sacheverell, you have nothing to do with the books, the books belong to us. Says he, take notice, I will—in a menacing way, and then held his tongue. Said I, I am sorry to see things here this day: I have been a member of the corporation, and been present at these elections for 18 years, and I never see such a thing as this; and said I, I profess I could almost cry to see these dissensions made among us. Said I, I must go, being one of those that was in commission to swear the mayor, my brother Hall is not here, and my brother Edge is with them; if they keep me here, the mayor cannot be sworn; so I pulled off my gown, and at last when they see I was resolved to go, with shoving and crouding I got through. But when the mayor was sworn, said I, you must now act as mayor, and give order for the people to depart: so he did. Says he, will you stay: No, said I, I dare stay no longer; the rabble are buoyed up to that height, that I am afraid we shall be knocked on the head.

So I went to my brother Hall's, and I said to his wife, sister, either give me a glass of wine or sack, for I am even spent.

L. C. J. That was to recover his heart again that was sinking; for an alderman's heart generally sinks in such a fright.

Parker. We did proceed on then, and I went back again: Said I, if they must be knocked on the head, I will go and be knocked on the head with them.

L. C. J. Ay, his courage came to him again, when he had a glass of wine.

Parker. I met them half way: Said I to the mayor, let us go to your house now, and let us proceed on to choose a mayor, and swear him, and all other officers. But, said I, we have nobody to assist us, we must do as well as we can. And we went thither, and proceeded to choose a new mayor, and then new sheriffs, and coroner, and chamberlain, and we gave them their oaths. And after all this, we went, according to the ancient custom, to the week day-cross, and there we gave orders for proclamation to be made, to give notice to the corporation who was then mayor, who were then aldermen, who were then sheriffs, who were then coroners, and who was then chamberlain for the year ensuing. Whilst this was doing, Mr. Sherwin, Mr. Green, and a great many of them came down hollowing and shouting, No new Charter! No new Charter! they cared not for the new charter, it was not worth a groat.

L. C. J. Who said that?

Parker. Sherwin, a man of a good estate. They were going fast away: No, said I, pray go on the old rate, we are in a good cause, and we do not fear them a pin; if they do lay on, it will be to their cost.

L. C. J. Well said, thou hadst drank a good glass of sack, I perceive, for thou wert in a horrid fright before.

Parker. The next day they could command all the counsel in the town to attend them with their new mayor, Greaves. There was Ralph Edge, John Sherwin, and a great many gentlemen, with swords by their sides, walked to the market-cross, and made proclamation. And after that was done, they continued this on Sunday; for on Sunday Mr. Greaves, the mayor, came with abundance of people at his heels, not gentlemen, but gown-men, those that were of that party, and offered to come into the seat were the mayor was; and we were so fearful of disturbance, that we were forced to have a guard to preserve the mace, and to secure it from being taken away by violence; and we writ a letter to London to my brother Hall to acquaint him with it, and sent post to my lord duke of Newcastle, to let him know how it was, that we were afraid of being knocked on the head; and his grace was so kind, that he immediately came to us, and was there about four or five o'clock, and then we began to be a little in hope.

L. C. J. Then you began to be in heart again?

Recorder. How have they behaved themselves since?

Parker. They have had such cabals, and meetings, and clubs, that we have often been afraid of them.

Mr. Holt. I suppose they can drink sack as well as you.

Mr. Jennings. Pray, Sir, had the burgesses at large any thing to do with the election by the old charter?—*Parker.* No.

Mr. Powis. Mr. Alderman, you have been a long time in that town.

Parker. My grandfather was an alderman of the town.

Mr. Powis. Did you ever know in your life, that these gentlemen ever used to interpose themselves, or concern themselves in the election?

Parker. No; we always went into the council-house, and were called one by one, and the gentlemen never came in among us, but only one gentleman that my brother Edge brought in out of curiosity, to shew him the formality; but never any burgess came, but those that were of the council, or clothing, as we call them. I never saw it otherwise, and I have known a great many.

Mr. Jennings. Did not Mr. Sacheverell, nor none of the out-burgesses, use to come in?

Parker. No, I told them, says I, this charter cuts you off, you have nothing to do.

Mr. Jennings. Did Mr. Hutchinson and Mr. Gregory use to come?

Parker. No, they were no burgesses. But now you talk of that if you please, I would speak to that: Mr. Hutchinson, Mr. Gregory, Arthur Riccards and Samuel Richards, came up to my brother Wild's, the old mayor, and demanded our mace. Said I, what have you to do with the mace? They said, Mr. Greaves the mayor hath sent for it. Said I, if the mayor took a little spirit upon him, he would do well to secure you, to ask such a thing, for this requires the good behaviour; said I, and if I was mayor, I would secure them, and let them take their advantage against me; I would try it with these gentlemen.

Mr. Lovell. You speak of something that was done at the cross the next day after the election; was Mr. Sacheverell there?

Parker. I believe he was.

Mr. Lovell. Did you see him?

Parker. I was in my chamber, but I cannot say positively he was there.

Mr. Lovell. What, at the cross?

Parker. There were all those that I named there: and I tell you, Sir, the riot continued there on Sunday; for all that bore office on their side, came and attended Mr. Greaves to church, and Mr. Greaves clapped his hand on the mayor's seat: Said I, Mr. Mayor, keep your seat, and do not stir out; and he did not.

Mr. Blencow. Pray, tell which of the defendants were at the cross on Saturday, or at church on Sunday.

Parker. There was Mr. Gregory and esquire Tym, his brother, and William Greaves, and

John Greaves, and Samuel Richards, and Arthur Riccards, and the Smiths and Sherwin.

Lovell. Were all these at church?

Parker. Yes.

Recorder. Did they use to come to church before?

Parker. Sir, it is a custom to wait upon the mayor the next Sunday, and they waited upon him in their formality.

Mr. Holt. Did not you give your vote for electing a mayor according to the old charter, upon your oath?

Parker. I will tell you what I did; when they called to the election, and to the poll, and asked who I was for, I told them that there was no man capable of being voted for, unless it were Ralph Edge.

Mr. Holt. But did you give a vote for such an election, or no?

Parker. I tell you, I said there was no man capable of a vote but him, and I could give my vote for none but Ralph Edge: and said I, if you will have it, I will give my vote for Ralph Edge.

Mr. Lovell. Was there an election for Mr. Greaves, and poll taken, pray?

Parker. I cannot tell that, but I was by almost to the latter end; for I could not get out, the croud was too great, till I had pulled off my gown and crowded out.

Mr. Lovell. Who took the poll?

Parker. Mr. Alderman Edge.

Mr. Lovell. Was Mr. Turpin in the council-chamber at that time, or not?

Parker. Yes, he was.

Lovell. Are you sure of that?

Parker. Yes, indeed am I.

Lovell. Was Barker there?

Parker. Yes, he was in the hall; it is all under one roof.

Recorder. The books that you speak of, that Mr. Sacheverell would have secured, what books were they?

Parker. My brother Edge can give a better account of that than I; for he kept them.

Recorder. You can tell what they were?

Parker. They were books that belonged to the mayor.

Mr. Stanhope. Mr. Parker, you say Mr. Wilson was there?

Parker. He was in the hall.

Mr. Stanhope. You know it?—*Parker.* Yes.

Mr. Stanhope. Are you sure of it?

Parker. Yes, you know it, Mr. Stanhope.

Mr. Stanhope. I was not there, sir, how should I know it? Pray, how did Mr. Wilson behave himself.

Parker. He was among all the rabble when they were shouting, and crying out, No new Charter, No new Charter; he was an abettor among them, so I give it you sworn.

Recorder. He exhorted them to it, I will warrant you.

Parker. Yes, and has encouraged it in his pulpit since.

Mr. S. Ward. Did you hear any thing of a standing-club to carry on this opposition?

Parker. I hear there is a public purse among them, and they have gathered several sums of money for this business.

Mr. S. Ward. Does any of the defendants spend money at alehouses that you know of, to keep up the spirit of the rabble?

Parker. I have heard so.

L. C. J. That is nothing to the business: what do you talk to us of any such thing?

Mr. Powis. Swear *Somner*. [Which was done.] Were you sent by the sheriff to demand the mace? and pray what happened?

Somner. Sir, at that time I was the sheriff's serjeant, and am still, at Nottingham, and so there was a great clutter, the one side going out, and the other calling To election, and Stop the books; and my master the sheriff coming out, I got in as fast as I could, and got hold of the mace that was upon the council-table. *Mr. Ralph Bennet*, *Mr. Salmon*, and *Mr. Arthur Riccards* took it from me again, and told me I had nothing to do with it. So I went and told my master *Malin*, and he went and demanded it; but they bid him get him gone about his business. But before I went from the mayor's house, the mayor called me in, and said, *Robin*, do not give any occasion of offence to man, woman or child, to-day.

Recorder. The jury desire to know who it was took the mace from you?

Somner. They did take it from me.

Recorder. Who did?

Somner. *Mr. Ralph Bennet*, *Mr. Salmon*, and *Mr. Arthur Riccards*, them three laid hold on me, and told me I had nothing to do with it.

Mr. Jennings. Did they force it from you?

Somner. Yes.

Mr. Jennings. And they did refuse the mace to *Mr. Malin* afterwards?

Somner. Yes, they did.

Mr. Stanhope. Where was the mace?

Somner. It lay upon the table.

Mr. Stanhope. I thought you said they took it from you?

Somner. Yes, after I had laid hold of it, and taken it off the table.

Mr. Powis. Were you sent for it by the sheriff?

Somner. I was serjeant to the sheriff, and it belonged to me to carry the mace.

L. C. J. Well, go on.

Somner. When the mayor came into the hall, and desired to have the new charter read, and heard in peace, comes in *Mr. George Gregory* and *Mr. Hutchinson*, and after they came in, they fell a shouting.

Recorder. What did they say?

Somner. They told the mayor they had chosen *Mr. Greaves* mayor, and if he would come and hear him sworn, he might. He made them some answer, but I did not hear what he said, the noise was so great. There was one that stood by me, one *Martin Chambers*, whom I spake to, and said, Prithes be quiet, or hold thy tongue, do not make such a noise; and with that he up with his hand, and hit me a full swop over the face.

L. C. J. Who was that?

Somner. One *Martin Chambers*; and that man they have brought up to be a witness for them.

Mr. Powis. Swear *Wortley*. [Which was done.]

Recorder. Pray will you give an account whether you saw *Wilson* there, and in what place, and what he did?

Wortley. Yes, I saw him in the council-house, my lord.

Recorder. In the council-house? or in the hall do you mean?—*Wortley.* In the hall.

Recorder. What did you see him do there?

Wortley. Nothing.

Recorder. Was he in the crowd?

Wortley. Yes.

Mr. Powis. Did you see the mace taken away?—*Wortley.* No.

Mr. Powis. What did you see any of them do? Or what did you hear any of them say?

Wortley. *Mr. Sacheverell* bid them stop the books.

Mr. North. My lord, I hope we have sufficiently proved our issue.

L. C. J. Did they make any noise, or hubbub, or outcries in the hall?—*Wortley.* Yes.

L. C. J. Did they make any noise in the council-house?

Wortley. I heard him bid them stay the books, that is all.

L. C. J. How many might there be of them, good Sir?

Wortley. There might be a hundred.

L. C. J. Were there two hundred?

Wortley. I cannot tell how many there might be.

Mr. Holt. Pray, *Mr. Wortley*, before you go, did you give no vote for the election of a mayor upon the old charter?

Wortley. No, Sir.

Mr. Pollexfen. Did not you give a vote at that time in the council-chamber?

Wortley. Yes, there was a vote, but I gave it for *Mr. Toplady*.

Mr. Jennings. Pray swear *Mr. Rd. Wright*. [Which was done.]

Recorder. Pray will you give an account what you know of this business?

Wright. As far as I can give an account, it was thus: I saw when the new charter came, and was carried to *Mr. Mayor's* house, and it was given to the mayor, and it was met before that by the company that was going to church, and they were acquainted there was a new charter, and desired to return back again; but they would not, but went to church. Then they were sent to by *Christopher Reynolds*, and one *Mr. —*, and desired to come and hear it read, but they would not.

Recorder. What did you do in the council-chamber?

Wright. I was not there, but in the hall?

Recorder. What did they do in the hall?

Wright. I will tell you what they did; They had the charter before them, and it was going to be read, and the burgesses were all

very quiet, till such time as Mr. Hutchinson and Mr. Gregory came to acquaint the mayor that they had chosen a mayor, and desired him to come and hear him sworn. To which Mr. Mayor answered, he could not, neither did he know by what authority they did it. After this there was a great tumult there, and some cried out, A Greaves, A Greaves; and others, No new Charter, No new Charter. Several times they were begged and persuaded to be silent and quiet, but they would not, but continued in a tumultuous manner for a long time. After this, I was at Mr. Mayor's when Mr. Hutchinson and Mr. Gregory, Mr. Arthur Riccards and Mr. Richards came to demand the mace, whereupon Mr. Mayor told them he would not deliver it but to the same authority by which he had it, otherwise he would not deliver it. There was in this company Mr. Ralph Bennet, Mr. John Sherwin, Mr. Samuel Smith, Mr. Thomas Trigg, and John Hoe; these I took particular notice of. Afterwards, when they came to proclaim the mayor at the cross, there came down this Hoe, and Sherwin, and several others, in a great body, that they could not proclaim the mayor thoroughly as they should.

L. C. J. Pray what number were they when they came into the council-chamber?

Wright. There might be fifty of them I believe.

Recorder. Who was the chief man among them?—*Wright.* Mr. Sacheverell.

L. C. J. When they were in the hall, how many were they?

Wright. When they were in the hall, I believe they were two hundred.

Mr. North. My lord, we rest it here; We think we have given a satisfactory proof as to all the defendants named in the information.

Mr. Pollexfen. May it please your lordship, and you gentlemen of the jury, I am of counsel in this case for the defendants; and, my lord, notwithstanding any thing that has been proved, we hope we shall make it plainly to appear, that we have done nothing but what became loyal good subjects and honest men, and that we were far from stirring or inciting any tumult and disorder in this town, or any thing that may be called a riot. And, my lord, I must beg leave a little to open their information, that we may come to the question upon which this matter does stand. My lord, they have in their information charged a tumultuous assembly upon the defendants to disturb the election of the mayor upon the new charter, and that this did continue by the space of seven hours upon that same day, and there is nothing more spoken of any other day; and so all that they talk of which happened the next day, is a matter wholly out of the information. My lord, there is another matter, another passage, in this information, about the taking away the mace from Malin, who was then sheriff. Now, my lord, our case as to that will stand thus: Malin was sheriff by the old charter, and not by the new; and then if Malin were sheriff by the old charter, then by the surren-

der he was out of office, and was not sheriff, and so the information fails: For I suppose they themselves would not have both charters to be in force at one time; and if they would have this to be after the new charter was granted, then was not Malin sheriff by the new charter. So that then all the fact that is laid concerning the taking away the mace from Malin that was then sheriff, is quite mistaken, for Malin was not sheriff then, if so be the old charter was not then in force, for he was not in the new charter, or any way elected or sworn sheriff: So that therein also, my lord, we think it impossible for them to maintain that part of their information. My lord, the next matter stands upon the assembling and acting of those persons that did assemble and act under the old charter; and therein, my lord, it will fall out thus: By the old charter the mayor is to be elected, and take his place on Michaelmas-day, upon which this fact is alledged to be. Greaves was elected before this time, upon the 14th of August according to the usage of the old charter. Then, my lord, according to the constitution of that old charter, a copy whereof we have here to produce, if the last mayor be not present, the coroner has power to swear the new one; and that will shew that this is the right day, and all things were done by the old corporation, as is usual and accustomed in all respects. There is one thing they say some of these persons are not of the corporation by the old charter, and others had no voice in the election; my lord, for that, supposing they had not a voice in the election, yet to be there was no crime; for if a man be a burgess of a town, and be present at the election of officers for the town, and does either advise or assist in the election (and he is not altogether unconcerned in it neither), this of itself will make no crime. Why then the day that was Michaelmas-day, that was according to the usage; and the place and proceedings were all according to the custom that they always used upon the old charter. For first, they go to the old mayor, from thence to church, from thence to the council chamber, where they used to establish the mayor that was before chosen; thither they went, there they did elect this Greaves to be mayor, and when they had elected him to be mayor, he did send, according as is proved by their witnesses, to the old mayor, who was then in the hall, to come and be present at the swearing of the new mayor; so that still all was done as is usual according to the old charter; and if that charter be in force, all is legal, and the answer that the old mayor does give, is also proved, my lord, for the defendants, all, besides four, were not in the hall, but only in the council-chamber, for any thing that appears by the evidence; but if the evidence be otherwise, we have witnesses to prove it. When we were in the council-chamber, and the mayor come and brought the charter, we were far from opposing, but did desire the new charter might be read, the mayor refused the reading of it, but took it away with him, and went

into the Hall: upon which they proceeded upon their old charter. My lord, the controversy concerning which is the right and which is the wrong, that is now depending; but this must be the consequence in this cause; if the old charter, were then in force, then to act according to the old charter to make an election, to swear their mayor, to go and demand the old mayor to swear him, and to demand the mace must be regular, if so be that be true, that the old charter was still in force. To go afterwards to the cross the other day to proclaim him, was also lawful, if that be so. And if there were nothing but what is usual in matters of this nature, and according to custom, then there is no offence, no violence nor force, nor any thing offered by any of these defendants: and that which they speak of the crying, A Greaves mayor, a Greaves mayor, is but a sort of an applause which in elections is very usual; why then if there are but orderly proceedings, such as are usual in things of this nature, I hope it will not be construed to be any riot or breach of the peace, or offence in us. My lord, the questions that will arise upon this information, are those that I have mentioned; for if so be this mace was not Malin's mace, then they having laid it in the information that we did take away from Malin, then sheriff, a mace that belonged to him as the ensign of his office, if he were not then sheriff, they are quite out in their information. That he could not be sheriff by the old charter, that will be pretty plain; for the old charter they say was surrendered. That he could not be sheriff by the new, is as plain, for he was not named sheriff in it. But if he were sheriff by the new charter, yet at this time he had not the authority of sheriff, for he had not taken upon him the office by the new charter, nor was not sworn. And there is an express clause in it, that neither the sheriff, nor any other officer, shall take upon him their office, till they have taken their oaths. Now all that was done in the council-chamber, of which this about the mace is part, was before these men had taken their oaths, and the oath was taken in the hall by the mayor, and where the rest took them, *non constat*: But they were not to act till then, nor could act by their new charter, and so their information falls short as to whatsoever was done in the council-chamber, and we proceeded right upon the old charter. For it is expressly said in the information, that the assembly was duly summoned by Gervas Wild, then mayor of the town, for the electing and swearing a mayor of that town, for the executing the office of mayor of the town, for the year ensuing, according to the effect and tenor of certain letters patents, on that behalf granted, by our sovereign lord the king that now is. Then, if so be whatever was done, was before he was sworn as mayor, then it could not be an assembly duly summoned by him, he having till then no authority to summon it: nor could what the defendants did, be in hindrance or disturbance of him in the

exercising of his office; and so their information is quite varying from the fact. Then there is this further besides, my lord, the assembling and meeting, and going on according to the old charter, was on the 29th of September, the new charter bears date the 28th of September, and comes down as you see the next day, which was Michaelmas day, at eleven o'clock. And we have it in proof, that the surrender of the old charter, which they pretend, was not enrolled till the 7th of October after; and under favour, my lord, the old charter could not be determined, till the surrender was enrolled, which was not till the 7th day of October; and till that time the old charter continuing in force, it was fit for them to act under it, as it did so continue; and if they had omitted their election on that day, they had been faulty, in not proceeding according to the old charter. My lord, we will call our evidence, and make out our fact.

L. C. J. But, Mr. Pollexfen, as to that you talk of about Malin; Was he sheriff or was he not sheriff?

Mr. Pollexfen. He was not sheriff according to this information.

L. C. J. But was he sheriff or not sheriff?

Mr. Thompson. Not sheriff by the new charter, say we.

L. C. J. But I pray answer me, Was he sheriff, or not sheriff?

Mr. Pollexfen. I believe he was sheriff by the old charter.

L. C. J. What had you then to do with the mace?

Mr. Pollexfen. Yet say we, you are mistaken in your information; for if so be you lay it be an offence, the taking away the mace from Malin that was sheriff by such a charter, and he is not so, then the information is mistaken.

L. C. J. There is no such thing as his being sheriff by such a charter.

Mr. Lovell. My lord, we do come here to justify

L. C. J. Ay, but let him come here first, and answer the objection.

Mr. Pollexfen. My lord, it is expressly said in the beginning of the information, that Wild was mayor, and that he had summoned an assembly to choose a mayor, according to the charter granted by this king; that the defendants did disturb that meeting, and that election; and that they did take away the mace, being the ensign of office, to the said sheriffs of the county aforesaid belonging, from one John Malin, being then one of the sheriffs of the county of the town of Nottingham.

L. C. J. All that is true.

Mr. Pollexfen. Then they must make it to be by one or the other charter. We say he was not by the new; they deny the old to be in being, and speak only of the new.

L. C. J. Ay, but I would fain know of you whether he was sheriff or not sheriff.

Mr. Pollexfen. I think they that will charge us with an offence, ought to make out that charge.

L. C. J. They say he is sheriff, and you say he is sheriff yourselves.

Mr. Pollexfen. That cannot consist with this particular question, as I conceive.

L. C. J. Why now then let us come yet a little further; it is said, that such a one being mayor, and so he was, take it which way you will; for if the new charter have no effect till the surrender of the old be enrolled, then Wild was mayor by the old charter; and if he was mayor, it was enough: and then he was met to choose a new mayor by virtue of the second charter; it is true it is so said, though perhaps according to strictness, it could not take effect till the enrollment of the surrender; yet what is that to this offence? I would fain know of you, is it not true in fact, that he was then mayor, and met in an assembly for the election of a new mayor?

Mr. Pollexfen. It is true; but that we conceive will not support this information.

L. C. J. Then I desire to know, how comes Mr. Sacheverell, and these sort of people to meddle in it?

Mr. Pollexfen. If it be insisted upon that he was mayor by the old charter, then we hope we have done nothing but what by the old charter we may justify.

L. C. J. What had Mr. Sacheverell, Mr. Hutchinson, and my parson Wilson to do there?

Mr. Pollexfen. By the old charter Mr. Sacheverell was a Burgess.

L. C. J. If he were, was he capable of electing?

Mr. Pollexfen. He might be present at an election, and was concerned as a Burgess.

L. C. J. But could he meddle with the election?

Mr. Pollexfen. Then, good my lord, what have we done—

L. C. J. Wonderfully done! these things you can never answer: in London, for the purpose, it was not an offence for any freeman to be present at the election of the mayor; but if a parcel of freemen come that are not liverymen, and run themselves into the business to give voices, and give direction about that they have nothing to do with, and cry out, pray stop the books, and pray, good Sir, deliver the Mace; then they had concerned themselves and meddled with an authority to which they had no pretence, which is an offence; and if men will busy themselves in that which does not concern them, they must suffer for it. Mr. Sacheverell, and the rest, were as capable of giving them advice about an election, seven years before as now; what reason had they now to come and make this hubbub? But some men will shew themselves such wonderful advisers before their advice is asked or needed.

Mr. Lovell. Will your lordship please to spare me one word—

Mr. Pollexfen. Prithce give me leave: my lord, when you see how the fact does appear upon the evidence, I suppose we shall not be thought guilty of any disorder.

L. C. J. It doth appear very plain, man, it has been very fully sworn; it has indeed.

Mr. Pollexfen. We hope to satisfy you otherwise by our evidence, as to the fact.

Mr. Lovell. Your lordship is pleased to object that upon us, which doth lie upon us, and requires an answer—

L. C. J. It does indeed.

Mr. Lovell. As to Malin's being sheriff. But my lord, I conceive he was not sheriff; for if the old charter was in force, then he was not sheriff: for there was a new sheriff chosen and sworn, before the mace was required of him: if the new charter were in force then he was not sheriff; for he was not named sheriff in it.

L. C. J. Who chose the new sheriff?

Mr. Lovell. He was not chosen by any body, he was named in the charter.

L. C. J. Malin was sheriff before that time, and was indeed sheriff till a new one was chosen in his place; and therefore the detaining the Mace was unlawful, that is our opinion; and if your opinion be otherwise, it is as idle as the opinion of the new charter.

Mr. Holt. Will your lordship please to spare me a word for the defendants? My lord, the information doth consist of two matters; the first is, the disturbing the election that was appointed by the mayor, by virtue of the new charter; the next is, the taking away the mace, being the ensign of office of Malin the sheriff. Now, with submission, my lord, I think they have failed in the first part of the information; for they have laid it special, that Wild being mayor, he had at that time, when these defendants did thus assemble themselves, appointed an election by virtue of the letters patents of this king; and after he had so appointed it, these defendants did assemble themselves in disturbance of that election, and after proclamation made, continued their disturbance. Now if this Gervas Wild had no authority to make or appoint this election by virtue of any charter, then had he no authority to make this proclamation; and these defendants are not guilty of this information, supposing what they did was not justifiable in the main, yet as here laid, they are not guilty; for it is not, nor can be to the disturbance of the election, or contempt of his authority.

L. C. J. Come, that has been said, and answered over and over again. Call your witnesses.

Mr. Holt. As to this business of Malin, and the mace, we did say it did not belong to him; and it is an usurpation upon the king, without authority by any charter or grant, and a novelty. No man can have any ensign of authority, but by grant from the king.

L. C. J. What is that to you? Why did you take it away? What authority had you for that?

Mr. Holt. This is laid to be an affront to the king's authority, and it was not, for the very mace was an usurpation.

L. C. J. He was in possession of it, and that

is the same thing as to you, whether it be of right or not? You never pretended to keep it for the king.

Mr. Holt. If so be they among themselves—

L. C. J. Pray go on to your witnesses, and do not spend our time in such trivial stuff; for this is all stuff, mere stuff.

Mr. Holt. My lord, we would make out our defence—

L. C. J. Do so if you can, call your witnesses; we must not give liberty to every one of the counsel to make speeches of the same thing, over and over again, and all to no purpose.

Mr. Holt. This mace did not belong to Malin.

L. C. J. How do you know that? Can you tell whether the king had not given them such power?

Mr. Holt. It was never given by the king.

L. C. J. Does the king question them for it?

Mr. Holt. We will prove it an usurpation, and can shew the time when it was first usurped.

L. C. J. This way of behaviour by riots, looks more like the times of usurpation, when rabbles meet to meddle with government.

Mr. —. My lord, I desire to offer only one word that has not been yet said.

L. C. J. No, I will hear no more speeches; call your witnesses, if you have any: sure you take yourselves to be in your common-halls, and council-houses, making speeches.

Mr. Holt. Call Edward Higley and sir Thomas Parkyns.

Mr. Pollexfen. May we read the old charter, my lord?

L. C. J. Ay, read what you will, and offer what you will in evidence for yourselves; but let us not have such doctrines preached among us, as settling governments, and trying rights, by club-law.

Mr. Pollexfen. God forbid, my lord, I am sure nobody here desires any such thing.

Mr. Holt. Swear Edward Higley. [Which was done.]

L. C. J. Well, what do you ask this man?

Mr. Holt. [Shewing him a paper-book.] Is that a true copy of the old charter?

Higley. Yes, it is.

Mr. Pollexfen. We desire it may be read.

L. C. J. What would you read it for?

Mr. Pollexfen. By that it will appear the election was regular, according to the old charter, which we say is still in force, and so we in no fault.

L. C. J. Shall we enter into a question of that nature here, which is in force? No, we will not. Why did you commit this riot? Answer that.

Mr. Pollexfen. By the old charter, my lord, the mayor and burgesses are to elect.

L. C. J. Ay, Mr. Pollexfen, and you know the old charter of London, was to the mayor, commonalty, and citizens of London, to choose a mayor; and we know that the mayor, com-

monalty, and citizens of London, have not chosen a mayor this many hundred of years. We know very well, that that election is made by livery-men: now you come and say, pray let us see how it is by the charter; why as well may not all the citizens of London claim to be at the election of the lord mayor? If you can shew me that heretofore, before this time, that there were other persons that used to be present at elections, you say somewhat: but if you have only an ancient right to be present, and they have ravished this right from you, you had done exceeding well to have asserted your right in a legal course. But do you think you are to regain your right by club-law, and throwing up your hats, and noise and riots, and opposing the king's authority?

Mr. Pollexfen. My lord, we were never for opposing the king's authority; we never were against the king?

Just. Withins. Who was that against, I pray, when you said, No new charter, No new charter? Was not that against the king?

Mr. Lovell. That was none of us who cried out so.

L. C. J. Who knows in a croud what person in particular makes a noise, or does not? You were where you should not have been.

Mr. Pollexfen. My lord, we pray the charter made to this town, in the reign of Henry 6, which provides, that the mayor shall be chosen by the burgesses, and sworn by the preceding mayor; but if he was not present, he should be sworn by the coroner. Your lordship objects the case of the livery-men by the city of London; that is by virtue of a particular by-law: but in our case, the old charter having prescribed this method, you will not take it out of that method, without their producing some by-law for it.

L. C. J. Yes, yes, we shall go according to the constant usage within memory, because we will not, upon this information, try the right one way or other. Shew us by the usage that there was a pretence for such persons as Mr. Sacheverell, and the others here, to be present at the elections.

Just. Withins. In this case it shall be presumed there was a by-law.

Mr. Pollexfen. I hope you will presume nothing to make us guilty of a crime; they ought to shew the by-law if they have any.

L. C. J. I think we need not trouble ourselves about that, what by-laws have been made; but we find these persons in possession of this usage, and so they have been for these 18 years past.

Mr. Pollexfen. My lord, that will not make them a title.

L. C. J. We will not allow the right to be tried upon this information.

Just. Withins. Mr. Pollexfen, what do you speak of swearing by the coroner? That could not be in this case, for the old mayor was there.

Mr. Pollexfen. Not at the swearing of Greaves.

Mr. Farewell. My lord, I would only observe one thing; the crime charged upon us, is for not departing after the proclamation made; now I do not observe that they prove that Mr. Sacheverell was ever there after the proclamation.

L. C. J. I thought indeed you were very full, you were so eager to speak; but your observation is very much in the wrong, for the proof is positive that Mr. Sacheverell and the rest of the company staid after; but because you shall observe it better, call Reynolds again; you were so full, you could not let it alone till you were tapt. Reynolds, upon your oath, did you make proclamation that all persons that were not summoned, or were unconcerned in the election, should depart?

Reynolds. Yes, my lord, I did.

L. C. J. Did Mr. Sacheverell, and the rest, stay there afterwards?—*Reynolds.* Yes.

Mr. Stanhope. My lord; the mayor I think swears he did not summons any one: the information is laid, that there was an assembly duly summoned and called before him.

L. C. J. He told you he sent to Alderman Parker, and Edge, and two or three more, to come away and hear the charter read; and he spoke to serjeant Bigland, and he was huffish, and did not reckon himself concerned in the new charter: for it seems he was not continued in his place of recorder by it. He tells you that the charter was read to them, and with much ado, he that read it, did go through with it: but he was mightily interrupted by the noise that was made by the defendants and their rabble; this proved that there was an assembly summoned before him, sure.

Just. Withins. Mr. Stanhope, do not you observe too, that he sent to church to summon them to come to him, and they would not come when he sent for them?

Mr. Pollerfen. My lord, they should produce their new charter, I humbly conceive.

L. C. J. I tell you before hand, we are not trying the validity of the new charter, or the old, but whether you are guilty of a riot, or no?

Mr. Holt. My lord, if they were in possession of government by their new charter, they should shew that new charter: we shall shew you an old charter to the mayor and burgesses there.

L. C. J. Can you shew a charter that the defendants were mayor, aldermen, and burgesses?

Mr. Holt. Swear Luke Oldham. [Which was done.] Look over that book, Mr. Oldham, is that a true copy?

Oldham. This is a true copy of the charter that I examined at the Tower.

Recorder. When did you examine it?

Oldham. I cannot tell you the particular day, Sir.

Recorder. How long ago is it that you examined it?

Oldham. It is about a twelve-month ago.

Mr. Holt. Upon your oath, is it a true copy?

Oldham. Yes, I read it over three days ago. *Clerk* reads. This is dated ——— of H. 6th. *Just. Withins.* Where would you have it read?

Mr. Pollerfen. We desire he may read that part of the incorporating the town, and the power of choosing the mayor.

Clerk. Whereabouts is it, Sir?

Mr. Pollerfen. Folio 81. [Which was read.]

Mr. Holt. Call sir Thomas Parkyns. [Who appeared, and was sworn.]

L. C. J. What do you ask this gentleman?

Mr. Holt. Pray, Sir, were you by in the Council-Chamber at Nottingham on Michaelmas-Day was twelve-month?

Recorder. Pray, Sir Thomas Parkyns, let me ask you one question; have not you laid out any money in this cause?

Sir T. Parkyns. No, Sir, not that I know of.

Mr. Stanhope. Pray, Sir, were you present in the council-chamber, when Mr. Wild, the mayor, was there; and did you see Mr. Sacheverell, and Mr. Hutchinson come in?

Sir T. Parkyns. Yes, I was there.

Mr. Stanhope. Pray, how did they demean themselves there?

Sir T. Parkyns. Very civilly, for any thing I did perceive, without any disturbance to the court, or any body else.

Mr. Stanhope. Did they use any gestures, or behaviours, to occasion the mayor to go away?

Sir T. Parkyns. Not as I know of at all, Sir.

Mr. Stanhope. Pray, Sir, will you tell all your knowledge how the thing passed?

Sir T. Parkyns. I understanding there was to be an election of a mayor for the town of Nottingham, upon Michaelmas-Day, as has been accustomed time out of mind, a very long while, as I have been informed, at the church, I was there, and went to the usual place in the chancel, and there we staid some time till after prayer; and after prayer there was notice of a new charter coming, but then I believe it was not come; but, as they were called, the old charter-men, alderman Greaves, and the recorder, serjeant Bigland, and alderman Edge, and several others, forty, I believe I could name, did send to Mr. Wild, the mayor that then was, and Mr. Rippon, and others, who were then at the town-hall, and desired them to come up to the chancel, as I am informed, in order to an election of a new mayor: but they did not come, but, as I heard, they sent word back again, to desire alderman Greaves, and the rest, to come down to the Town-hall, which accordingly was done.

Mr. Pollerfen. And what happened there?

Sir T. Parkyns. I was there along with them, and went into the Town-hall and so into a room which I conceive they call the council-chamber: and there upon several discourses, there were some were for going to voting for a new mayor, and there were some that did say, they had a new charter, and they must have a mayor.

according to that new charter; whereupon they desired it might be read, but there was no answer, I think, made to that: I did see the thing they said was the new charter in a box: I think it was so, but I did not see it out.

Mr. Combs. Then it was not read while you were there?

Sir T. Parkyns. I did not hear a word of it read; but I think there was alderman Edge did say, I do not know how I am to act by the new charter, but I understand what I have to do by the old charter very well, therefore we will proceed to the election of a new mayor; and then upon that account they did go to voting, and several votes there were for several persons, as particularly for Mr. Edge himself, and some for Mr. Toplady, but the most for alderman Greaves; and when they did understand, as I conceive, that alderman Greaves had the majority of votes, then they did rise up, and went away.

Mr. Pollexfen. Who did?

Sir T. Parkyns. The mayor, Mr. Wild, and alderman Rippon.

Mr. Stanhope. Pray, Sir, did the mayor stay all the while the Poll was?

Sir T. Parkyns. He was there, I am sure while they voted; that I am certain he was; I cannot say he was there all the time.

Mr. Pollexfen. Did he oppose the election?

Sir T. Parkyns. No.

Mr. Pollexfen. Was there any proclamation made for any-body to depart?

Sir T. Parkyns. None that I heard of.

Mr. Holt. When the new charter was produced, was it desired by any-body there, that it might be read?

Sir T. Parkyns. Yes, Sir, there was some that desired it might be read.

Mr. Lovell. Why was it not read?

Sir T. Parkyns. I cannot tell that? but I did hear they should shew Mr. Edge his name in the new charter; and they did believe he was continued in his place, and I think Mr. Edge replied he had his place by the old charter during life; and by that charter he knew how to act; he could not tell what he was in the new charter?

Mr. Farewell. Pray, Sir, did any of the old charter-men oppose the reading of the new charter?

Sir T. Parkyns. No, indeed, Sir, not that I know of.

L. C. J. Pray, Sir, let me ask you a question or two, you are a burghess of this town, are you not?

Sir T. Parkyns. Yes, my lord.

L. C. J. How many years have you been a burghess?

Sir T. Parkyns. Several years.

L. C. J. Were you ever at an election before?

Sir T. Parkyns. No, but I have been at several of their meetings.

L. C. J. How came you to be there at this time?

Sir T. Parkyns. Upon no invitation by any body, but upon my own accord.

L. C. J. How came you to accord upon that time more than upon another?

Sir T. Parkyns. Truly, my lord, I cannot answer you to that.

L. C. J. No, I believe not; but let me ask you another question: who gave their votes there?

Sir T. Parkyns. Several gave their votes.

L. C. J. Did you give any vote?

Sir T. Parkyns. No, my lord, I gave no vote.

L. C. J. What did you do there?

Sir T. Parkyns. There were several other gentlemen of the country there besides me.

L. C. J. Ay, there were several there that had nothing to do there, and which should not have been there: did not you hear any proclamation made at all?

Sir T. Parkyns. No, my lord, I did not.

L. C. J. Did you hear no crying out in the council-chamber, A Greaves Mayor, A Greaves Mayor; No New Charter; No New Charter!

Sir T. Parkyns. I did not hear any outcry at all.

L. C. J. Did you hear nothing said, Pray stay the books, pray stay the books?

Sir T. Parkyns. No, my lord, I did not.

L. C. J. Pray, did you observe any thing in the world about the mace there?

Sir T. Parkyns. Yes, I did.

L. C. J. Pray let us hear that, for I see you did not hear a great deal, nor any thing indeed that other people heard; now let us know what you did see?

Sir T. Parkyns. The old mayor went away with two of the maces, I think, and one was left behind; and presently after comes back Mr. Malin, and demanded the other mace.

L. C. J. Of whom?

Sir T. Parkyns. Indeed, I cannot tell, my lord.

Justice Withins. What answer was given?

Sir T. Parkyns. There were several, I cannot tell the particular names, that said they had as much interest in it, as Malin in the mace; and the reason was this, it was bought by several contributors.

L. C. J. Who was that said so?

Sir T. Parkyns. Indeed, my lord, I cannot tell particularly.

L. C. J. Alack-a-day! now we have forgot all again; pray did not you see the thing called The New Charter as you expressed it?

Sir T. Parkyns. No, I did not see it out of the box.

L. C. J. Did you observe when Mr. Edge called to read the charter?

Sir T. Parkyns. No, my lord, I did not.

L. C. J. I mean when he spoke to my brother Bigland to read it.

Sir T. Parkyns. My lord, I was there from the beginning to the end. If you please to hear me, my lord, I will answer you to what you ask me: I think the mayor, Mr. Wild, did speak to serjeant Bigland, and asked him something of advice, but what it was I can-

not tell; it was something concerning the new and the old charter; and serjeant Bigland answered him, Do you ask me as recorder, or as counsel? Truly, I forgot what reply was made.

Mr. Pollexfen. This gentleman, my lord, was not in the hall.

Recorder. Did you see any struggling about getting the mace away?

Sir T. Parkyns. No, I did not, Sir.

Recorder. How came Somner to leave the mace behind him?

Sir T. Parkyns. I do not know, I cannot tell.

Recorder. Did you hear any thing said by Mr. Sacheverell?

Sir T. Parkyns. No, I do not.

Justice Withins. Did not he say, Hold the books, Stop the books?

Sir T. Parkyns. No, I do not remember it.

Mr. Holt. Pray did you stay as long as Mr. Sacheverell staid?

Sir T. Parkyns. I staid as long as they all staid.

Justice Holloway. Did you observe no noise nor uproar?

Sir T. Parkyns. No, by my soul, not I.

Justice Holloway. That is strange.

Mr. Holt. He was not in the hall where the noise was.

L. C. J. But could he be in the next room, and not hear the hubbub?

Sir T. Parkyns. My lord, I said I was in the place called the council house, and I did not stir till they all went out together.

Recorder. Was not you at the proclamation at the market-place? and was there no throwing up of hats?

Sir T. Parkyns. Yes, they did, when they said God save the king, the people said Amen and threw up their hats.

Mr. Stanhope. Pray did you hear Mr. Sacheverell desire them to be quiet and peaceable?

Sir T. Parkyns. Yes, I did so.

L. C. J. Did you hear Mr. Sacheverell when he spoke to the mayor in the hall?

Sir T. Parkyns. No, I was not in the hall at all.

L. C. J. Did you hear him when he spoke to the mayor in the council chamber?

Sir T. Parkyns. Not that I do remember.

Justice Holloway. You say you heard Mr. Sacheverell speak to them to be quiet and peaceable?

Sir T. Parkyns. No, not there, but it was at Mr. Greaves's own house.

Justice Holloway. Was there any uproar then there?

Sir T. Parkyns. No, my lord, but I will tell you there was a multitude of people there, and a great deal of rabble like to be, and Mr. Sacheverell desired the people to do their business with all modesty; and I think there never was so great a number of people that ever carried themselves more civilly than they did. I did not hear, by the oath I have taken, any angry passionate word or any thing of that kind.

Recorder. They were all of a side then.

Mr. Stanhope. Were you by when Mr. Hutchinson was sent with Mr. Gregory? What was hesent for?

Sir T. Parkyns. I can't tell that, but I did hear they did go.

Mr. Stanhope. Was hesent to demand, or desire the mace?

Sir T. Parkyns. Indeed I can't tell how it was.

L. C. J. He can tell nothing?

Recorder. I believe he was worse frightened than alderman Parker, he has forgot all.

Mr. Pollexfen. Swear Mr. John Thinn. [Which was done.] Pray, Sir, were you present on Michaelmas-day, at the election of the mayor of Nottingham?

Thinn. My lord, I hear there are several gentlemen indicted for a riot at that time, I hope I shall receive no prejudice for giving my information here.

L. C. J. What do you mean, Mr. Thinn?

Thinn. My lord, I understand by some persons, that there is like to be an information brought against me, if I give my evidence here.

L. C. J. Prithee, man, we know nothing at all of the evidence or information; if you will evidence, you may.

Mr. Pollexfen. Pray, Sir, were you present when this matter was transacting on Michaelmas-day?

Thinn. I happened to be in the country at that time, about a business between Mr. Edge and myself; we are copartners in an estate, and we were then upon a partition; and on Michaelmas-day I went to church, and being at church, and seeing a great deal of company in the chancel, I went to see the usual ceremony of choosing the mayor, and so forth. I was there then, and while I was there in the church, I staid there near an hour, I believe after prayer was done, and there was an expectation of the old mayor, and others, to meet together upon the election, but nobody came: but at last there was some message came down, I know not by whom, nor from whom, but the general vogue was, that it came from Mr. Wild the old mayor, and that he had sent down to desire the company to come down to the hall, but I cannot say who brought the message; and upon this, all the company went from the church, up to the hall, and I went with alderman Edge, who was the person I had business with; we went through a great room, the town-hall, and then there is a little room within, I think they call the council-chamber, and a great table within a rail, as this may be; and I remember, I sat down behind the alderman: I could observe nothing of heat among them at all, nor the least word that I observed, of jangling. There was a box upon the table, which they said was the new charter, but it was not read; but Mr. Edge was offered to read his own name, to shew that he had power to act in it; but he did not know how far he might act by that, and therefore he

was proceeding to swear the officer according to the old one.

Mr. Pollexfen. Was there any cry, or any noise there?

Thinn. I do not know that I heard any one say any harsh or ill word; there was not so much as a shout.

L. C. J. Did you hear any hubbub, or tumult?

Thinn. No, my lord, not in the room where we were.

L. C. J. Did you in any other room?

Thinn. I cannot tell that, there was a great many people about the window.

Mr. Holt. Did the old mayor, Wild, stay there while they elected Mr. Greaves?

Thinn. He staid there some of the time.

Mr. Stanhope. Was he there all the while?

Thinn. I cannot say but that some of the aldermen staid all the time, and some of them gave their votes for Mr. Greaves.

Mr. Lovell. What did Edge do?

Thinn. He took the poll, and to the best of my remembrance, alderman Parker, that is one of the aldermen that has been here, gave his vote for Mr. Edge.

Mr. Lovell. Did the mayor, Wild, stay till the poll was cast up?

L. C. J. Poll, we hear nothing of a poll; Who gave you authority to poll?

Mr. Lovell. He that was in the new charter appointed mayor, yet staid to see the election, and then went away.

Mr. Pollexfen. Sir, did you hear any proclamation made in the council-chamber?

Thinn. No, Sir; I came from church with Mr. Edge, and the rest of the gentlemen.

L. C. J. Were you there when Greaves was sworn?

Thinn. Truly, my lord, I don't remember that I was.

L. C. J. I desire to know by what authority Mr. Edge swore him: let him look upon the statute of *Præmunire*, and consider with himself about it a little.

Just. Withins. As far as I find, this gentleman was not much concerned, and did not mind what was done.

Thinn. No truly, Sir, not I, much.

Mr. Holt. Did Mr. Sacheverell go with you or stay behind.

Thinn. We went all together.

Mr. Blencow. Pray swear Mr. Pole. [Which was done.]

Mr. Stanhope. Pray, Sir, were you in the council-chamber at Nottingham on Michaelmas-day was twelve-month? Pray tell us what happened there.

Pole. I have lived in Nottingham about 12 years. I used to go and see the mayor and other officers sworn: upon this day I was at church, and they went to prayers, and after prayers were ended, I think there was Mr. Gregory and Mr. Hutchinson, as I take it, sent by some to desire the mayor, that was Wild, to come to church, that they might proceed to an election according to the old charter; but what

answer was returned I cannot say: but after that, as I take it, there was alderman Parker and alderman Rippon did come and speak to the company, and said the mayor desired them to come down, for they had the new charter, and he was to have their advice how to proceed upon it. While they sat there, I walked from the church to the town-hall; and in a little while the company from church came to the town-hall: when they were there, the mayor desired serjeant Bigland's advice how to proceed upon the new charter; says he, do you desire my advice as recorder or as counsel? and I think as to that he gave no answer. The like question he put to Mr. Edge; and Mr. Edge referred it to serjeant Bigland's answer, and I think it was a very good one. After a while, some of the company that used to be the electors of mayors and sheriffs, being of the clothing, cried, let us go to the poll; and I think Mr. Edge began to take the poll, and there was several that did vote, but that was the general cry of those that were inclined to the new and to the old charters. Some that were in the new charter gave their votes, but not for Greaves; I do not remember any one did when the poll was taking.

L. C. J. Who directed the poll, pray?

Pole. I think it was some that were for the old charter; but I think it was the general desire to go to the poll.

L. C. J. Who took the poll?

Pole. Mr. Edge took it.

Mr. Holt. Did the old mayor propose the election, or the new mayor, or no?

Pole. No, I do not know he proposed it, but it was put to him.

Mr. Stanhope. Was he present at the election?—*Pole.* Yes, he was.

Mr. Stanhope. Was he present when the poll was taken?

Pole. Yes, he was.

Mr. Stanhope. Did he contradict it?

Pole. I cannot say he did contradict it.

L. C. J. How many of these elections have you been at before?

Pole. I was not by at the nomination; that I could not be, for they excluded all but those that had votes.

L. C. J. How came you to be so busy as to be there at this time?

Pole. I went of my own accord; I was not desired by any body, any more now than other years, but used as much as I could to endeavour to be at the swearing of them; for they excluded all people usually out of the chancel, where the election used to be, if they were not of the clothing.

Mr. Stanhope. Who gave the oath to the person elected usually?

Pole. The coroner used to give the mayor his oath.

Mr. Lovell. Who used to take the poll at other elections?

Pole. I cannot say who took it, because we were excluded the chancel; but it has been reputed that Mr. Edge used to take it.

Mr. *Blencow*. Who came to fetch you from church?

Pole. I think alderman Rippon and alderman Parker did desire them to come to the town-hall, and I think Malin was there, but I cannot tell what he said.

Mr. *Blencow*. Who was at church then?

L. C. J. Pray, were you desired to come?

Pole. No, I was not.

L. C. J. Was Mr. Sacheverell?

Pole. No, I do not know that he was?

Mr. *Stanhope*. When these gentlemen came, did they behave themselves civilly?

Pole. Yes; I saw nothing but civil behaviour: there was a great concourse of people, I believe most of the well-wishers to the old and new charter were there that day.

L. C. J. Can you say you did not hear a great deal of noise and hubbub?

Pole. I cannot say so, nor truly can I say I did.

L. C. J. Do you believe you did or not?

Pole. But I believe I might hear some noise; but I was in the council-chamber, not in the hall.

Just *Holloway*. Was sir Thomas Parkyns there?—*Pole*. Yes, he was.

L. C. J. Was Mr. Thinn there?

Pole. Yes, I think I sat next him when they came from church: I did desire to see the proceedings of the day, and I think I dined with the company, and went in with the first.

L. C. J. Did you see any thing about a mace?

Pole. Yes, I think I did see something about a mace.

L. C. J. Why then prithee tell me, as near as thee can guess, what thee didst see about the mace.

Pole. When they went out, Wild and his company, the room was full of company; and, as I take it, Mr. Malin, or whoever it was that was to take it, did forget the mace behind him; and somebody coming for the mace, I think there was one of the gentlemen of the council did put it from him, and would not let him have it.

L. C. J. Ay, come, who was that one gentleman of the council?

Pole. I cannot be positive, I believe it might be Mr. Salmon, or Mr. B——.

L. C. J. But, prithee, wilt thou tell me that there was no shouting, nor noise, nor hubbub?

Pole. In the council-chamber, I am satisfied as to myself, I heard none and believe there was none; I will not say there was not in the hall, for I was not there.

Just *Holloway*. Did you hear any one cry, Stop the books?

Pole. I think there was at that time a dispute about the books.

L. C. J. Ay, tell me now who that dispute was between?

Pole. I think it was among the gentlemen that were of the council.

L. C. J. You say well, name me some of them now.

Pole. I cannot, indeed, my lord, name any particular person.

Just *Holloway*. Did you hear Mr. Sacheverell speak any thing about the books?

Pole. I think I did, I believe it was one of the clothing.

L. C. J. Prithee, canst thee not guess who that man of the clothing was?

Pole. If I do guess, my lord, I cannot speak positively.

L. C. J. Prithee, do not say so, I know thee canst if thou wilt, come, recollect thy memory.

Pole. My lord, I would remember it, and fix the person, if I could, but I cannot.

L. C. J. But as near as thee canst guess, I know thee hast a good guess with thee.

Pole. Indeed, my lord, I cannot.

Mr. *Powis*. Did you observe that he did any ways concern himself about the election, Mr. Sacheverell I mean?

L. C. J. What did he do there, Mr. Powis? he was present there.

Recorder. Was not he the head of the old charter party?

Pole. The old charter people took it that the surrender had been surreptitiously obtained, and I think he might say they had a good right to insist upon the old charter.

L. C. J. Who said so? Mr. Sacheverell?

Pole. I believe I did hear him say something to that purpose, but I cannot positively say what; I dare not undertake to say what particular persons spoke that day.

Recorder. Was not he for reading of the new charter, upon your oath?

Pole. I cannot tell whether he was or no.

Recorder. Did he not bid the people be quiet?

Pole. I cannot say I heard any such thing.

Mr. *Ward*. Did not you hear him say any thing to the mayor when he came into the council-house?

Pole. No, I did not.

Mr. *Ward*. Did not you hear the Serjeant make proclamation for all people to depart that had no business there?—*Pole*. I did not.

L. C. J. What say you, Reynolds, did you make proclamation in the council house by the mayor's direction?

Reynolds. Yes, I did.

L. C. J. And yet you said you staid there all the time.

Mr. *Blencow*. When the shout was in the hall, pray, where was Mr. Sacheverell?

Pole. He was in the council-chamber: the occasion of the shout to be in the hall was this, when the poll was taken, and the majority appeared to be for Greaves, Mr. Hutchinson was sent to acquaint the mayor with it, and to desire him to come, and be present at the swearing of him.

L. C. J. Who sent him?

Pole. Mr. Hutchinson and they can tell themselves.

L. C. J. But who do you say sent him?

Pole. I can't tell particularly, they can best tell.

L. C. J. But who told you so? or did any body tell you so?

Pole. I was told so by several persons that were sent.

L. C. J. Prithce, who told thee?

Pole. I believe I may have heard it from himself, that he was sent.

L. C. J. Who did he tell you sent him?

Pole. He did not tell me who particularly.

Mr. Farewell. My lord, I desire to ask Reynolds this question; Who was there besides that heard you make the proclamation?

Reynolds. The mayor was there.

Just. Holloway. They made such a noise, that perhaps every body could not hear it.

Mr. Pollerfen. Pray swear Mr. Slater. [Which was done.]

Mr. Holt. Were you in the council-chamber on Michaelmas-day was twelvemonth in Nottingham?

Slater. Yes, I was.

Mr. Holt. Pray, give me an account of what passed there, and what you observed.

Slater. I was at St. Mary's Church with them, and came down from the church with them to the council-house; and when they came, they went into the council-house to the mayor that was then, alderman Wild, and there they went and staid some small time; and then the mayor and aldermen came out, and came to the common-hall, and staid a pretty considerable time; and then came Mr. Hutchinson and Mr. Gregory to his worship, and told him, and it please your worship, the council desires you to come and hear Mr. Greaves sworn mayor; and at that word, the mayor replied to them, that he would come to them presently, if they should have done there: so presently after some cried out A Greaves mayor, a Greaves mayor; and alderman Rippon and others bid them hold their tongues, or it should be worse for them; but still they cried, A Greaves, a Greaves.

L. C. J. Where was that?

Slater. In the common-hall.

Mr. Pollerfen. What the burgesses cried out so, did they?

Slater. The people in the hall.

Recorder. Was not you one of the shouters?

Slater. No, I did not shout.

L. C. J. Were you one of the clothing, one of the council of the town?

Slater. No, my lord, I was not.

L. C. J. What business had you there?

Slater. I went to see, as others did.

Just. Withins. What trade are you?

Slater. I am a taylor.

Just. Withins. Do you use to go to church?

Slater. Yes, Sir.

L. C. J. You say the people did shout, A Greaves mayor; did you hear them among that shout, cry, No New Charter, No New Charter?

Slater. I cannot say any thing of that.

L. C. J. Canst thee say thou didst not hear any such shout?

Slater. For my part, I can safely say I heard nothing of it. Then I see alderman

Wild take a book in his hand, as to take an oath, and then there was a shout, A Greaves mayor; and alderman Parker went off from the bench, and said, A Riot, a Riot.

Mr. Pollerfen. Swear Roger Ryley. [Which was done.]

Mr. Holt. Pray, were you at the election of a new mayor at Michaelmas-day was twelve month?

Ryley. I was at the first nomination, which was the 14th of August.

Mr. Holt. Who was named then?

Ryley. Mr. Greaves.

Mr. Holt. Is that the custom of the town to nominate him before?

Ryley. Yes, it is.

Mr. Holt. Were you there on Michaelmas-day?

Ryley. Upon Michaelmas-day I was summoned in upon the clothing, and there the new mayor went to the old mayor, and waited there a long time to go with him to go to church; at last the old mayor would not go, but staid waiting for a new charter; so we went to church and heard the prayers, and from the church we went to the hall according to custom; and there was the new mayor there, Mr. Greaves, and he was sworn mayor there.

L. C. J. Who swore him?

Ryley. Alderman Edge.

L. C. J. Did you ever know him swear a mayor before?

Just. Holloway. Did you ever know a mayor sworn before in the absence of the old mayor?

Ryley. I have known many, I have been of the council these eighteen years.

L. C. J. You say you have been of the council these eighteen years?

Ryley. Yes, I have so, Sir.

L. C. J. And have you been present when the new mayor has been sworn?

Ryley. Yes, I have.

L. C. J. And do you know that the new mayor was sworn when the old mayor was not there?

Ryley. I have known many sworn, I say, but I cannot tell whether I ever knew but that the new mayor was sworn before the old mayor.

L. C. J. Then when Edge gave Greaves the oath, was the old mayor there?

Ryley. He was in the room when he was chosen.

L. C. J. Was he there when he was sworn, or when he was going to be sworn?

Ryley. They would not abide the place, but went away.

L. C. J. But, prithee friend, don't dally, thou art upon thy oath; was Wild, the old mayor there, when they gave Greaves the oath?

Ryley. I don't know exactly the moment when he went away, but he was there when they voted him.

L. C. J. Thou art a prevaricating shuffling fellow.

Ryley. If it please you, my lord, I won't swear myself for all the town and country.

L. C. J. Speak the truth, man, and answer my question.

Ryley. He was there all the while they were voting, and how he went away I don't know.

L. C. J. Was he there when Greaves was sworn?

Ryley. I can't tell that, if it please your honour.

Mr. Farewell. My lord, I desire to ask him one question.

L. C. J. But the man won't answer a question fairly.

Just. Holloway. I swear, I think both sides are very careful of answering questions.

Mr. Farewell. My lord, I desire to ask him what was the behaviour of the company all the time they were there in the council-house; was there any disturbance there?

Ryley. None, that I saw.

L. C. J. I ask you again, was there no proclamation made?—*Ryley.* I heard none.

Mr. Farewell. Did you take notice of Reynolds to be there?

Ryley. He might be there, for ought I know.

Mr. Farewell. Do you believe he could make a proclamation, and you not hear it?

Ryley. No, I don't know how he should.

Mr. Pollexfen. Call Thomas Muxlow and John Peak.

Just. Withins. Have you any more witnesses, Mr. Pollexfen?

Mr. Pollexfen. We have more, my lord, if we can get them but in. Swear Thomas Muxlow. [Which was done.]

Mr. Lovell. Were you at the election of a mayor at the town of Nottingham Michaelmas-day was twelve-month?

Muxlow. I went to the church, as the custom was; after prayer we expected to go to the election.

L. C. J. Ay, prithee speak out as if thou wast at an election; you would have shouted then, I warrant you.

Muxlow. When we were at the church, we waited there, expecting to have Mr. Wild and the rest of the company, to nominate the mayor, according to the ancient custom.

Mr. Holt. You say you were at the election on Michaelmas-day was twelve-month; pray speak how things were carried there?

Muxlow. Yes, I was there, and it came to an election, and it came to a poll.

Just. Holloway. Who proposed the election? Recorder. Were you an elector?

Mr. Holt. Answer the gentleman's question, were you one of the clothing?

Muxlow. I was one that had a vote there.

Mr. Holt. Do you know any thing of this matter?

Muxlow. I know there was a fair election according to custom.

Mr. Stanhope. Was it peaceable and quiet?

Muxlow. Yes, there was no disturbance at all.

Mr. Stanhope. Was there no shouting?

Muxlow. No shouting that I heard.

Mr. Holt. You were in the inner room, were not you?

Muxlow. I was in the council-house.

Mr. Holt. Were you not in the hall?

Muxlow. I was in the hall, as we went out.

L. C. J. Did you hear nothing of crying out, A Greaves, a Greaves?

Muxlow. No, I can't remember that.

L. C. J. Were you there when Greaves was sworn?

Muxlow. Yes, I was, when Alderman Greaves was sworn.

L. C. J. Was you there when the mace was taken away?

Muxlow. No, my lord, I was not.

L. C. J. Who swore the mayor?

Muxlow. One of the coroners.

L. C. J. Was the old mayor there when the new mayor was sworn?

Muxlow. I can't tell that.

Just. Withins. None of them can tell that, or will tell it.

Mr. Pollexfen. Swear Burroughs and Parker. [Which was done.]

Mr. Lovell. What is your name?

Burroughs. My name is Burroughs.

Mr. Lovell. Were you present on Michaelmas-day at the election of a mayor of Nottingham?

Burroughs. I was one of them that were at the hall; when I was in the hall, there came a gentleman, one of the council-house, and acquainted Mr. Wild, the present mayor, that the burgesses had elected Mr. Greaves mayor, and the coroners were proceeding to swear him, and asked him to come and hear him sworn; and he said he could not come presently, they must wait a-while: he was asked how long, he told them by and by; with that, somebody cried out, A Greaves; A Greaves, and there was a great shout.

L. C. J. Where was that shout?

Burroughs. In the hall; but then the gentlemen were in the council-house.

Mr. Blencow. Where was Mr. Sacheverell then?

Burroughs. He was in the council-house.

L. C. J. Well said: now you have made this fellow swear through a wall, that your other witnesses could not hear through. Prithee, friend, were not thou one of the clothing?

Burroughs. No, my lord, but I was a Burgess.

L. C. J. What did you do there?

Burroughs. There were other burgesses not of the clothing besides me.

Mr. Holt. Come then, our next witness is John Parker.

L. C. J. Reynolds, did you see this fellow there, was he one of the shouters?

Reynolds. Yes, and he flung up his hat thus.

L. C. J. Were you one of the shouters?

Burroughs. I cannot say I did not shout.

L. C. J. Did you fling up your hat?

Burroughs. No, I did not.

L. C. J. Did you do it over your head?

Burroughs. It may be I might.

Just. Holloway. Were you by, when Greaves was sworn mayor?

Burroughs. No, I was not.

Mr. Holt. Well, what say you to this matter, Parker?

Parker. Going by the street, I met the new charter coming down, Reynolds brought it; so I turned back again to the mayor, and after he had received it, pray, says he, go up and tell Mr. Sacheverell, and some of them, that they will come up to the church, and if they will but stay there a-while, we will come to them: so I, and another, and two or three more, went up to the church, and told them the mayor would come and wait upon them, and bring the new charter; upon that Mr. Sacheverell looked upon his watch, and staid a considerable while, and looked again upon his watch, and I heard him say he had staid above an hour, and presently a message came from the mayor, desiring them to come down to the Town-hall to wait upon the mayor.

Mr. Stanhope. Who did the messenger direct his speech to?

Parker. I suppose it might be to alderman Edge and serjeant Bigland. Says Mr. Sacheverell, we will go down, and see what they say to us: so they went down, and we went with them; they got many of them into the council-house, but I could not; so I stood in the hall, and waited all the while the gentlemen were in the council-house; then there came out alderman Rippon, the mayor, and Mr. Malin, and by and by after them, alderman Parker, out of the council-house, and sat down upon the bench; Mr. Malin had not his mace, and he was asked where it was, and they said they had it in the council-house: so, said they, you had best have a care of your staff; no, said he, before they take my staff, I will break it over their pates; and by and by they proceeded to swear Wild mayor, and they were about to give him some of the oaths, I suppose of allegiance and supremacy; but before he said any thing, there came two of the council-house, and told him, they had elected Mr. Greaves mayor, and desired the mayor, and the rest, that they would please to come and hear them swear the mayor; he said, he could not come; but come, come, says he, we will go on, and upon this they proceeded to give Mr. Alderman Wild the oath, and when they had gone half way in the oath, somebody came and cried out, they were swearing Mr. Greaves mayor, and upon that both parties gave a shout, and one cried, A Greaves! A Greaves! and another cried, A Wild! A Wild! And upon this, alderman Rippon had the new charter by him, and he took it out; look you, said he, we do nothing but by authority, we have his majesty's order, and the broad seal, and thereupon sat down again; but somebody told him it was commonly reported they were deprived of their privileges; he said, it was

not so; if it was, he would forfeit his head and his estate: upon that, they proceeded to swear Mr. Wild; the burgesses gave another shout, but not so big as the other; with that alderman Parker went out, and I think, cried, A riot, a riot. They sat a little longer, and it was desired to send for alderman Parker again, but said they, he won't come, and so they whispered a little upon the bench, and went off down the street, and I went down the hall with them, and in — Street-Gate, they met with alderman Parker; and he was coming to the hall again, and he turned back to the mayor's; and I went to the council-house; but I could hear nothing, only that afterwards at the mayor's they called the gentlemen, and swore them according to the new charter.

L. C. J. Were you one of the electors?

Parker. No, not I; I was not concerted on any side.

Mr. Pollexfen. Were any of the defendants, Mr. Sacheverell or Mr. Gregory at the shooting in the hall?

Parker. Not that I know of.

Mr. Farewell. He says, my lord, that the mayor sent to Mr. Sacheverell and them to come from church.

L. C. J. How do you know the mayor sent to Mr. Sacheverell?

Parker. My lord, they directed their speech to the persons that were there, I cannot justly say to whom in particular.

L. C. J. It has been sworn they directed their speech to alderman Edge and serjeant Bigland.

Parker. They told it when Mr. Sacheverell was present, and so he went down with them.

Mr. Pollexfen. But this appears by the evidence, that the Old Corporation is by the name of mayor and burgesses, but we know there were aldermen since, and so it is according to truth; as it is laid in the information; but let them put in their new charter. [Which was done and read.]

Mr. Pollexfen. Is there not a proviso in it, that the mayor should not act till he be sworn?

L. C. J. Admit it be so, what then?

Mr. Pollexfen. Then it follows that we must be not guilty.

L. C. J. How so?

Mr. Pollexfen. It is plain, my lord, that this man should not take upon him the office of mayor till he has taken the oath; then suppose they take it that the old charter is gone; by this there is no new mayor till he be actually sworn; then all these things being done before he was sworn, it cannot be that this was such an assembly as was laid in the information.

L. C. J. You mistake yourselves sadly, the proclamation was after the swearing.

Mr. Pollexfen. No, no, my lord, I am not mistaken in that.

L. C. J. Reynolds, Was not the proclamation made after he was sworn?

Reynolds. I cannot tell, my lord.

L. C. J. Where is the mayor, Wild? Upon

your oath, were you sworn before you gave direction to make proclamation to depart or no?

Wild. I cannot certainly tell, but I think the first proclamation was made in the council-house; that was before I was sworn; the proclamation afterwards was after I was sworn.

Mr. Holt. Where was the proclamation after you was sworn?—*Wild.* In the hall.

L. C. J. Did Mr. Sacheverell continue there after you was sworn?

Mr. Pollexfen. Good, my lord, this I think is the fact upon the evidence: in the council-house Mr. Sacheverell, and the greatest part of these defendants were, and then they went on to the election of Greaves; and they sent out to tell *Wild*, the former mayor, when he was in the hall, that Greaves was elected, and did desire him to come in to swear him, but he refused; but when this was done, he was not sworn; but upon this, there was the shout of the people, A Greaves! A Greaves! All this was, as I think, before he was sworn.

L. C. J. The mayor himself says he was sworn.

Wild. My lord, I was just come into the hall before the messenger came in; but I told them they could make no new election without me, not at all, because of the new charter.

Mr. Pollexfen. Then as to the business of the mace, I hope the information will not hold to charge us, because then he was not mayor.

L. C. J. That does not affect the mayor but the sheriff, the mace does not.

Mr. Pollexfen. But, my lord, as this information is laid, he says he was mayor, and called an assembly, and it was held before him, and these things were done; but this cannot be true, for by this very new charter he must be sworn before he can act, and this tumultuous proceeding, as they call it, and seizing upon the mace was before he was sworn, and this information supposes all the fact was done while he was mayor.

Mr. Holt. I think it does appear by *Wild's* own oath, that he was not sworn when proclamation was made in the council-chamber; and I think there was but one proclamation made there, the next was made after, and that was in the hall: now, with submission, that does not affect those that were in the council-chamber, because they did not hear the proclamation; now the information is laid, that they continued after the proclamation; therefore we must leave it to your lordship and the jury.

L. C. J. Well then, gentlemen of the jury, this case has held long, but the question is very short: here is an information exhibited by Mr. Attorney General against the defendants, which by particular names are by some of the witnesses sworn to be present when the occasion of this fact did arise.

Mr. Coombs. Pray, my lord, give me your favour, here is one of the defendants says, he has a witness to prove he was not there; it is *Mr. Turpin*.

L. C. J. *Reynolds*, upon your oath, did you see *Turpin* there?

Reynolds. Yes, I did.

Just. Withens. *Mr. Mayor*, did you see him there?

Wild. Yes, I saw him in the hall.

Just. Withens. Was he busy in the hall?

Reynolds. Yes, he was shaking his hat, and shouting.

L. C. J. Well, now where is your witness?

Mr. Pollexfen. Swear *Mr. Flaits*. [Which was done.] What say you, was *Mr. Turpin* there?

Flaits. He was in the hall that day, but not above a quarter of an hour.

L. C. J. You were there, it seems, pray had you a vote there?

Flaits. I went to speak with *Mr. Turpin*.

Mr. Pollexfen. Was he in the hall when the mayor came into the hall?

Flaits. I never saw him there while the mayor was there.

Mr. Pollexfen. I pray swear *Mr. Holt*. [Which was done.] Pray was *Mr. Barkett* either in the hall, or in the council-chamber that day.

Holt. No, I was at work with him that day from six of the clock in the morning till eight at night.

L. C. J. And he was not out all the time?

Holt. No, he was not.

L. C. J. Well, have you done, gentlemen?

Sacheverell. My lord, here is *Mr. Serjeant Bigland*, I desire he may be examined.

L. C. J. Ay, with all my heart. Swear him. [Which was done.]

Mr. Pollexfen. *Mr. Serj. Bigland*, I think you were down at the election of this mayor upon *Michaelmas* was twelve-month; will you be pleased to tell the court and the jury what was done then?

Serj. Bigland. I will give you as short an account as I can. I was in my house when the mayor and aldermen, sent to me to desire me to give my attendance: they sent the two sheriffs to me, and I did attend, and staid an hour or two, and went to church, according to the usual course; and when we had been there a while, alderman *Rippon* came to me, and desired me that I would go down with them to the hall; accordingly I did go down, and there was *Mr. Wild* and several aldermen sat there; so then they proceeded to that that was done towards an election.

Mr. Lovell. Pray, Sir, how was their carriage during the time you was there?

Serj. Bigland. I sat then in the council-chamber, I think I sat next the mayor, and *Mr. Edge*, I think, was next to me, and I saw nothing of disorder at that time, that I took notice of.

Mr. Lovell. Was there any proclamation made for people to depart?

Serj. Bigland. Upon the oath that I have taken, I do not remember it.

L. C. J. Pray did the mayor ask your advice about any thing?

Serj. Bigland. Yes, my lord, he did; and I said to him, in what capacity, Sir, do you desire

my counsel, as recorder, or how? and so he said no more to that: but he said there was a new charter, but whether he desired me to read it or no, I cannot tell.

L. C. J. Was it opened?

Serj. Bigland. Some part of it was opened.

L. C. J. Upon your oath, did you hear Mr. Sacheverell speak to the mayor?

Serj. Bigland. No, my lord, I do not remember any such thing.

L. C. J. Pray let me ask you, you have been, before this, at elections of mayors of this town?

Serj. Bigland. I was deputy-recorder in my lord marquis of Dorchester's time; as soon as he was dead, I was chosen recorder, and then I was at one election at another day, when they do nominate, which is before Michaelmas.

Mr. Holt. Pray Sir, was there any disturbance?—*Serj. Bigland.* None that I saw.

L. C. J. Was there any shouting that you heard?

Serj. Bigland. I was not in the hall, my lord; in the council-chamber there was none.

Just. Holloway. Did you hear any body cry A Greaves, A Greaves?

Serj. Bigland, I heard a noise in the hall, but what it was particularly, I cannot say.

Mr. Holt. How long did you stay in the council-chamber?

Serj. Bigland. I believe I staid as long as most of the company was there.

L. C. J. Did you stay while Greaves was sworn?

Serj. Bigland. My lord, I believe I was there then.

L. C. J. Pray what authority had you to swear Greaves?

Serj. Bigland. All that I know of it was, he was nominated at August according to custom.

L. C. J. But what occasion had you to be present then, and what authority had you to swear him? You are a gentleman of the long robe, and should have known better.

Serj. Bigland. Truly, my lord, he was chosen by those that had a right to choose in August before.

L. C. J. But what authority had you to swear him? Why did not you send for somebody out of the street to swear him? I reckon it to be worse in those people that understand the law, than in others, that they should be present at such things, and not advise people better; here is serjeant Bigland and Mr. Edge have mighty squeamish stomachs as to the reading of the charter, and nice questions; Do you ask me as Recorder, or as counsel? But they would have done well to advise people to meddle with their own business; let my brother take that along with him.

Mr. Pollasfen. Pray swear Mr. Edge. [Which was done.]

Edge. My lord, I did not swear him.

Just. Holloway. Pray who took the poll?

Edge. I took the poll.

Just. Within. Pray did you ever know a mayor sworn when the old mayor was not by?

Edge. I did tell them so. Mr. Sacheverell and the other gentlemen would have gotten me to poll in the vestry in the absence of the mayor, but I told them I would not have any such thing done; and when the old mayor went out of the council-chamber, they would have had me read the oath. Said I, gentlemen, I will not swear him, but in the mayor's presence.

Mr. Ward. Did not Mr. Sacheverell head them all the day?

Edge. He was among us all the day.

Mr. Ward. Did he peruse the charter?

Edge. I can't tell that.

L. C. J. They that once begin first to trouble the water, seldom catch the fish.

Mr. Hutchinson. My lord, I desire I may ask Mr. Edge one question, whether I was not sent to the mayor, and did not go myself?

Edge. Upon the best of my knowledge I did not send you to the mayor.

L. C. J. I thought, Mr. Hutchinson, you had been a man of greater quality than to go off his errands. Have you done, gentlemen?

Mr. Holt. Yes, my lord.

L. C. J. Then, gentlemen, as I said, this is an information against several persons, you shall have the names of them delivered to you, and it is for a riot, an unlawful assembly in Nottingham; and though there are two times that have been spoken of, and two places in the evidence, yet I must tell you, that that part that does affect these persons is only that which does relate to Michaelmas-day, and for the other part, about the cross, is not comprised in this information; and persons that were put at the cross, but that were not put at the hall, are not concerned in this information: But all, it appears, were concerned, except one, which is Humphry Barker; now though he was hopping and jumping upon the cross, yet not being present upon Michaelmas-day, he is not within this information.

And now, gentlemen, because the cause has held something long, I shall be the shorter: Only, for example sake, there are some things that ought to be taken notice of. The right of the charters, whether it be the new, or the old charter that is to prevail in point of law, is not a question: that is not to be determined in this cause one way or another, for they have a methodical way to have that point determined, and should not have proceeded in the way they went; and it is pretty well known they have proceeded in that way too, for we know there are Scire Facias's and Quo Warranto's depending between them. They would have done well to have pursued the legal course only; for I hope, we shall never live to see that law prevail in England which is called club-law: Let the right be never so much on their side, they ought to take a rightful way to observe it, and not by any unlawful means.

Another thing, gentlemen, is this; they insist upon it, that they could not be guilty upon this information, because the mayor was not sworn. It is plain they are guilty of a very

great crime, because till another was chosen, he was mayor. They say their mayor was sworn regularly according to the old charter; but according as the evidence has been given, they could not swear him by any pretence whatsoever; and whosoever administered the oath to him, were guilty of a very great fault, as well as he that took it.

Now, gentlemen, the law is so direct in point, that they needed not to have gathered themselves into an assembly about this matter; for if he that they pretend to be a mayor had been rightfully chosen mayor, they had a regular course to have brought him into this office; for they might have come, and of right have demanded a Mandamus to admit and swear him into the office, and so he must have been sworn mayor, unless they had shewed good cause to the contrary.

Gentlemen, there is no right but has a lawful remedy, therefore it had been much better for these gentlemen, if they have a right, to have gone in a rightful way to obtain that right.

Now this being premised, I must tell you, it is very unfortunate, concern it whom it will, and very strange to me, that men in matters of government, where they have nothing to do, that are country gentlemen, that never came to interpose in any election before, that they should come to busy themselves, and head people where they have nothing to do; nay, they have no pretence of precedent, for it was never practised before.

If in case it was only to satisfy their curiosity to see the manner of the election, they had been only there, and patient and quiet, it had been something; but to be there, and to demand people to be sworn, and calling people to look to the books, and heading the mob, that does not become any man, let him be as great as he pleases: the greater the man, the greater his name; and the greater his influence, the greater his offence, and the greater ought to be his punishment.

Then, gentlemen, to have those other persons to come there, Mr. Hutchinson and Mr. Gregory, and they must be demanding of the mayor to come and swear; pray what have these people to do there?

Then, gentlemen, you see the consequences of it, it was come to that height in the midst of this great and populous town of Nottingham, that nothing but flinging up hats, and hollering, and shouting, and making all the disturbance and interruption in the world; nay, in so much, that you may observe by one of the witnesses for the king, the very seal was broken off from the new charter. Nay, to that height they were grown, that whereas there was a mace, that is an ensign that doth belong to the sheriff, they came and ravished it away, and force it from him, and take it away whether he would or no, and bid him go about his business, he had nothing to do there: so that here are people without any authority choose a mayor, that mayor must call and assemble together a

meeting of all sorts of people, and all sorts of disorders must be committed under pretence of this authority; which is setting up a kind of commonwealth, I can call it no better; and had it been such a general assembly, not with an intent for doing such one particular purpose, it had been high-treason. For if people once think to obtain the rights they pretend to in a mutinous manner, that in the general is high-treason, or at least so near, I will assure you it is pretty hard to distinguish between them.

Now, gentlemen, as to the evidence, I must tell you the witnesses do swear, that all these persons were present, abettors, and assistants in this matter; the man that headed the party had no manner of concern among them: and surely, after you have heard all this matter, if ever there was a riot proved in this world, this riot is plainly proved upon every one of these men except Barker.

But whereas they pretend on the other side, and they would have you to believe that the sheriff was not sheriff till he was sworn, surely he was sheriff till another was sworn: and if you allow him to be sheriff, then they ought not to take his mace from him, if he was the sheriff *de facto*, in possession of the ensign of this office, that is enough; for the right is not to be determined in such a way as this.

The next thing they pretend to is this, a-lack-a-day, there was no proclamation made till after he was sworn mayor by the new charter, when before he came first into the common-council, the hubbub was there begun, and the mayor told them, gentlemen, you have nothing here to do, pray go about your business; and when Mr. Sacheverell pressed him, he ordered proclamation for all persons that had nothing to do, to be gone. Then afterwards he comes into the hall, there is sworn in the hall, and takes his oath according to the new charter, and still after proclamation made; then the same persons continue still in the same place, so that there is no obedience given either to the old authority or the new; and instead of going away upon the proclamation, that made them the more violent; for you find by Mr. Edge, the last witness, that even to the time of the swearing, Mr. Sacheverell continued very earnest to have him sworn, though Mr. Sacheverell was shewn the new charter, and they could not even by the old one proceed to swear him in the absence of the old mayor; and the old mayor was absent.

There are indeed several gentlemen that are witnesses for the defendants, that happened to be there at that time; there is sir Thomas Parkyns, and he being asked whether he heard any noise at all, why truly he forgot that there was ever a word spoken; and though other persons, even some of their own witnesses, did hear a noise, yet he heard none, but all was a wonderful regular thing; so that the witnesses that they themselves called, interfere among themselves, some of them say they did hear a noise and shouting, yet such is the unhappiness

of some people, that they cannot hear if they have no mind to it. Then here is Mr. Thinn, a gentleman that came by accident, and he can give no good account of the matter: some he said he did hear, but he came but as a stranger, and was not concerned one way or other, as he says.

You have heard several other witnesses, that give an account there was a noise, but they cannot tell whether the charter was produced, or not produced; and they cannot tell one word that was said of A Greaves, or No New Charter: And one particular man, I have forgot his name, he could not by any means remember any thing of the matter; though he was there all the while, he could not tell what Mr. Sacheverell said, he did hear him, but not what he said.

This, gentlemen, is the substance of the evidence: I can only say this to you, you must believe all the witnesses for the king actually perjured, unless you believe their evidence; and for what others say, that they did not hear such and such things, yet all these other people did hear; and though the witnesses for the defendants did not see, the others did see; and you must find these men without any evidence that does appear, to be guilty of wilful perjury, or else every person that you have had in charge, except Humphrey Barker, is guilty of the riot whereof they have been informed against.

Then the jury withdrew, and the court broke up, and a private verdict being delivered in the

night, the next morning it was given in open court, where they found twenty of the twenty-one defendants that were in the issue, guilty of the offence and misdemeanour in the information; and the other defendant, Humphrey Barker, Not Guilty.

In Trinity-Term following, the Defendants, who had been found Guilty, were sentenced, as follows:

William Sacheverell, fined	500 Marks.
George Gregory	300
Charles Hutchinson	300
John Greaves	20 Nobles.
William Greaves	20 Marks.
Samuel Richards	20
Robert Green	20
Francis Salmon	5 Nobles.
Arthur Riccards	20 Marks.
Ralph Bennet	20 Nobles.
John Sherwin	100 Marks.
William Wilson	100
Samuel Smith	20 Nobles.
Thomas Trigg	20 Marks.
Richard Smith	
John Hoe	20 Nobles.
William Smith	20
Joseph Turpin	100 Marks.
Nathaniel Charnel	100
Joseph Astlin	5

And that the several defendants do give security for their good behaviour for a twelvemonth.

The CASE of the CORPORATION of NOTTINGHAM, as it was stated by the late WILLIAM SACHEVERELL, of Barton, esq.

THE town of Nottingham hath always claimed to have been a borough by prescription. And it cannot well be doubted that it hath been so; for that it appears by Domesday-book, in the time of king William 1st, that the burgesses of Nottingham then had divers houses and parcels of land in Nottingham; and the burgesses of that town were 173 in number in the time of Edward the Confessor.

That town hath also always claimed to have been a corporation by prescription. And it is hard to believe it otherwise; because no charter of its first incorporating could yet be found; and the charters granted to the burgesses of that town by king Henry 2nd, and king John, do imply them as a body corporate before those times.

Yet it appears by the charter of king Edward the 1st, that there was no mayor of that town before his reign; for that he then was pleased to grant the burgesses of that town a privilege, that they then after should choose a mayor out of themselves annually; and some of their former charters, as small as that, shew that for some time before they had only bailiffs of that town. From Edward the 1st's time, under

mayor and bailiffs the town continued till Henry 6th's time, who was pleased to make it a county, and grant them sheriffs instead of bailiffs, and the privilege of choosing out of themselves seven aldermen, and one of them annually to be mayor; and that the aldermen (as long as they so continued) should be justices of the peace within that town; and moreover, that the burgesses of the town of Nottingham should for ever be a body corporate by the name of mayor and burgesses. Nor hath any charter since, nor any bye-law that can be heard of, given the aldermen any more power than they had by that charter, which was then nothing more than every burgess of that town had except being justices of the peace, and wearing gowns and hoods. So that the aldermen, though of late they have taken upon them to sit as members of the council of that town, can neither prescribe to that power, because there were no aldermen in that town before king Henry 6th's days; nor can they claim to be of the council of that town by force of any charter, for no charter either in Henry 6th's time, or since, hath granted them any such authority, nor did they pretend

to in that council by virtue of any bye-law of that town, or ever shewed any such bye-law, though their right of sitting and voting there had been denied in the council by members thereof.

The aldermen indeed in king James's time began, though they had no right so to do, to take upon them to be part of the council, and to intermeddle in the town's concerns, and to encroach so far upon the burgesses, without their consent, as to pretend to have a right in the setting and disposing of the corporation-lands, and of the bridge-lands, and school-lands: But the burgesses were so far from consenting to their having of any such power or authority, that they in the year 1605, by their petition to the lords of the council-table, complained of the encroachments of the aldermen, and prayed redress. Upon which the lords of the council referred the examination of the matters in controversy to the judges of assize that went that circuit, to the end they might be certified and better informed by the said justices of such course, as upon good advice and deliberation they should find in their judgments agreeable to law, and meet to be set down and ordered in that behalf. Who accordingly entered into consideration of the complaints on both sides, and advised with the rest of the judges touching the charter granted to that corporation, and all other matters meet to be considered of concerning the matters in controversy; and returned certificates of their opinions of such order of agreement as they thought fit and convenient to be observed and established, according to law and justice, for the public good and government of the said town. Wherefore the mayor and the parties indifferently sent up to solicit a peaceful end of those controversies, having taken knowledge, did consent thereto; and thereupon, by consent of the said parties, it was, amongst other things, ordered, That there should be a council in that town of 24 persons only, out of which the aldermen for the time being should always be excepted; and that the said council, with the mayor or the greater part of them being at such assembly, without any other of the said corporation, should set and let the town-lands, bridge-lands, and school-lands, taking unto them the chamberlains, bridge-masters, and school-wardens respectively, as their places for the lands within their several offices should require, as by the said order and agreement, which the burgesses have ready to produce when occasion shall require, will plainly appear. So that now all pretence of the aldermen being of the council, or having any thing to do with the corporation-lands, the school-lands, or the bridge-lands, was adjudged against both by the judges and the lords of the privy council, and accordingly was wholly laid aside, till of late.

The case standing thus, and the mayor, aldermen, and burgesses of that corporation being by their burgess-oath particularly obliged that the franchises of the said town they will

maintain, sustain with their bodies, their goods, and their chattels to their power, and them not let neither for love nor dread, without regard of any man, but maintain the laws, good customs, and franchises of that town: and divers burgesses of that town being informed, about the beginning of Easter-term last, that the mayor and some of the aldermen of that town had a design to surrender the charters of that corporation, it was scarce credited by any of the burgesses, that the mayor or almost any of the aldermen would consent to do a thing so directly contrary to their burgess-oath. Yet divers burgesses of the said town considering they had taken the said oath for preserving the rights of the town, thought it but convenient, for the prevention of the ill consequences which they well knew must befall that town if their charters should be delivered up, and a new charter taken without the privy, consent, or hearing of the burgesses of that town, to order four caveats to be entered: and accordingly in Easter-term ordered two to be entered at the lord chancellor's, and two at the attorney-general's. One of which caveats in each place was against passing any new charter to the town of Nottingham without the privy, consent, or hearing of the burgesses of that town; the other against the accepting of any surrender of any charter of that town, without the like privy, consent, and hearing. Which said caveats were entered accordingly.

And so the matter rested till the 25th of July last: but upon that day the mayor called a council without giving notice what the business would be, unless it was to those of his own party and confederacy. But that he had thoughts of surrendering when he came to the hall, will be pretty manifest from what he did after the question was put to the vote, and the poll taken: there appeared at the hall the mayor and five aldermen, and two and twenty of the council, and Mr. William Toplady (who the last year, by order of Mr. Gervas Rippon, the then mayor, was sworn in as an alderman, though Mr. Sherwin, who stood in competition with Mr. Toplady, had near twice as many votes; upon which Mr. Sherwin brought his Mandamus, and the cause is yet undecided in the court of King's-bench). After some business in the hall was dispatched the mayor caused a question to be put for surrendering of the charters of that town; and though it was declared by some of the council, That the aldermen had no right to vote therein, yet the mayor caused a poll to be taken, and admitted them and Mr. Toplady as voters, save only that Mr. Alderman Edge suspended his vote, and gave it neither way. The rest voted as followeth, viz.

For surrendering the Charter.

Gervas Wild, mayor, Christopher Hall, alderman, John Parker, alderman, Gervas Rippon, alderman, William Toplady, alderman, *de facto*. William Mabbot, Edward Mabbot, William Petty, Robert Wortley, Hugh Walker, William Woolhouse, John Whiby, Thomas Lee, John Unwin.

H

Against surrendering the Charter.

William Greaves, alderman, John Greaves, Samuel Richards, coroners, Robert Green, sheriff, Huntingdon Eyre, Roger Ryley, Thomas Walker, Richard Smith, Francis Salmon, Ralph Bennet, John Sherwin, Samuel Smith, Thomas Trig, William Smith.

So that if the aldermen should be admitted to have a right to vote in the council, yet here was no majority for the surrender. But on the contrary, the aldermen having no colour of right, either by prescription, or charter, or otherwise, for the reasons aforesaid, to be of the council; it is plain, there was only the mayor and nine of the council for the surrender, and thirteen of the council against it; and consequently that the greater part of the council voted against the surrender. Nor can it be imagined that the council of that corporation (being neither settled by prescription, nor vested in by charter, but only brought in by consent and choice of all the burgesses, only for the better managery of the revenues of the corporation, and dispatch of some other ordinary affairs, and not intrusted with many rights of that town,) can pretend to any power of surrendering the charters and liberties of that town, more than any small number of burgesses. So that how this surrender of fourteen men against the vote of the greater number of the council, and will of almost all the burgesses, should be good in law, is not yet well understood. And if the putting of the town-seal to an instrument without the consent of the body corporate, should be said to be sufficient in law to give away the lands and rights of any body corporate, then any thief that can but steal the corporation-seal, will have it in his power, though he be no member of the corporation, to give up the lands and liberties thereof; which indeed would be a strange piece of law and justice to be owned in any nation that pretends to sense and honesty. Yet Mr. Mayor, all this notwithstanding, did, as soon as the said vote was over, pull out of his pocket an instrument in writing, purporting a surrender of their charters, and caused the town-seal to be affixed thereto without any further vote. The draught of the instrument, as it is commonly said, was first made at London, and thence transmitted to an honourable person in Nottinghamshire, and by his order conveyed to Mr. Mayor. But this report, if it were not for one thing, which it is believed will be proved if there be occasion, might seem not well grounded, because, as it afterwards will appear, this surrender was not thought sufficient, and so another was sealed; which yet one of the aldermen would have to be the very same, word for word, with that which was first sent up sealed to London; as if twice sealing would make that effectual which was not so by being once sealed. But it is likely he had not heard what is commonly reported, and perhaps will be proved when time serves, that the first instrument for surrendering that was sealed, was drawn so as to make

a surrender, by the right honourable the earl of Halifax and sir Leoline Jenkins.

After the said vote touching the intended surrender was over, many of the burgesses of Nottingham, considering their oath, and that there were many customs and privileges in reference to trade, which the burgesses of the corporation held only by custom and prescription; and that as some of the lands which that corporation held was by grant from some of his majesty's royal predecessors, so most of their town-lands, (which are of great annual value) were given by private persons; thought fit to ask advice of counsel in several points.

The first question proposed to counsel was, Whether if the charters were surrendered, and a new one taken, that new grant would not preserve the lands to the corporation. To which counsel replied, That if the charters of any body corporate were lawfully surrendered, then the corporation that held by such charters was dissolved; and that if they had any lands which had been given to that corporation, the heirs of those that gave those lands would, as soon as such surrender was completed, be entitled to the lands, and recover the same. And they said, Those lands which had been given to such corporation by any of his majesty's predecessors, his majesty might, if he so pleased, grant them again to the corporation; but no new charter of his could, as they conceived, give the corporation any title to those lands which had been given by private persons, or enable the corporation to keep them from the heirs of those that gave them, in case such surrender should be. And so, they say, it was resolved by the judges when the monasteries were surrendered, or dissolved; and that therefore a special act of parliament was advised to be made, and accordingly was made, to vest those lands in the king, there being no other way to hinder them from going to the heirs of those that gave them, when by surrender they had dissolved those corporations.

The second question proposed was, Whether, if the mayor and burgesses of a corporation claim any right of common by custom or prescription upon other men's lands, as is in the case of Stafford, Derby, Coventry, and many other corporations, they can surrender their charters, and yet, by any new charter to be obtained from his majesty, or by any means, preserve their right of common. To which it was answered, That if the mayors and burgesses of any corporation claim such common, and afterwards make such surrender, and so dissolve the body corporate, their prescription for common is destroyed; and though his majesty should please to incorporate them anew, yet their title to common will, as they conceive, be totally lost.

The third question was, Whether the town of Nottingham, being one of the ancientest corporations of England, and free of tolls in most places, should have the same privilege if they surrendered their charters. To which it was answered, That if the town of Nottingham

surrendered their charters, and so dissolved their corporation, then in all other places that had formerly tolls granted them, and kept their old charters, they should have toll of Nottingham men, and all such corporations as shall so surrender, notwithstanding any new charter, that can be granted them.

The last question propounded was, Whether if the mayor, or any other members of a corporation do, without the consent of the major part of the body corporate, occasion the surrender of the charters of that corporation, the particular persons that received damage by that surrender, may not have an action at law for recovery of their damages? To which it was answered, that it was no question but that every particular person that should be any ways damaged by such surrender, might by action at common law recover all his damages of those persons that occasioned the surrender. Yet it was thought advisable, as the most proper way for preventing the surrendering of the charters, and of those inconveniences and suits which might be occasioned thereby, or by the taking of a new charter if obtained by the mayor and a few of the burgesses without privacy, consent, or hearing of the rest, that the major part of the burgesses should present Mr. Mayor with their sense of his proceedings, and declare their dissent from any surrender, and accordingly a writing was drawn, and signed by betwixt three and four hundred of the burgesses, and then a fair copy made and examined with the original, and so with all the burgesses names to it that had subscribed, was by several of the burgesses, and in presence of several gentlemen of quality that were no burgesses, presented to the mayor upon the fourth day of August, as the sense of most of the burgesses of that town. The writing so presented was as followeth, viz.

To Mr. GERVAS WILD, Mayor of Nottingham.

Sir;

We whose names are hereunto subscribed, being burgesses of the town of Nottingham, and knowing or understanding that you and thirteen more of the corporation have, without the consent of the burgesses of this town, and against their will, taken upon you to agree to the surrender of the charters, liberties, and franchises of this corporation, and to cause the corporation-seal to be affixed to an instrument for making of such surrender; and being by our burgess- oath obliged to preserve as far as in us lies, all the rights and privileges of this corporation; and considering what great damage it must necessarily be to the corporation in general, and to us and every other particular burgess of the corporation, if the charters, liberties, and franchises should be so surrendered; have thought ourselves obliged, in order to prevent so great an evil, to signify these our thoughts of what you have done, and are about to do; and that many of your liberties and franchises, which are only held by custom, and not by char-

ter, will certainly be lost, if you make such surrender as you have agreed to. We do therefore hereby declare our dissent from those your proceedings; and that we neither do nor shall consent, or have consented, that any surrender of any charter, liberty, franchise, or privilege of the corporation of Nottingham should be made either by you, or any members of this corporation, or other person or persons whatsoever; and that we will by all lawful ways and means oppose and hinder the surrendering or vacating of any of the charters, rights, liberties, or privileges of this corporation; and that in case you occasion the surrender of any of the charters, rights, liberties, or privileges of this corporation, we shall expect from you such satisfaction as the law will allow us.

The burgesses were also advised to order, and accordingly did order caveats in the names of some particular burgesses, on behalf of themselves and most of the burgesses of the town, to be entered at the lord chancellor's, the lord privy-seal's and in the signet-office, against surrendering of any of the charters of that town without the privy, consent, and hearing of the said burgesses, and against passing of any new charter to that town without like privy, consent, and hearing. And the burgesses have had an account from their agent at London, that he had entered such caveats at the lord chancellor's and in the offices of the lord Conway and sir Leoline Jenkyns, it being commonly reported that the lord privy-seal had delivered up the privy-seal to the said sir Leoline.

The burgesses were further advised to petition the lord chancellor to be heard before any surrender of their charters should be accepted, or any new charter to that town should pass the broad-seal; and accordingly a Petition was drawn, and signed by above three hundred and sixty burgesses, and a copy thereof fairly engrossed, with the names of the burgesses that had subscribed, was sent and presented to the lord chancellor at Bath on Thursday the tenth of this instant August. Which Petition was in these words following, viz.

To the right honourable the Lord High Chancellor of England: The humble Petition of the Burgesses of the Town of Nottingham, whose names are hereunto subscribed, on behalf of themselves and most of the Burgesses of that Town.

Most humbly sheweth:

That the town of Nottingham being a borough by prescription, and an ancient corporation; and the burgesses of that town (who are a body corporate by the name of mayor and burgesses) having many liberties, privileges, rights, and franchises, which they hold by grant and confirmation from his majesty and his royal predecessors, and many other rights, liberties, and privileges which they hold by custom or prescription; and divers persons having given lands to that corporation of a

very great annual value: The present mayor, with three or four of the aldermen, and nine other burgesses of that corporation, have declared they design to take a new charter, and have taken upon them, without the consent of your petitioners, and most of the burgesses of that town, to agree to the surrender of the charters of that corporation; and have taken the town-seal, and affixed it to an instrument, designing thereby to make an actual and absolute surrender of all the said charters; which if they have power to effect, it will (as your petitioners are advised) not only dissolve the corporation, deprive your petitioners and other burgesses of that town of many rights, liberties, and privileges which they held by custom and prescription, cause all the lands given to that corporation to revert to the heirs of the donors, and disinherit your petitioners and other burgesses of that town of all the said lands, liberties, and privileges, which both they and their predecessors, as burgesses of that town, have inherited, and ought to enjoy, but also subject your petitioner and their freeholds against their will to such services, damages, and great inconveniences, as may be brought upon them by the contrivances of the said mayor and aldermen, in case they can obtain a new charter to pass the broad-seal without the privity, consent, or hearing of your petitioners.

Your petitioners therefore humbly pray your lordship to take into consideration the aforesaid mischiefs, damages, and inconveniences that are like to befall your petitioners and other burgesses of that town, in case such surrender should be made and accepted, and a new charter taken by the said mayor and aldermen: And that your lordship would please before such surrender be accepted, or any new charter for that town be passed the broad-seal, to grant your petitioners a day of hearing, and to order thereupon as shall be agreeable to equity and justice

And your petitioners shall ever pray, &c.

The Petition being delivered as aforesaid, and Mr. Mayor having been acquainted in manner aforesaid, by the generality of the burgesses, that they neither had consented, nor should consent to a surrender of any of the charters, rights, or liberties of the town, and the burgesses having been advised by council that no instrument for making a surrender of the charters to the earl of Halifax and sir Leoline

Jenkyns could be effectual in law: it was hoped that there would not have been any further progress in the business, at least before the burgesses were heard upon their caveats or petitions. And it was taken for granted, that no new instrument in order to any surrender could be made and sealed without calling together the council of that town; because, by custom of that town, the town-seal hath always used to be kept under the custody of three locks and keys, and not taken out but in council; and those three keys kept by three several persons, for better preventing of any indirect use of the seal. But contrary to the burgesses' expectation, and against all ancient usage, Mr. Mayor (having, as he said, received advice from London that the instrument he had sent up for surrendering the charters was not sufficient) did on Saturday the 12th of August require of the senior coroner to deliver him his key; which the coroner refusing to do, (unless, according to the custom of the town, a council was called, and should order such delivery) it seems Mr. Mayor found another way to come by the seal, if that be true which was signified in the public prints that came down to Nottingham on the 19th of August, viz. That upon the 14th of August a surrender of Nottingham charters was made to his majesty. And there is one thing which hath happened since, which gives a shrewd light what Mr. Mayor did on that 12th of August, without so much as summoning a council; for the party who by Mr. Mayor's command, as he saith, did that day force open the lock to which the coroners' key belonged, hath since confessed the fact. So that now if it should hereafter appear to be true, as those prints seem to intimate, than any instrument for surrendering of Nottingham charters to his majesty, was presented to his majesty on the 14th of August, it will scarce be a question, by what means, or how lawfully Mr. Mayor came by the seal, or how valid such surrender is like to be.

This is the true case of the burgesses of Nottingham, who are ready to make good every matter of fact, as herein stated, whenever there shall be occasion; and doubt not but to prove it, if they may either be heard upon their petition or caveats; and however question not but by the assistance of the courts of justice they shall still preserve their rights, notwithstanding all these endeavours that have been used to give up their charters and liberties.

307. Proceedings against Sir THOMAS ARMSTRONG,* in the King's-Bench, upon an Outlawry, for High Treason: 36 CHARLES II. A. D. 1684.

ON the 14th of June, 1684, sir Thomas Armstrong was brought to the bar of the Court of King's-bench at Westminster, by virtue of a Writ of a Habeas Corpus, directed to the keeper of the goal of Newgate; which

* "But if the Court lost much by the death of Holloway, whom they had brought from the West-Indies, they lost much more by their proceedings against sir Thomas Armstrong, who was surpris'd at Leyden, by virtue of a warrant that Chudleigh the king's envoy had obtained from the States, for seizing on such as should fly out of England on the account of the Plot. So the scout at Leyden, for 5,000 guilders, seized on him; and delivered him to Chudleigh, who sent him over in great haste. Armstrong in that confusion forgot to claim that he was a native of the States: for he was born at Nimeguen: and that would have obliged the Dutch to have protected him, as one of their natural born subjects. He was trusted in every thing by the duke of Monmouth: and he having led a very vicious life, the Court hoped that he, not being able to bear the thoughts of dying, would discover every thing. He shewed such a dejection of mind, while he was concealing himself before he escaped out of England, that Hambden, who saw him at that time, told me, he believed he would certainly do any thing that would save his life. Yet all were disappointed in him: for when he was examined before the council, he said, he knew of no Plot but the Popish Plot: he desired, he might have a fair trial for his life: that was all he asked. He was loaded with irons; though that was not ordinary for a man who had served in such posts, as to be lieutenant of the first troop of guards, and gentleman of the horse to the king. There was nothing against him, but what Rumsey and Shepherd had sworn of the discourses at Shepherd's, for which lord Russell had suffered. But by this time the credit of the witnesses was so blasted, that it seems the Court was afraid that juries would not now be so easy as they had been. The thing that Rumsey had sworn against him seemed not very credible: for he swore that at the first meeting Armstrong undertook to go and view the guards in order to the seizing them; and that upon a view he said at a second meeting that the thing was very feasible. But Armstrong, who had commanded the guards so long, knew every thing that related to them so well, that without such a transient view he could of the sudden have answered every thing relating to them. The Court had a mind to proceed in a summary way with him, that he should by the hurry of it be driven to say any thing that

writ was on his majesty's behalf moved for on Thursday last by Mr. Attorney-General.

The return of the writ was read by the clerk of the crown, by which it appeared he was in the custody of the keeper of Newgate, by a

could save him. He was now in an outlawry: but though the statute was express, that if an outlawed person came in at any time within the year, he was to have a trial notwithstanding his outlawry. It was pretended in answer to this, that he not coming in, but being taken, had not a right to the benefit of the statute. But there were several months of the year yet to run. And since a trial was a demand founded on natural justice, he insisted on it. And when he was brought to the King's-bench bar, and asked what he had to say why sentence should not be executed, he claimed the benefit of the statute. He said, he had yet, when he was taken, several months to deliberate upon his coming in: and the seizing on him before his time was out, ought not to bar him a right that the law gave him. He also mentioned Holloway, to whom a trial was offered the former term. And, since it was a point of law, he desired council might be heard to argue it. Jefferies rejected all this: He said, the king might either offer a trial or not, as he saw cause: and he refused to hear council: which being demanded upon a point of law, the denying it was thought a very impudent piece of injustice. And when Armstrong insisted, that he asked nothing but the law, Jefferies in his brutal way said, he should have it to the full; and so ordered his execution within six days. And the law was executed on him with the utmost rigor: for he was carried to Tyburn in a sledge, and was quartered, and his quarters were set up. His carriage, during his imprisonment and at his death, was far beyond what could have been imagined. He turned himself wholly to the thoughts of God, and of another state; and was praying continually. He rejoiced, that he was brought to die in such a manner. He said, it was scarce possible for him to have been awakened into a due sense of his sins by any other method. His pride and his resentments were then so entirely conquered, that one who saw him said to me, that it was not easy to think it was the same person whom he had known formerly. He received the Sacrament; and died in so good a temper, and with so much quiet in his mind, and so serene a deportment, that we have scarce known in our time a more eminent instance of the grace and mercy of God. Armstrong in his last paper denied, that he ever knew of any design against the king's or the duke's life, or was in any plot against the

warrant from the honourable Sidney Godolphin, esq. one of his majesty's principal Secretaries of State; which Warrant followeth in *hæc verba*;

Sidney Godolphin, esq. of his majesty's most hon. Privy Council, and principal Secretary of State.

"These are in his majesty's name to authorize and require you to receive into your custody, from on board his majesty's yacht the

government. There were no remarks published on his speech, which it was believed the Court ordered: for they saw how much ground they had lost by this stretch of law, and how little they had gained by his death. One passage in it was the occasion of their ordering no such reflections to be made on it, as had been made on the other speeches. The king had published a story all about the Court, and had told it to the foreign ministers, as the reason of this extreme severity against Armstrong: he said, that he was sent over by Cromwell to murder him beyond sea, and that he was warned of it, and challenged him on it; and that upon his confessing it he had promised him never to speak of it any more as long as he lived. So the king, counting him now dead in law, thought he was free from that promise. Armstrong took this heavily: and in one paper which I saw, writ in his own hand, the resentments upon it were sharper than I thought became a dying penitent. So, when that was represented to him, he changed it: and in the paper he gave the sheriffs he had softened it much. But yet he shewed the falshood of that report: for he never went beyond sea but once, sent by the earl of Oxford, and some other cavaliers, with a considerable present to the king in money, which he delivered; and brought back letters of thanks from the king to those who made the present. But Cromwell having a hint of this clapt him up in prison, where he was kept almost a year. And upon the merit of that service, he was made a captain of horse soon after the restoration. When Jefferies came to the king at Windsor soon after this trial, the king took a ring of good value from his finger, and gave it him for these services: the ring upon that was called his blood stone. The king gave him one advice, which was somewhat extraordinary from a king to a judge; but it was not the less necessary to him: the king said, it was a hot summer, and he was going the circuit, he therefore desired he would not drink too much." Burnet, 577.

"June 11th 1684. Sir Thomas Armstrong, one of the late fanatic plotters, and who stood outlawed for High-Treason, having been taken the last week at Leyden in Holland, by order of the States, was brought in one of his majesty's yachts, and committed last night to Greenwich, and was this morning committed to Newgate.

Catherine, captain Davies commander, the person of sir Thomas Armstrong, kt. outlawed for high-treason, and him safely to keep in his majesty's prison of Newgate, till his majesty's pleasure be farther known. And for so doing, this shall be your warrant. Given under my hand and seal at Whitehall, this 10th day of June 1684. In the 36th year of his majesty's reign.

S. GODOLPHIN,
"To Captain Richardson, Keeper of his Majesty's Prison of Newgate."

"Sir Thomas Armstrong, when he was taken, had in his pocket a bill of exchange charged by one Hayes, a merchant here, payable there; on which Mr. Hayes is committed to Newgate for holding correspondence with traitors.

"14th. Sir Thomas Armstrong was brought from Newgate to the King's-bench bar, where being asked what he could say why execution should not be awarded against him, he standing outlawed and so attainted upon an indictment of High-Treason, for conspiring the death of the king, &c. He said he was beyond sea at the time of the outlawry, which the court telling him they could take no notice of: he then desired that he might come to his trial, and that his majesty would grant him the same favour he had offered to Holloway; but the court told him that belonged to his majesty, not to them; then he said he was within the statute made 5 & 6 E. 6, c. 11, and demanded his trial, he being within the statute, and desired council to argue the same; but the court being of another opinion would allow him no council, but made a rule for his execution on Friday next at Tyburn.

"18th. The same day, also, sir Thomas Armstrong's daughter, petitioned the court of King's-bench that her father might have a Writ of Error allowed him to reverse his outlawry and so come to his trial; but the court told them this was no proper place to move in; they must go into the chancery for it; but there they had been before, and the lord keeper was pleased to deny it.

"20th. Sir Thomas Armstrong was drawn upon a sledge with a very numerous guard to Tyburn; where being come Dr. Tension prayed with him, who seemed very penitent; he prayed himself also very fervently, which done, he delivered a paper to the sheriffs, and submitted himself to the sentence; after he had banged about half an hour, he was taken down and quartered according to his sentence, and his quarters were brought back in the sledge to Newgate, to be disposed of as his majesty shall direct.

"Sir Thomas Armstrong's quarters are disposed of; a forequarter is set on Temple bar, his head on Westminster, another quarter is sent down to the towri of Stafford, for which he was a Parliament-man. Quære, how many quarters of the Popish Traitors were set up, and quære, which of these fanatic plotters were not set up.

"July 1st. Came out the Paper that sic

L. C. J. (Sir George Jefferies) What would you have, Mr. Attorney?

Att. Gen. (Sir Robert Sawyer) Have you the Outlawry there?

Cl. of Cr. Yes, Sir, here it is.

Att. Gen. That which I humbly pray, my lord, is an award of execution for the king against sir Thomas Armstrong upon the outlawry.

L. C. J. First, we must file this return.

Att. Gen. I pray it may be filed.

L. C. J. Let it be filed: now, what do you desire, Mr. Attorney?

Att. Gen. My lord, I pray an award of execution upon the outlawry.

L. C. J. Arraign him upon the outlawry.

Cl. of Cr. Thomas Armstrong, hold up thy head. [Which he did.] Thou hast been indicted in London, by the name of Thomas Armstrong, of London, knight, of high-treason, for conspiring against the king's majesty's life, and the government: for not appearing to plead and try that indictment by due process of law issued against thee, upon that indictment thou standest outlawed, and thereby attainted of the same high-treason. What hast thou to say for thyself, why execution should not be awarded against thee upon that attainder according to law?

Sir T. Armstrong. My lord, I was beyond sea at the time of the outlawry; I beg I may be tried.

L. C. J. That is not material at all to us; we have here a record of an outlawry against you, sir Thomas.

Sir T. Armstrong. I desire to be put upon my trial, my lord.

L. C. J. We cannot allow any such thing; we have nothing to do upon this record before us, but to award execution. Captain Richardson, which are your usual days of execution?

Captain Richardson. Wednesdays and Fridays, my lord.

Mrs. Matthews. Here is a statute, my lord.

L. C. J. What is the matter with that gentleman?

Sir T. Armstrong. Hold your tongue. My

Thomas Armstrong delivered to the sheriffs at the time of his execution, wherein he denies the being of a spy to Cromwell for the seizing the king when in Flanders; he inveighs against the hardness of his case at the King's-bench bar, being denied his trial; and does absolutely deny his being concerned in any plot against the king's life or for alteration of the government, as also the story of the lord Howard's about him; he professed himself to die in the reformed religion, and in the Communion of the Church of England, concluding with his prayers for the king and these poor nations.

"His majesty hath been pleased as a signal favour to the lord chief justice Jefferys, to take a diamond ring off his finger, and present it to his lordship." Narcissus Luttrell's MS. "Brief Historical Relation," &c. in the College of All Souls, Oxford.

lord, there is a statute made in the 6th year of Edward the 6th, which I desire may be read.

L. C. J. To what purpose would you have it read, sir Thomas?

Sir T. Armstrong. It giveth the prisoner, or person outlawed for high-treason, a year's time to reverse the outlawry, if he were beyond sea. I desire it may be read.

L. C. J. Ay, let it be read. Where is it, do you say?

Sir T. Armstrong. It is in the 6th year of Edward 6.

Mrs. Matthews. Here is a copy of it— [Shewing a paper.]

L. C. J. Why, how now? We do not use to have women plead in the Court of King's-bench; pray be at quiet, mistress.

Sir T. Armstrong. Pray, hold your tongue. My lord, I could not come to alledge this before, because I have been a close prisoner, and nobody permitted to come at me. I desire counsel to be assigned me at this bar.

L. C. J. For what, sir Thomas?

Sir T. Armstrong. To argue whether this outlawry ought not to be reversed.

L. C. J. Read the statute he desires.

Att. Gen. Ay, let it be read. Sir Thomas will not find it to his purpose.

Cl. of Cr. What Chapter is it?

L. C. J. You may easily find it about outlawries for treason.

Cl. of Cr. Reads. 'Provided always, and be it enacted by the authority aforesaid, That if 'the party'—

Att. Gen. Read the clause before that, sir Samuel.

Cl. of Cr. Reads. 'And that all process of 'outlawry hereafter to be made and had within 'this realm, against any offenders in treason, 'being resident or inhabitant out of the limits 'of this realm, or in any the parts beyond the 'sea, at the time of the outlawry pronounced 'against them, shall be as good and effectual 'in the law, to all intents and purposes, as if 'any such offenders had been resident and 'dwelling within this realm, at the time of 'such process awarded and outlawry pronounced.'

L. C. J. Read on the next paragraph.

Cl. of Cr. Reads. 'Provided always, and be it enacted by the authority aforesaid, that if 'the party so hereafter to be outlawed, shall 'within one year next after the said outlawry 'pronounced, or judgment given upon the said 'outlawry, yield himself unto the chief justice 'of England for the time being, and offer to 'traverse the indictment or appeal, whereupon 'the said outlawry shall be pronounced as is 'aforesaid: that then he shall be received to 'the said traverse, and being thereupon found 'not Guilty by the verdict of 12 men, he 'shall be clearly acquitted and discharged of 'the said outlawry, and of all penalties and forfeitures by reason of the same, in as large 'and ample manner and form, as though no 'such outlawry had been made, any thing

'herein contained to the contrary in any wise notwithstanding.'

Att. Gen. Sir Thomas, I suppose, now will shew he yielded himself to your lordship.

L. C. J. This is the first time I have seen sir Thomas.

Sir T. Armstrong. My lord, I have been a prisoner, and the year is not yet out; I now render myself.

Att. Gen. Before he went out of England he might have rendered himself, and been tried, if he pleased.

Sir T. Armstrong. I am within the benefit of the statute, I conceive, my lord.

L. C. J. We think otherwise, sir Thomas.

Sir T. Armstrong. I think, my lord, the statute is plain in the case.

L. C. J. We are of another opinion than you are; it doth not reach your case.

Sir T. Armstrong. The year is not yet out, and therefore I come time enough now; and here I am, and desire the benefit of this act.

L. C. J. Sir Thomas, you should have rendered yourself to me.

Sir T. Armstrong. I do it now, my lord, and the year is not yet out.

L. C. J. We cannot take notice of that; we have nothing but the outlawry, and you did not render yourself according to that act, but are brought as a prisoner before us now.

Sir T. Armstrong. My lord, I beg I may have counsel* to plead for me in this case.

L. C. J. For what reason? we are of opinion it is not a matter of any doubt. For you must not go under the apprehension that we deny you any thing that is right; there is no doubt nor difficulty at all in the thing.†

* "Here the prisoner was denied counsel upon a point of law, in which case it was never pretended but he is intitled to it." Former Edition.

† "King and Johnson, Mich. 2. Geo. 2. B. R. The prisoner was allowed to be within the benefit of the Proviso, and though he had escaped out of prison, and was retaken in England, was admitted to prove himself beyond sea at the time of the outlawry; and upon proving that he was then at Middleburgh in Zealand, his outlawry was reversed, and he was admitted to a Trial, and acquitted: Armstrong's case was declared a precedent not fit to be followed." Former Edition.

This Case of Johnson is thus reported by Mr. Justice Foster, Crown Law, 46.

"Michaelmas, 2 Geo. 2. B. R.

"The Case of ROGER JOHNSON, cited twice in Mr. Ratcliffe's Case, was thus:

"The defendant stood outlawed upon an indictment for High Treason in diminishing the current coin of the kingdom, and was taken and committed to Newgate. Being now brought to the bar by Habeas Corpus, he offered to surrender himself to the chief-justice, pursuant to the act of the 5th and 6th E. 6. c. 11. (being within the year) and to traverse the

Sir T. Armstrong. Methinks my lord, the statute is plain.

L. C. J. So it is very plain that you can have no advantage by it. Captain Richardson, you shall have a rule for execution on Friday next.

Sir T. Armstrong. I would only take notice of one thing, my lord, may I speak?

indictment; alleging that he was at Flushing beyond the seas at the time the outlawry was pronounced.

"The chief justice said, we cannot refuse to accept his surrender; he must be remanded to Newgate; and let a special entry be made that he offered to surrender, and to traverse the indictment.*

"At another day in the same term the defendant was again brought to the bar, and he tendered a plea in parchment, 'That he was out of the realm on the 8th of February' when the outlawry was pronounced,' and pleaded over to the treason; which plea was received. The attorney-general prayed that he might have a copy of the plea, and three days time to demur or join issue; which was granted; the court declaring that the attorney might have joined issue *instanter*; and that on the trial of such issue the prisoner could not challenge any of the jury without cause. The prisoner prayed counsel and had four assigned.

"At another day in the same term the prisoner being at the bar, by leave of the court, withdrew his plea; and pleaded the substance of it, viz. his being beyond sea on the 8th of February, *ore tenus*. The attorney-general *ore tenus* replied, 'I say he was within the realm on the 8th of February, and I traverse his being then out of the realm.' Issue being thus joined, the court awarded a *venire* returnable *instanter*, and the sheriff, sitting the court, returned a jury. Then the prisoner's counsel opened the plea and case, and called their witnesses; and the attorney-general insisting that the witnesses should be examined apart, they were so examined; as likewise were the witnesses produced on the part of the crown.

"The prisoner's counsel managed the whole in his behalf, and three of them were heard on the reply; and the jury, after a short recess, returned with their verdict, 'That the prisoner was out of the realm on the 8th of February.'

"Then the prisoner was arraigned on the indictment, to which he pleaded not guilty; and the attorney joined issue, and prayed a *venire* returnable the first return of the next term; which the court awarded; and the prisoner was remanded to Newgate."

"This note of Johnson's case was communicated to me by my good friend the late Mr. Justice Abney. The case is reported by serjeant Barnardiston in his first volume, and by sir John Strange.

* "This justice was refused to sir Thomas Armstrong in a like case."

L. C. J. Ay, Sir Thomas, very freely what you please.

Sir T. Armstrong. A little while ago there was one in this place had the benefit of a Trial offered him,* if he would accept of it; that is the thing I desire now, and I thank God, my case is quite another thing than his, I know my own innocence; and I desire to make it appear by a trial.

L. C. J. Sir Thomas Armstrong, you may go away with what opinion you please, of your own innocency: but you are here attainted by out-lawry. That which was done to him you speak of, was the grace and mercy of the king, and he may, if he please, extend the same grace and favour to you; but that is not our business: we are satisfied that according to law we must award execution upon this outlawry.†

Mrs. Matthews. My lord, I hope you will not murder my father; this is murdering a man.

L. C. J. Who is this woman? Marshal, take her into custody. Why, how now? Because your relation is attainted for high-treason, must you take upon you to tax the courts of justice for murder, when we grant the execution according to law. Take her away.

Mrs. Matthews. God Almighty's judgments light upon you!

L. C. J. God Almighty's judgments will light upon those that are guilty of high-treason.

Mrs. Matthews. Amen, I pray God.

L. C. J. So say I. But clamours never prevail upon me at all: I thank God, I am clamour proof, and will never fear to do my duty. [Then she was carried away.]

Att. Gen. My lord, I would only acquaint you with one thing, in reference to what *sir Thomas Armstrong* has said: the king did indulge *Holloway*, that he speaks of, it is true, so far as to offer him a trial, and his majesty, perhaps might have some reason for it, but the prisoner truly deserves no sort of indulgence or mercy from the king. For it has appeared by the evidence that has been given of this late horrid conspiracy, that after the disappointment that was given by the providence of God, by the fire at *New-Market*, to the meeting at the *Rye*; this gentleman was one of the persons that actually engaged to go upon the king's hasty coming to town, and to destroy him by the way as he came to town. And this appears upon a full and clear evidence, as positively testified as any thing can be.‡ And when he was taken beyond seas, letters of communica-

* See the Case of *Holloway*, p. 1, of this volume.

† See in this Collection, *Mr. Erakine's* observations on this Case in his Address to the Jury in *Hardy's Case*, A. D. 1794. See, too, the Case of *Purefoy* as there mentioned by *Mr. Erakine*:

‡ "If this had been so evidently clear, it can scarce be imagined they would have been so backward to have waved the outlawry, and let him have his trial; nothing but a conscious-

tion with foreign ministers with other people were taken about him, and will be—

L. C. J. We are not to meddle at all with the evidence, *Mr. Attorney*; that is not our business: here is an outlawry; upon this outlawry he is attainted; we have nothing more to do, but to do the duty of the court upon this record before us, to award execution upon that attainer, and we must give a rule for it. If the king will be pleased to do for *sir Thomas Armstrong* what he did for *Holloway*, and indulge him a trial, and wave the outlawry, with all our hearts. We are not disposers of his grace and favour, but the ministers of his justice. If the king will pardon him, he may; that is not our business; but all we have to do upon what is before us, is to consider the record, and what the prisoner says against awarding of execution. We have considered whether this be a yielding within the proviso of this statute, and we think it is not, nor can be, by any means.

Sir T. Armstrong. My lord, I am within the statute. I was outlawed while I was beyond sea, and I come now here within the twelvemonth. That is all I know, or have to say in this matter.

L. C. J. We think quite the contrary, *Sir Thomas*.

Sir T. Armstrong. When I was before the council, my lord, they ordered that I should have counsel allotted me, but I could have no benefit by that order; for when I was taken, I was robbed of all the money I had, and have not had one penny restored to me, nor any money since; I know not whether the law allows persons in my condition to be robbed and stripped.

L. C. J. I know nothing at all of that matter, *sir Thomas*.

Sir T. Armstrong. My lord, I know lawyers will not plead without money, and being robbed, I could not have wherewithal to fee them.

L. C. J. *Sir Thomas Armstrong*, you take the liberty of saying what you please; you talk of being robbed, nobody has robbed you that I know of.

Sir T. Armstrong. Nobody says you do know of it; but so it is.

L. C. J. Nay, be as angry as you will, *sir Thomas*, we are not concerned at your anger. We will undoubtedly do our duty.

Sir T. Armstrong. I ought to have the benefit of the law, and I demand no more.

L. C. J. That you shall have by the grace of God. See that execution be done on Friday next, according to law. You shall have the full benefit of the law.

Then the prisoner was carried back to *New-gate*, and afterwards, upon a Petition, the Court ordered *Mrs. Matthews* to be released out of custody without fees.

ness of the contrary could, probably, have prevailed to put so strained a sense on the statute; in order to deprive him of a Trial." Former Edition.

The sheriffs of London and Middlesex, about nine o'clock in the morning, coming to Newgate, and demanding their prisoner, he was forthwith delivered to them, and put into a sledge, and drawn to the place of execution, attended by a numerous guard, and as great a number of spectators, of all degrees and qualities, as have been seen on such occasions.

He employed the time he was drawing to Tyburn in reading "The Whole Duty of Man," till he came within sight of the gallows, and then he laid it by, and with lifted up hands and eyes, addressed himself to Heaven, till he came beneath the tree, where he remained about a quarter of an hour in the sledge; before he ascended the cart that stood ready for him, he desired the sheriff to admit Dr. Tension to come to him: and having delivered a paper to the sheriff, the doctor kneeled down with the prisoner, and prayed with him about a quarter of an hour, during all which time the prisoner preserved a becoming and heroic countenance, little daunted with the terror of that fate he was in view of: but rising from his devotions, he pulled off his cravat and hat, which he gave to his servant who attended him, and had followed him by the sledge-side, when kneeling down himself, he prayed for a short time with fervency and devotion, begging pardon of his God for those manifold and crying sins he had been too often guilty of, and concluded with a resignation of himself to the God of Heaven and earth, before whose judgment seat he was forthwith to appear, desiring that the whole world would forgive him, with whom he hoped he died in peace and charity. Having thus ended these devotions, he again stood up, and putting off his periwig, he had a white cap delivered to him, which he put on; and being soon after tied up, the chief of his discourse was addressed to a gentleman who stood by him; and after a short space, holding up his hands, he again renewed his prayers; his visage little changing all the time, till the very moment the cart drew away; the executioner having pulled the cap over his eyes, he continued his prayers all the time, and even whilst he hung, as long as life was in him, and he had the command of his lips; after he had hung about half an hour, and the executioner had divested him of his apparel, he was cut down according to his sentence, his privy members burnt, his head cut off, and shewed to the people as that of a traitor, his heart and bowels taken out, and committed to the flames, and his body quartered into four parts, which with his head was conveyed back to Newgate, to be disposed of according to his majesty's pleasure; and were afterwards publicly exposed.

The substance of the Paper delivered to the sheriff was, "That he thanked Almighty God, he found himself prepared for death, his thoughts set upon another world, and weaned from this; yet he could not but give so much of his little time as to answer some calumnies,

and particularly of what Mr. Attorney accused him of at the bar.

That he prayed to be allowed a trial for his life, according to the laws of the land, and urged the statute of Edward 6th, which was expressly for it; but it signified nothing, and he was with an extraordinary roughness condemned and made a precedent; though Holloway had it offered him, and he could not but think all the world would conclude his case very different, else why was it refused to him?

That Mr. Attorney charged him for being one of those that were to kill the king. He took God to witness, that he never had a thought to take away the king's life, and that no man ever had the impudence to propose so barbarous and base a thing to him; and that he never was in any design to alter the government.

That if he had been tried, he could have proved the lord Howard's base reflections upon him to be notoriously false.—He concluded, That he had lived, and now died of the Reformed Religion, a Protestant in the communion of the church of England, and he heartily wished he had lived more strictly up to the religion he believed: That he had found the great comfort of the love and mercy of God, in and through his blessed Redeemer, in whom he only trusted, and verily hoped that he was going to partake of that fulness of joy which is in his presence, the hopes whereof infinitely pleased him. He thanked God he had no repining, but cheerfully submitted to the punishment of his sins: he freely forgave all the world, even those concerned in taking away his life, though he could not but think his sentence very hard, he being denied the laws of the land."

These Proceedings were afterwards enquired into, and censured as illegal by the House of Commons in 1689.*

Martis, 12 November, 1689.

A Petition of the lady Armstrong and her daughters, was read; whereupon a Committee was appointed to examine the matter, and make their report to the House.

"Resolved;

"That it be an instruction to the Committee, That they examine who were the judges that gave the sentence against sir Thomas Armstrong, and who were the prosecutors of him; and who had his estate; and how the petitioners may have reparation: and also to examine what proceedings were in order to a writ of error by him desired, and how it came to be denied, and by whom: And they are to make their report with all convenient speed."

Martis, 19 November, 1689.

Mr. Chrisly reported from the Committee to whom the Petition of the lady Armstrong, and the daughters of sir Thomas Armstrong was referred; an account of the whole pro-

* See 5 Cobb. Parl. Hist. 445, 516.

cedings against him; and that thereupon they had come to these Resolves,

1. "That sir Thomas Armstrong's plea ought to have been admitted, according to the statute of Edward 6, and that the execution of him upon the attainder by outlawry, was illegal, and a murder, by pretence of justice.

2. "That the executors and heirs of sir Thomas Armstrong, ought to have a reparation of their losses out of the estates of those that were his judges and prosecutors.

3. "That a Writ of Error for the reversal of a judgment in felony or treason, is the right of the subject, and ought to be granted at his desire, and is not an act of grace or favour; which may be denied or granted at pleasure."*

To all which Resolves the House agreed.

"Resolved,

"That leave be given to bring in a bill to reverse the attainder of sir Thomas Armstrong, and to make reparation to his widow and children, out of the estates of the judges and prosecutors: and the same to be without fees."

Monday the 20th of January, 1689.

Mr. Chrisly reported from the Committee, to whom the bill for the annulling the Attainder of sir Thomas Armstrong was recommended; some amendments to the bill; as also who were his prosecutors; and also what losses sir Thomas Armstrong's family had sustained, by reason of the attainder; and thereupon it was resolved,

"That sir Richard Holloway, sir Francis Wythens, the executors of the late lord Jefferies, and of the late justice Walcot, Mr. Graham and Mr. Burton, do attend the House on Saturday morning next, to answer to such matters, as are charged against them touching the proceedings against sir Thomas Armstrong."

Then Mrs. Matthews, sir Thomas Armstrong's daughter, was called in, and examined what she knew of the prosecution against her

* See Salk. 504, and the books there cited in Serjeant Wilson's edition, *contr.* S. C. Skinn. 195. 3 Mod. 47; in the former of which books, it is said, 'This seems to be a case of the first instance, et durus sermo.' See, too, Holloway's Case, p. 1. of this Volume, and the cases of Ratcliffe and Cameron, and also East's Pleas of the Crown, as there cited.

† "The vast learning and ability of sir Robert Sawyer," says Mr. Hargrave, (Preface to lord Hale's Treatise on the Jurisdiction of the Lords' House or Parliament, cxli, Note) "are sufficiently testified by his wonderfully profound and extensive argument for the crown in the great London Quo Warranto case in the reign of Charles the second. By thus referring to that argument, it is not meant in any degree to intimate any impression as to the real law of that famous case. The transitions of sir Robert Sawyer's life as a member of parliament and lawyer are particular. In this great struggle

father; and sir Robert Sawyer † (then Attorney-General) being named by her, as one of the prosecutors; after she was withdrawn, he was heard in his place to what was objected against him, and then he withdrew, and upon debate of the matter, it was resolved, "That sir Robert Sawyer's name be put into the Bill,

of the Commons about appellant jurisdiction over equity he took a decisive part against the claims of the Lords. About five years afterwards and when he had been Speaker of the Commons, he was made attorney general, and in that office so conducted the state prosecutions during the latter part of the reign of Charles the second and for some years of the reign of his bigotted and unfortunate successor, as to render himself very unpopular if not odious. But a few months before the Revolution, sir Robert, having refused to support the dispensing power [See the Case of sir Edward Hale's, in this Collection, A. D. 1686] claimed by king James, was removed from office: and then he was singled out as one of the dounsel for the bishops on their trials, [See their Case in this Collection, A. D. 1688,] and acquitted himself with distinguished ability. See 1. Burn. Hist. fol. ed. 742. In the Convention Parliament, he was zealous against James; and in one of the debates previous to the vote of Abdication, even went the length of saying 'in all I have read I never met, in so short a reign, with the laws so violated and the prerogative so stretched,' 5 Cobb. Parl. Hist. 48. When the Revolution was accomplished, there seemed to be a prospect, that his great legal and parliamentary abilities would raise him again into some high official situation in the law. But his rivals were eager to take advantage of his former conduct: and his harsh proceedings against sir Thomas Armstrong, who was executed on an outlawry for high treason notwithstanding all the earnest and pitiable efforts of his lady and her friends to obtain a writ of error to reverse the judgment, the legality of which was most apparently questionable, soon gave the opportunity. A petition of lady Armstrong and her daughters was presented to the House of Commons; and the result was implicating sir Robert Sawyer as the leader of the prosecution, and in respect of it he was expelled the House of Commons. It is observable, that this petition of lady Armstrong produced a Resolution of the House of Commons, 'that a Writ of Error for the reversal of a judgment in felony or treason is the right of the subject and ought to be granted at his desire, and is not an act of grace or favour, which may be denied or granted at pleasure.' This Resolution passed the 19th Nov. 1689, which was about two months before sir Robert's expulsion; and it seems from Mr. Grey's account of the debates on that occasion, as if his coarse behaviour, on declining to assist the granting of the Writ of Error, was one of the grounds. But on the other hand it should be remembered on his behalf, that the chief wit-

as one of the prosecutors of sir Thomas Armstrong."

Resolved, "That sir Robert Sawyer be expelled the House for the same."

Saturday the 25th of January, 1689.

The House being acquainted, That according to their order, sir Francis Wythens, sir Richard Holloway, Mr. Graham, and Mr. Burton, attended at the door, they were severally called in, and examined, touching the Prosecution and Proceedings against sir Thomas Armstrong.

And also the executors of the late lord Jefferies, that were attending at the door, were likewise called in, and asked what they had to say, why reparation should not be made out of the lord Jefferies's estate, to the said sir Thomas Armstrong's family.

No persons appearing as Executors to the late justice Walcot; the House was acquainted that he died intestate, and had not left an estate sufficient to pay his debts.

After the persons before-mentioned were heard and withdrawn, Mr. Blaney was called in, who gave the House an account of the proceedings in the court of King's-bench, upon the awarding execution against sir Thomas Armstrong.

And then the House proceeded upon the amendments made by the Committee to the bill, for annulling the Attainder of sir Thomas Armstrong: and after having inserted the name of sir Robert Sawyer, as a prosecutor, and resolved; That the sum of five thousand pounds should be paid by the judges and prosecutors, to sir Thomas Armstrong's lady, and children, as a recompence of the losses they had sustained by reason of his attainder, the bill was recommitted (upon the debate of the House) to the same Committee.

This bill not passing, the Attainder stood in force till 6 William and Mary, when it was reversed upon a Writ of Error in the King's-bench; for that the record did not mention where the court of Hustings were held, the words *pro Civitate London* being omitted. 4 Mod. Rep. 366.

A COPY of the PAPER delivered to the Lord-Keeper NORTH, the Lord-Chief-Justice JEFFREYS, and Mr. ATTORNEY-GENERAL, by the Lady ARMSTRONG, on the behalf of her husband Sir THOMAS ARMSTRONG.

My Lord;

I am informed, That by the common law of

ness examined against him admitted, that he did not demand execution of sir Thomas till the judges had declared themselves, and that as to the Writ of Error he said it was not in his power to grant a Writ of Error, but that the king or lord keeper must be applied to by petition."

England, any man that was outlawed in felon or treason, might bring a writ of error to reverse his outlawry; which was to be granted 'ex debito justiciæ;' though it may be, th manner for suing for such a writ of error to the king might be by way of petition (as in a Petition or Remonstrance de droit for lands, &c. and so it was resolved in Ninian Melvin's case Co. 4 Inst. 215.

Next, by the common law, if any man were in England at the time of the exigent awarded and went out of the realm after that, and before the outlawry pronounced, he could never assign that for error, that he was beyond sea at the same time of the pronouncing of the outlawry; and the reason is, because he was here at the time of the awarding of the exigent and might reasonably have notice of it.

On the other side, If any were out of England during the whole process and pronouncing of the outlawry, it was never yet a doubt but that was an error, and might be assigned for error, either by the party or his heir, at the common law, and so continues to this day and was, not long since, adjudged in O'Kerny's case, the Irishman, who came in about two years after the outlawry.

Then comes the statute of 5 and 6 Edw 6. cap. 11. and enlarges the law for the benefit of the outlawed person, and gives him liberty to assign for error, that he was beyond sea at the time of the outlawry pronounced; which he could not do by common law, before the statute; and so continues.

Then comes the proviso, and says, That he must come in within a year, and render himself, to be entitled to the benefit of that act; which was to assign for error, that he was beyond sea at the time of the outlawry pronounced.

So that, my lord, upon this short state of the law, and my husband's case, he being beyond sea all the time of the process, and at the time of the outlawry pronounced, it is conceived he is well entitled to assign this for error, at the common law, without any aid of the statute, though the proviso in that statute should be ruled against him; which (with submission) is the opinion of many learned persons, in the law, that he is within the intent and meaning of that proviso, for many reasons too long to trouble your lordship with now.

Therefore I do hope that this case of my husband's being the first case that any man was executed upon an outlawry (that did not desire it) may have that weight with your lordship that it deserves: and do hope that your lordship will so advise the king in matter of law (whose counsel you are), that my husband may have a writ of error granted him, and counsel assigned him to argue these points, as by the law has been allowed to criminals in capital cases, with whatsoever else shall appear upon the record of outlawry produced, which as yet my husband, or any for him never saw.

The following is Roger North's defence of his brother the Lord Keeper's refusal to grant the writ of error :

"Of a like nature with this [an application for a mandatory writ requiring Chief Justice Saunders to sign a bill of exceptions tendered to him at the trial of Pilkington Shute and others for a riot in London See the Case, vol. 9, p. 187, of this Collection,] was another application to the great seal for a fiat that a writ of error might issue to reverse an outlawry against sir Thomas Armstrong. The law is, that if a man, outlawed for high treason, renders himself within a year, he may have the benefit of a writ of error to reverse the outlawry, and so take his trial; otherwise not: and an outlawry, in such case, while it stands, is a complete attainder, as if tried and attain'd by verdict and judgment. Armstrong fled into Holland, and was outlawed for the Rye Plot treason. Afterwards, within the year, he was taken up in Holland and brought into England, and, being opposed as to what he had to say for himself why execution should not be awarded, he insisted that, being present here within his year, he ought to have a writ of error, and be admitted to plead. But the judges were of opinion that being brought in by force, against his will, was not a rendering himself within the statute; and thereupon he was executed. Pending the question, application was made to his lordship for a writ of error; and, examining into the matter, his lordship found that writs of error, to reverse outlawries in treason, had never been made out without a warrant from the attorney-general; for it is not a writ of right, but of favour: and it could not be demanded at the great seal otherwise; nor had the seal a warrant without a fiat from the attorney-general. But besides, the matter of right depended before the justices of oyer and terminer; and the writ would follow, or not, upon their determination: for which reason, it was impertinent to come to the great seal about it. But then, and afterwards, a clamour was raised and ventilated abroad, as if the man had been hanged for want of a piece of common justice at the great seal; and, after the Revolution, divers warm members began to open about it. For which reason a paper was framed, and put into the hands of some members, wherein it was thought fit to represent farther, that, 1. It is the office of the cursor to make out writs of error in criminal cases, when the usual and proper warrants are brought to them. And the lord keeper's fiat never was, and, in that case, would not have been a warrant to the cursor for such writ. Wherefore the refusal of it lay not upon the lord keeper. 2. The application to the great seal for special writs must be either by motion in open court, or by petition; which being granted, a fiat is wrote and signed upon it; and that remains in the offices, and is the warrant for farther proceeding; else, it is delivered out unanswered; which is the refusal to grant what is desired in the petition. And no such application was

ever made in that case. 3. An oral application in private, is not to be regarded, because there is no certainty of what is either asked or denied. Business, of that kind, is not trusted to memory; but must be in writing, because the lord keeper is not to solicit any man's suit at his instance. He may direct if he thinks fit, but is not bound. Suitors must follow in the proper offices; and it was never heard that such suit was made to the lord keeper, but from the person whose case it is. There was reason to endeavour a right understanding at that time, when committees of both Houses apart were appointed to enquire into the foregoing proceedings. That of the House of Lords was called the Committee of Murther. But after all methods of enquiry that could be taken upon oath or otherwise, no blame was found in any judge or minister in the time of king Charles 2. Which, as has been touched already, is a vindication that few ages, put to such a trial, could hope for."

A Copy of the PAPER delivered by Sir THOMAS ARMSTRONG to the Sheriff.

I thank Almighty God, though I have had but a short time allowed me, I find myself prepared for death, and my thoughts set on another world; and I trust in God's mercy, I am well weaned from setting my heart on this; yet I cannot but give so much of my little time, to set down in writing my answers to some calumnies raised since my close imprisonment, as well as what Mr. Attorney accused me of at the bar. I was told, a very great person said I was a spy of Cromwell's. I was sent from England by the best and considerabest friends the king had then, with bills of exchange, and letters of very great importance to his majesty at Brussels; I appeal to his majesty if I delivered them not safe, and his answer to them, when I returned: Which I had not been above six days but I was clapped up a close prisoner in the Gatehouse, and in extreme danger of my life for that journey. Before this, I had been a year in Lambeth-house a prisoner; and after a prisoner in the Tower, when the usurper died, and near starving in every one of them: very ill treatments for a spy and a pensioner! My lord of Oxford and many others of quality, will I think, testify my innocence in this point. I protest, before God I was never a spy or pensioner to Cromwell, or any other man. On Saturday last I was brought down to the King's-bench bar, on an outlawry of high treason: I was asked what I had to say for myself, that judgment of death should not pass? I answered, That I was beyond sea when the outlawry came out; I thought the law allowed a writ of error to reverse it; I prayed I might be allowed a trial for my life, according to the laws of the land; I urged the statute of Edward 6th, which was express for it; but it signified nothing: I was condemned, and made a precedent; though

Mr. Holloway a little before had it offered him. I cannot but think all the world will conclude my case very different: and why was it refused me? Mr. Attorney accused me there for being one of those that were to kill the king as soon as he came back from Newmarket after the fire. I take God to witness, I never was in any design to take away the king's life; neither had any man the impudence to propose so base and barbarous a thing to me; neither was I ever in any design to alter the government of England. What I am accused of, I know no otherwise than by reports, and prints; which I take to be uncertain. So that it cannot be expected I should make particular answers to them. If I had been tried, I could have proved my lord Howard's base reflections upon me to be a notorious falsehood; for there were at least ten gentlemen, besides all the servants in the house, can prove I dined there that day.

I have lived, and now die, of the reformed religion, a true and sincere Protestant, and in the communion of the church of England. I have found the great comfort of the love and

mercy of God, in and through my blessed Redeemer, in whom I only trust; and I do verily hope I am going to partake of that fullness of joy which I believe is in his presence; the hopes whereof do infinitely please me. I thank God, I have no repining at my heart for the condition my sins have most deservedly brought me to; I have deserved much worse at the hands of God: So that I cheerfully submit to this punishment, as being taken off but a small time sooner. I do freely forgive all the world, even those concerned in taking away my life. As for the sentence of death passed upon me, I cannot but think it a very hard one; being denied the law of the land, as I think, To conclude: As I never had any design against the king's life, or the life of any man; so I was never in any design to alter the government. I die in charity with all the world; and therefore I heartily pray God to bless the church of Christ every where, these poor nations, and the king's majesty; and I heartily commend my soul to God's infinite mercy, through my blessed Saviour, Jesus Christ.

Remarks upon the AWARD of Execution against Sir THOMAS ARMSTRONG; by Sir JOHN HAWLES, Solicitor-General in the Reign of William the Third.

AT common law, if a person was beyond sea when an outlawry was pronounced against him, it was an error in fact, for which the outlawry was to be reversed; and it is an error in all outlawries but for high treason to this day. By the 6th of Edward 6th, that error is taken away in high treason, but there is a proviso in that statute, that if the person outlawed shall within a year after the outlawry pronounced, yield himself to the chief justice of the King's-bench, and offer to traverse his indictment, and on his trial shall be acquitted, he shall be discharged of the outlawry. Upon the construction of this statute, no judgment was ever given that I know of; and the reason is, no man outlawed was ever denied a trial till this time, if he was taken within a competent time. The reason of making that statute was this; men would commit treason, and presently fly beyond sea, and stay there till the witnesses who should prove the treason were dead; then return, and reverse the outlawry for the error of their being beyond sea; and the witnesses being dead they were safe: and therefore this statute takes away that error in part, though not in the whole, and doth in effect say, that the person outlawed shall not have advantage of that error, unless he comes and takes his trial within a competent time, which that statute limits to a year after the outlawry pronounced.

It being plainly the sense of the statute, was unjust to deny the favour or right of a

trial to sir Thomas Armstrong, which was never denied any person before nor since, where it was agreed that all the witnesses against the person accused were alive, as in sir Thomas Armstrong's case they were, barely upon the quibble of the word 'reader,' which in no case that ever I read was differenced from 'taken,' but in one case, which is Smith and Ashe's case, in Cro. Car. 58. in an outlawry for debts against husband and wife, which will not extend to, or warrant the judgment in this case; and if there were but a doubt in the case, as it cannot be denied there was, the outlawry ought to have been waved, or at least counsel for the prisoner heard as to the point.

It was a vain and unjust reason (and only tending to incense the thing) assigned by the attorney, that the prisoner was one who actually engaged to go, upon the king's hasty coming to town to destroy him by the way; whereas the prisoner offered to prove his innocence in that and other matters of which he was accused: and even that objection against him was an invention of the attorney's, for any thing appears; but then it was resolved to stop at nothing, and success had made them fearless. Fitzharris and Colledge it was owned had had hard measure, and that their cases might be forgotten, their quarters were buried; but sir Thomas Armstrong's were exposed, though the proceedings against him were equally as unjustifiable as in the other two cases.

308. Proceedings on a Writ of Inquiry of Damages* between his Royal Highness JAMES Duke of YORK, in an Action upon the Statute de Scandalis Magnatum,† and TITUS OATES,‡ in the King's-Bench: 36 CHARLES II. A. D. 1684.§

HIS royal highness the duke of York, having brought an action against Titus Oates, grounded upon the statute de Scandalis Magnatum, for very slanderous and opprobrious words, the de-

fendant suffered judgment to go against him by default, and thereupon a writ of inquiry was taken out, directed to the sheriff of the county of Middlesex, to enquire by a jury of that county

* As to the Writ of Inquiry to assess damages, and the execution of it, see the Books of Practice and the Law Dictionary, title "Judgment I;" title "Writ of Inquiry to assess Damages." Under the first of these titles in the Law Dictionary, edition of 1809, it is said, "the number of jurors sworn upon this inquest need not be confined to twelve;" and the same is laid down by Mr. Christian in a Note to 3 Blackst. Comm. 398; but no authority in support of the position is cited except this Case of Oates: *idèd quære*. It appears, (3 Blackst. Comm. 398. Law Dict. tit. Judgment 1), that by the judgment out of which the Writ of Inquiry arises, "the sheriff is commanded, that by the oaths of twelve honest and lawful men, he inquire," &c. For the trial of issues in civil suits, the sheriff is commanded, "that he cause to come, &c. twelve free and lawful men, &c. to recognise the truth," &c. See Law Dict. title Jury IV. As to the Writ of Inquiry in Replevin, see Selwyn's Nisi Prius, Replevin, sect. 9.

† As to the action for Scandalum Magnatum, see Selwyn's Abridgement of the Law of Nisi Prius, chap. Slander.

‡ See, in this Volume, the Reports of his Trials for Perjury on the 8th and 9th days of May, 1685.

§ Of the frequency, about this time, of prosecutions for defamatory speeches and writings, a notice may be formed from the following passages extracted from Narcissus Luttrell's MS. "Brief Historical Relation," &c.

"Nov. 28th, 1682, being the last day of the term, Mr. Pilkington, late sheriff of London, came into the court of King's-bench, and rendered himself into custody in discharge of his bail, in the Scandalum Magnatum by the duke of York against him.

"May 3d, 1683, was a trial at bar in the King's-bench, in a Scandalum Magnatum, brought by the duke of Ormond against Mr. Wm. Hatherington, for speaking these words of him; that he was a Papist and in the Irish Plot, and guilty of high treason, to his damage of 10,000*l*. This was tried by a substantial jury of the county of Surrey: the witnesses that proved the words were Narrative Smith and justice Warcup, who swore very home; but the defendant making little defence, the jury, without going from the bar, found for

the plaintiff, and gave him 10,000*l*. damages; upon which Hatherington rendered himself into custody in discharge of his bail.

"April 30, 1684. In the afternoon, at the Nisi Prius for the county of Middlesex, before the Lord Chief Justice Jefferys, George Cawdron, steward to the earl of Clare, was tried upon an information for speaking very scandalous and seditious words of his majesty and the government, and was thereof found guilty.

"May 3d, was a trial at the King's-bench bar, in an action of Scandalum Magnatum, by his Royal Highness, brought against John Dutton Colt, esq. a member of parliament for the borough of Lemster, for very scandalous words spoken of the Duke, which words being fully proved, the jury went from the bar, and presently came in and found for the plaintiff, and gave him damages to 100,000*l*.

"His Royal Highness, some time since, commenced an action of Scandalum Magnatum against Sir Francis Drake, bart. of the county of Devon, for words spoken by him of the Duke about four years since; which he hearing of, and that a writ was coming down to arrest him, thought fit to abscond, and is since gone beyond sea, and has, as is said, disposed of his estate, thinking it better to have his liberty in a foreign country, than be laid up in his own for 100,000*l*.

"His Royal Highness has brought his action of Scandalum Magnatum against Dr. Titus Oates for words; and not being able to find bail, he was committed to the Compter, and since turned over to the King's-bench prison by Habeas Corpus.

"9th. Edward Noseworthy the younger, esq. pleaded at the court of King's-bench Not Guilty, to an information for these words: He hoped to see the judges hanged that tried Fitzharris.

"12th. George Cawdron, convicted some time since for seditious words, came to receive the judgment of the court, which was to pay a fine of 100*l*. to stand [qu. in the pillory] in the Palace-yard, at Westminster, and in Clare-market, to find sureties of his good behaviour for life, and be committed till this be done.

"31st. Robert Julian came to the court of King's-bench, and pleaded Not Guilty to an information, for making and publishing that scandalous libel, being a ballad to the tune of "Old Simon the King."

"June 11th. Francis Smith, bookseller,

what damages the plaintiff had sustained thereby, and upon a motion made at the court of King's-bench, a day was given to the defendant, to shew cause why that writ of inquiry should not be executed at the bar of that court, which he not doing, it was ordered, that it

at the Elephant and Castle, in Cornhill, was tried before the Lord Chief Justice Jefferys, upon an information for printing and publishing a scandalous libel called *The Raree Shew*, of which he was found guilty.

" June 18th. Some time since the duke of York brought his action of *Scandalum Magnatum* against Dr. Oates, upon which he was arrested and committed for want of bail; he thought it not fit to stand a trial, so let judgment pass by default, upon which a Writ of Enquiry of damages was moved for, and ordered to be at the King's-bench bar this day; which accordingly came on, and a jury was sworn, the sheriffs of Middlesex attending: the words were proved very fully, being very scandalous, with several other malicious words of his spoken of his Royal Highness; so that the jury assessed damages to 100,000*l.* and 20*s.* costs of suit. The words were spoken two or three years ago; and the defendant made no defence at all, nor did any one appear for him.

" One Hindmarsh, a bookseller, convicted of printing and publishing a blasphemous libel, entitled, *The Presbyterian's Pater Noster*, was sentenced to pay the fine of 20*l.*

" Francis Smith, convicted lately of printing and publishing that libel, called, *The Raree Shew*, was brought the 18th to the King's-bench bar, and sentenced to pay a fine of 500*l.* to stand in the pillory at the Palace-yard, at Westminster, at the Temple, and at the Royal Exchange, and the libel to be burnt by the common hangman, and to have a paper set on him signifying his crime; to find sureties for his good behaviour for life, and be committed till all this be done.

" Nov. 3d, 1684. Robert Nicholson and Wm. Dalby, two of Oates's men, pleaded Not Guilty to informations for speaking scandalous and seditious words of the King, the Duke, and the Government.

" Nov. 12th. One Harris, an attorney, of Windsor, convicted of speaking seditious words against the king, was sentenced to pay twenty nobles fine, and to stand in the pillory at Reading, Abingdon, Newbury, and Windsor.

" The same day also, Julian, secretary to the ———, convicted for publishing many scandalous libels, was sentenced to pay 100 marks fine, to stand in the pillory at Westminster, at Charing-cross, and at Bow-street, and to be bound to his good behaviour during life.

" 19th, was a trial at the King's-bench bar against Mr. Edw. Noseworthy, for seditious words, in saying, He hoped to live to see the judges hanged that tried Fitzharris. This was laid to be done in Wiltshire, but the witnesses

should be executed at the bar on this day, and that the high sheriff should appear and attend the execution of the writ in person. Accordingly this day sir Peter Daniel, kt. and Samuel Dashwood, esq. the then sheriffs of the county of Middlesex, came into this court, and being

testifying the words to be spoken in Dorsetshire, he was acquitted.

" 15th. Nathaniel Thompson, the popish printer, was brought to the court of King's-bench, and pleaded Not Guilty to an indictment for printing and publishing a scandalous popish libel, entitled, *The Prodigal Son* returned home; which denies the king's supremacy in ecclesiastical affairs.

" 20th. Elias Best, convicted some time since for drinking a health to the memory of pious Stephen Colledge, was brought to the court of King's-bench, and sentenced to pay 1,000*l.* fine, to stand in the pillory at Westminster, at the Exchange, and at Guildhall for the space of an hour; be bound to his good behaviour for life, and be committed till this is done.

" 26th. Nathaniel Thompson was tried there for printing and publishing a scandalous popish libel, called, *The Prodigal* returned home, and thereof found guilty.

" 28th. Mr. Butler, of Northamptonshire convicted the last assizes, for presenting an reading the Address of the Freeholders of the county to the Knights of the Shire for the last Parliament, was brought to the court of King's-bench to receive the judgment of the court which was to pay a fine of 500 marks, to find sureties for his good behaviour for life, and committed till this is done.

" Jan. 23d, 1684-5. Being the first day of term, several persons appeared at the court of King's-bench, being bound thereto, and his their appearances recorded. Then also, Milk Fleetwood and sir Thomas Samwell pleaded Not Guilty, for publishing, printing, and mailing a libel called, *An Address to the Knight of the Shire for the County of Northampton.*

" 23d. Mr. Henry Baker pleaded Not Guilty to an information for scandalous words about the duke of York; as also one Norden did an indictment for publishing the scandalous libel in vindication of the lord of Essex.

" Then, also, sir Scroop Howe pleaded Not Guilty to an information for speaking most reflecting words on the duke of York.

" Feb. 11. The same day Dalby and Nicholson, Oates's two men, convicted for speaking seditious and scandalous words against the late majesty and the present king, were sentenced each to pay 10*l.* fine, find sureties for life, and stand in the pillory in all the remarkable parts of the town.

" Nov. 16, 1686. The court passed judgment on the attorney, Mr. Edward Whitaker being convicted of speaking words against king Charles the First; he was adjudged to pay when taken, 100 marks fine, and be imprisoned till paid."

placed at the table at the judges feet, were, during the execution of the writ, covered. Mr. Thomas Rous the then Under-Sheriff managed it, and proceeded in this manner.

Under-Sheriff. Crier, call sir Charles Lee. Crier. Vous avez sir Charles Lee. [Who was sworn thus.]

Under-Sheriff. You shall well and truly enquire of damages, between the most illustrious prince James duke of York and Albany plaintiff, and Titus Oates defendant, and therein a true verdict give according to your evidence. So help you God.

The rest were sworn thus :

Under-Sheriff. Sir William Hill, sir Richard Downton, and sir John Berry ; the same oath your foreman hath for his part taken, you and every of you for your parts, shall well and truly keep. So help you God.

Under-Sheriff. Thomas Harriot, Thomas Row, and Walter Brydall; the same oath, &c. Edward Guise, Thomas Done, and William Wood ; the same oath, &c. John Sharp, and Nehemiah Arnold ; the same oath, &c.

Will you please to have any more than twelve sworn ?

L. C. J. (Sir George Jefferies.) How many do you use to have ? Pray swear an odd number as you used to do.

Under-Sheriff. Then I will swear three more, and that will be just fifteen.

Francis Stevens, Nicholas Baxter, and John Kirk. The same oath, &c. The names of them that were upon the Inquiry : sir Charles Lee, knight, sir William Hill, knight, sir Richard Downton, kt. sir John Berry, kt. Thomas Harriot, Thomas Row, Walter Brydall, Edward Guise, Thomas Done, William Wood, John Sharp, Nehemiah Arnold, Francis Stevens, Nicholas Baxter, esquires, John Kirk, gent.

Under-Sheriff. Gentlemen, you are sworn, hear the king's writ.

L. C. J. Ay, read it to them.

Under-Sheriff. " Charles II. by the Grace of God, of England, Scotland, France and Ireland king, defender of the faith, &c. to the sheriff of Middlesex, Greeting ; whereas the most illustrious prince James duke of York and Albany, one of the nobles and peers of England, our most dear and only brother, who as well, &c. lately in our court before us at Westminster, by bill without our writ impleaded Titus Oates, then in the custody of the marshal of our Marshalsea, before us being, for that whereas in a statute made in the parliament of Richard 2, late king of England after the conquest, held at Gloucester in the second year of his reign, amongst other things : it is ordained and strictly prohibited, ' That from thence none should be so hardy to devise, tell or relate of the prelates, dukes, earls, barons, and other nobles and great men of England, nor of the chancellor, treasurer, or clerk of the privy-seal, steward of the King's house-

hold, justices of the one or the other bench, nor of other great officers of the kingdom aforesaid, any false news, lies, or any such false things, whereby scandal or discord within the said kingdom might arise ; and whosoever should do this, should incur and have the penalty otherwise thereon ordained by the statute of Westminster the first, as in the statute aforesaid is more fully contained. And whereas the 4th day of December in the 35th year of our reign, and long before the yearly rents, issues and profits arising, or due and payable for or by reason of the general post-office within this kingdom of England, for the carriage of letters, before were erected and yet are established upon the said most illustrious prince James duke of York and Albany. The aforesaid Titus Oates the statute aforesaid not considering, but the good name, state, credit, dignity and honour of the said James duke of York and Albany, our brother, devising and maliciously intending to hurt and detract, and him the said James duke of York and Albany, our brother, into the great displeasure and hatred of us, and of the peers of this kingdom of England, and also divers other venerable persons our subjects, to bring, out of his meer malice and envy had and forethought, the aforesaid 4th day of December, in the year of our reign the 35th, at the parish of St. Martin in the fields in the county of Middlesex aforesaid, upon a certain discourse then had and moved by and between the aforesaid Titus Oates and divers of our liege people, of and concerning the aforesaid James duke of York and Albany, our brother, and of and concerning a certain letter in the hand of the aforesaid Titus Oates at that time being, divers false news and horrible lies of the aforesaid James duke of York and Albany, our brother at that time, and yet being of the peers and nobles of this kingdom, in the presence and hearing of divers venerable persons, publicly, falsely, maliciously and scandalously said and related ; and with a loud voice published in these English words following, viz. ' This letter' (the letter aforesaid, so in the hands of the aforesaid Titus Oates, as is beforesaid being, meaning ' cost me' (the said Titus Oates, meaning) ' nine pence, and might have been brought for a penny, I (himself the aforesaid Titus Oates meaning) ' know nobody is the better for it, but that traitor James duke of York' (the aforesaid James duke of York and Albany our only brother meaning.) And the aforesaid Titus further devising and maliciously intending the aforesaid James duke of York and Albany, our brother, into the hatred of us, and the peers of this kingdom of England, and also of divers other venerable persons, and our subjects to bring ; out of his meer malice and envy, had and forethought, the 4th day of December, the year abovesaid, at the parish of St. Martin in the fields aforesaid, in the county of Middlesex aforesaid, upon a certain other discourse then had and moved by and between the aforesaid Titus Oates and several of our liege people of and concerning the

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aforsaid James duke of York and Albany our brother, and of and concerning a certain letter in the hands of the aforsaid Titus Oates, at that time being, divers other false news and horrible lies of the aforsaid James duke of York and Albany, our brother at that time, and yet being one of the nobles and peers of this kingdom of England, and our only brother, in the presence and hearing of several venerable persons, publicly, falsely, maliciously and scandalously said, related, and with a loud voice published, viz. 'This letter' (the aforsaid letter so in the hands of the aforsaid Titus Oates, as is before said being, meaning 'cost me' (the aforsaid Titus Oates meaning) 'nine pence, and might have been afforded 'for a penny, I' (himself the aforsaid Titus Oates meaning) 'know nobody is the better for 'it, but that traitor James duke of York' (the aforsaid James duke of York our only brother meaning.) And afterwards, to wit, the 5th day of December in the 35th year above said; the aforsaid Titus Oates further devising and maliciously intending the said James duke of York and Albany our brother to scandalize, and into the further displeasure and hatred of us, and of the great men of this kingdom of England, out of his meer malice and envy, had and forethought, at the parish of St. Martin, in the fields aforsaid, in the county of Middlesex aforsaid, the said fifth day of December in the year above said, upon certain other discourse of the said James duke of York and Albany, divers false news and horrible lies of the aforsaid James duke of York and Albany, publicly, falsely, and maliciously said, related, and with a loud voice published, to wit 'That a letter in the hands of the aforsaid Titus at that time being, cost him the aforsaid Titus 'nine pence, but might have been brought for 'one penny, and that he knew no body to be the better for it, but that traitor James duke of York.' And the aforsaid Titus Oates further contriving and maliciously intending the aforsaid James duke of York and Albany, our only brother, into the further displeasure and hatred of us, and of the great men of this kingdom of England, and also of divers other venerable persons, and our subjects, to bring, out of his meer malice and envy, had and forethought the 6th day of December, in the 35th year above said, at the parish of St. Martin in the fields, aforsaid, in the county of Middlesex aforsaid, upon a certain discourse at that time had and moved by and between the aforsaid Titus Oates and severall of our liege people, of and concerning the aforsaid James duke of York and Albany, our brother, divers other false news and horrible lies of the aforsaid James duke our only brother, at that time, and yet being one of the nobles and peers of this kingdom of England, in the presence and hearing of divers venerable persons, publicly, falsely, maliciously and scandalously said, related, and with a loud voice published in these English words following, to wit 'the duke of York' (the aforsaid James duke of York and Albany, our

only brother, meaning) 'is a traitor.' And the aforsaid Titus Oates further contriving, and maliciously intending the said James duke of York our brother, into the hatred of us, and of the great men of this kingdom of England, and also of divers other venerable persons, and our subjects, to bring, out of his meer malice and envy, had and forethought the aforsaid 6th day of December the year above said, at the parish of St. Martin in the fields, in the county of Middlesex aforsaid, upon certain other discourse at that time had and moved by and between the aforsaid Titus Oates and divers of our liege people, of and concerning the aforsaid James duke of York and Albany, our only brother, divers other false news and horrible lies of the aforsaid James duke of York and Albany, our only brother, and at that time and yet being one of the nobles and peers of this kingdom of England, in the presence and hearing of divers venerable persons, publicly, falsely and maliciously said, related, and with a loud voice published; to wit, 'that the said duke of York was a traitor.' By reason whereof the said James duke of York and Albany, our only brother, in his reputation, honour and dignity is very much hurt and scandalized. And the said James duke of York and Albany, the grace, good opinion and esteem which we and others the great men of this kingdom of England before towards him James duke of York and Albany, did bear, utterly lost, and divers rumours and scandals between very many nobles and peers of this kingdom of England, and other our subjects, by the occasions aforsaid, within this kingdom of England, are arisen and divulged, and great scandals and discords by occasion of the premises between him the aforsaid James duke of York and Albany, and divers nobles and great men, and other subjects of this kingdom of England, are arisen; and daily more and more in the like may arise, to the great disturbance of the peace and public tranquillity of this kingdom of England, and in contempt of us and our government of this kingdom of England, and to the great scandal and grievance of him James duke of York and Albany, to the damage of him the said James duke of York and Albany, our most dear brother, 100,000*l.* As he then said, and thereupon in our court before us it was so proceeded, that the aforsaid James duke of York and Albany, our only brother, his damages against the said Titus Oates by occasion of the premises ought to recover; But because it is not known to our court before us, what damages the aforsaid James duke of York and Albany, our brother, hath sustained, as well by occasion of the premises, as for his costs and charges by him about his suit in this behalf expended. Therefore we command you that by the oaths of good and lawful men of your bailiwick, you diligently enquire what damages the aforsaid James duke of York and Albany hath sustained, as well by occasion of the premises, as for his costs and charges by him about his suit in this behalf, expended,

and the inquisition which thereupon you shall take, you shall have before us at Westminster on Wednesday next after three weeks of the Holy Trinity, under your seal, and the seals of them by whose oath you take that inquisition) distinctly and openly you send, and this writ. Teste sir George Jefferies, Knight and Baronet, at Westminster the thirtieth day of May, in the year of our reign the thirty-sixth.

“ Ri. Swift. HENLEY.”

You are to enquire what damage his royal highness the plaintiff has sustained, by means of the premises; as also, what costs he has been at in this suit.

Mr. Henes. May it please your lordship, you Mr. Sheriffs, and gentlemen of the jury, his royal highness the duke of York is plaintiff, and Titus Oates is the defendant: and this is, in an action of trespass and contempt, grounded upon the statute of Scandalum Magistram, wherein his royal highness sets forth, that whereas such a statute was made, prohibiting the slandering the great men and peers of the kingdom, and the plaintiff being the king's only brother, and a peer, the defendant upon a discourse between him the defendant and some other persons, about a letter that the defendant had then in his hands, publicly, falsely, and with an intent to scandalize the plaintiff, spoke these English words: ‘ This Letter’ (meaning the letter then in the defendant's hands) ‘ cost me’ (meaning the defendant) nine pence and might have been brought for a penny; I (meaning the defendant) ‘ know nobody is the better for it, but that traitor James duke of York;’ meaning the plaintiff.

Gentlemen, this is not all, the Declaration goes on further, and says, that the defendant intending further to scandalize the plaintiff, the 8th of December in the 35th year of this king, upon a discourse had and moved by and between him the defendant and some other persons, in the presence of divers venerable persons, said these words of the plaintiff: ‘ The duke of York’ (meaning the plaintiff) ‘ is a traitor:’ and this is laid to the plaintiff's damage of 100,000*l.*: the defendant has not pleaded, and the plaintiff has signed his judgment; and now you, gentlemen, are to enquire of the damages.

At. Gen. (Sir Robert Sawyer.) You observe, gentlemen, the words are acknowledged by the defendant's default, and not pleading; that they were spoken is owned by him, and you are to enquire only of the damages: and, I think, there will need nothing to be said for the aggravation of them, they are words of the highest nature, in respect of slander and scandal, that can be spoken or thought of, accusing him of treason. We shall only call you some witnesses to prove this way of discourse to be his constant habit in all places, and among all persons and company, inveighing against the government, and particularly against his royal highness the plaintiff; and then you will, I

know, give such damages as may be fit to repair the plaintiff's honour.

Sol. Gen. (Mr. Finch) We will call some witnesses to give you an account how he uses to treat the plaintiff in all companies, and we shall begin with Mr. Smith. And the truth is, the proving of the words, will demonstrate the malice of them; and the manner and circumstances of speaking, will make them appear to be such, as need nothing to be said for their aggravation at all. Swear Mr. James Smith.

Under-Sheriff. The evidence that you shall give to the sheriffs and the jury, sworn about the matter in question, shall be the truth, the whole truth, and nothing but the truth.

Sol. Gen. Mr. Smith, pray will you tell the court and the jury, what you have heard the defendant Oates say of his royal highness.

Smith. At the last Westminster parliament, as I was sitting in a coffee-house, I saw Mr. Oates, he had a letter in his hand, and he said, ‘ This letter cost me nine pence, it might have been brought for a penny, I know nobody that is the better for it but a traitor,’ to the best of my remembrance he said, ‘ the duke of York.’

Att. Gen. Swear Mr. Penniston Whaley. [Which was done.] What words did you hear Mr. Oates say of his royal highness?

Whaley. The time was either the Easter or Whitsuntide after sir Thomas Gascoigne's trial.

Sol. Gen. What were the words you then heard him say?

Whaley. It was at the bishop of Ely's table at Ely house. I had received the Sacrament at the chapel there that day, and so had the Doctor too; it was upon Easter-day or Whitsunday, I suppose, because I never used to receive the Sacrament here in town, but one of those two times, and Dr. Oates and I were sitting there, and some discourse happened about sir Thomas Gascoigne's Trial, and he fell very foul upon the jury, and said, ‘ They were a company of profligate villains’ (or some such expressions as he was wont to use) and said, ‘ He would have them attainted.’ Then said I to him, Doctor, you are a good man at a matter of fact, but, I doubt, you are not so at a matter of law. Upon that, we came to some high words about that and other things, and among the rest of the discourse, he said, ‘ The duke of York was a traitor.’ Upon that I said to him, Doctor, you lie under a great error in that, I suppose, by mistaking a statute made against popery; says he, ‘ No matter for that, I say he is a traitor.’ Then there were some other discourses happened afterwards, and I began to reply, and growing both of us pretty warm, the Doctor called to his two men, his myrmidons, that used to be always with him, and follow him up and down: said I to him, Nay, Doctor, you need not call your men to your assistance, there is nobody here will hurt you: do you think the bishop of Ely's table is not a protection good enough for any body that comes here?

L. C. J. Where was this, Sir, pray do you say?—*Whaley.* At the bishop of Ely's table.

L. C. J. Was the bishop there, then?

Whaley. He was at the table, but at a great distance from us, the Doctor and I sat at the lower end of the table. Afterwards I begged the bishop of Ely's pardon, for being so hot and loud at his table; says the bishop to me, 'I thank you kindly for it, none of us dare talk with him.'

L. C. J. And this you say was at dinner after the Sacrament was over?

Whaley. Yes, it was so.

Mr. North. Then swear *Edw. Johnson.* [Which was done.]

Att. Gen. *Mr. Johnson,* Pray will you give the court and jury an account, what discourse you have heard from the defendant, *Mr. Oates,* against the plaintiff.

Johnson. Upon the 23rd of August, 1680, I met *Dr. Oates,* and said, good-morrow Doctor, all things will go well now—

L. C. J. You mean him they call *Dr. Oates,* I suppose.

Johnson. Yes, they used to call him so; said I, good-morrow Doctor, all things will go well now, for there is a parliament to meet in a little time. 'No,' said he, 'not till York is either banished or hanged; but of the two, hanging is the fittest for him.' Said I, do not talk so, Doctor: says he: 'I speak nothing but what is true; he has a good brother, but he takes all the courses in the world to undo him:' and then the Doctor and my lord Howard went away together.

Sol. Gen. Swear *Randall Bowring.* [Which was done.] What have you heard *Mr. Oates* say of the duke of York?

Bowring. About the middle of October 1679, there were several persons at dinner with the Doctor.

L. C. J. What Doctor, prithee?

Bowring. *Mr. Oates.*

L. C. J. *Mr. Oates* we know very well, but we do not so well know who this Doctor is.

Bowring. They used to call him Doctor, or I should not have taken upon me to give him the title.

L. C. J. Well, go on: there were several persons at dinner with him, and what then?

Bowring. There happened some discourse concerning his royal highness.

L. C. J. Where was this?

Bowring. At his lodgings at Whitehall: and a gentleman that was there, said, In case his royal highness were a papist, how should we be secured, that in case he come to the succession of the crown, he would not bring in popery among us? Then the Doctor replied, 'I would not have you trouble yourself about that; for he shall be hanged before that time.'

Att. Gen. What have you heard him say any where else; at Foster-Lane, or any other place?

Bowring. After the sermon he had preached there at Foster-Lane church, the church-war-

dens, and some of the parish, invited him into the vestry to drink a glass of wine.

L. C. J. What? He made as if he would preach there?

Bowring. He did preach there, and then the church-wardens invited him to dinner; but then he asked them, 'If ever any of them had dined with James duke of York, at any of the feasts of the city, where the duke used to come sometimes?' To which none of them answering a word, he replied, 'He would not dine with any man that had eat with the devil.' And so would not go to dine with them, but went and dined at a private brasier's by London-Wall.

L. C. J. An excellent gospel-preacher upon my word.

Att. Gen. What brasier was that?

Bowring. Truly I do not well know his name.

Att. Gen. Where did he live?

Bowring. By London-Wall.

Sol. Gen. Then swear *Mr. Fairfax.* [Which was done.] Pray, Sir, tell my lord and the jury what words you heard this man speak of his royal highness.

Fairfax. May it please your lordship, in August 1679, I happened to come into the company of *Oates* the defendant, upon the account of an election that was to be of parliament-men for Grinstead in Sussex, by the means of one Auckland; *Oates* was to go down thither in my lord Wharton's coach, and then we came first to be acquainted and afterwards we frequently did eat together, and became very well acquainted. And in my lord Scroggs's time, when he was lord chief justice, there was some presentment intended to be brought in by the grand jury here at the term, against his royal highness for being a Papist, and not coming to church, and this *Oates* was the main prosecutor of it. He was used often to come up to me, and speak to me when he met me; and I was about that time walking in the court that was built up here for the trial of the lords in the Tower; it was after that grand jury were dismissed, which was done a day or two before they used to be dismissed in the ordinary course, and walking there I met *Oates,* and said I to him, Doctor, now you are non-suited, what will you do now? 'Oh, says he, 'We will do well enough; there will be sessions after the term, and there we will at him again; and we will have no more regard for him, than if he were scavenger of Kent-street.' And upon that he was called away from me, and he went away.

Sol. Gen. Swear *Mr. Philips.* [Which was done.]

Att. Gen. Come, *Mr. Philips,* will you acquaint my lord and the jury, what you have heard *Oates* say of the duke of York?

Philips. In or about January (1678) may it please your lordship, I was in the company of one Deacon, at *Oates's* lodgings at Whitehall, where *Mr. Oates* said, 'He hoped to see your or our master James' (meaning the duke of

Yet, his royal highness I suppose) 'at the 'be of the House of Commons; and it would 'be so disparagement to him, to appear there, 'for there were better men members of that 'House than he was.'

L. C. J. Pray what was the occasion of this discourse?

Philips. Truly, it was a discourse of his own; he ran it on, we talked but little to him.

L. C. J. Who did he apply himself to in that discourse?

Philips. To us two, Mr. Deacon and I.

L. C. J. How came he to mention your master James, had you any relation to the service of his royal highness?

Philips. No, my lord, we had not; but he said, either our master, or your master: he ran on in such kind of discourse as he used to do.

L. C. J. But do you think he intends his royal highness, when he named your master James?

Philips. I could not imagine he did mean any body else.

Att. Gen. Then swear William Ashlock. [Which was done.] Pray will you acquaint my lord and the jury, what words you have heard him speak of his royal highness.

Ashlock. May it please your lordship, in Easter-Term 1682, Dr. Oates—

Att. Gen. Mr. Oates, you mean.

Ashlock. Mr. Oates went out one morning, with Delben and Robin Nichols, two of his men, from his lodgings at Whitehall, and while he was dressing, he said he went out, in order to draw up a bill of indictment against the duke of York; but he did not do it, because he was otherwise advised by some persons as I heard. Then at Michaelmas, 1682, when he was going to dress him, I held the basin to him to wash, as he commonly had two or three every day to wait upon him to dress him, there came in a gentleman, that came newly out of Sussex, I cannot remember his name: he asked him how all friends did in Sussex, and then fell a talking about the election of sheriffs, and abusing them that were then chosen, and reflected very much upon sir John Moor, and called him rogue, and said he deserved to be hanged up as an example. And afterwards, he said, the city of London was fired by the duke of York's order, and sir Thomas Bludworth had a hand in it; and the forces at Black-heath were to have plundered the city, and killed all the honest Protestant Dissenters in London: and this he would prove, if ever they had a parliament to their mind that should sit. At another time there was one Starkey, Henry Starkey, that was concerned in Colledge's business at Oxford, and one Mr. Paschall, and, I think, captain Clare, and some others that used to keep him company, and Mr. Oates stepped up on a sudden, and said, 'The duke of York was a son of a whore, and he should live to see him hanged; and if they could but get a parliament to their mind, they would soon send the duke and all his gang out of England,

'for he must never expect to succeed to the crown.'

Sol. Gen. Pray who did he say was to head the forces at Black-heath that you talk of were to plunder the city?

Ashlock. 'The duke of York; and London was fired by his order; and this he would prove, if they could but get a parliament to their mind,' and he said, 'They should take away the Post-Office from the duke of York, and give it to the duke of Monmouth.'

Sol. Gen. Then call captain Cressett, and swear him. [Which was done.]

Att. Gen. Capt. Cressett, Pray do you remember what discourse you had with Oates, when the duke went into Flanders, what he said of his royal highness?

Capt. Cressett. It was the last time the duke went into Scotland with her royal highness, I think it was in October 1680. I was commanded over night to wait at the duke's lodgings, till a paper should be delivered me by my lord Rochester; I stayed there till twelve o'clock at night, and not seeing my lord come out, I went away, and came early next morning; And when the duke and dutchess went to take water at the privy stairs, I came down through the guard-chamber, and Dr. Oates was in the gallery that leads betwixt that and the gate? when he saw me, I bid him, good-morrow doctor, or he bid me, good-morrow; one of the two, I cannot exactly tell which; says he to me, 'You will never leave till you have lost your reputation.' Why, what is the matter now, Doctor, said I, I hope my reputation is not hung upon so slender a thread, as to be lost for my going any where? Says he 'You have been with James.' Who do you mean by James, said I? 'York,' says he. Surely, said I, it might have been the Duke of York, or his royal highness: no, said he, 'he is a Rascal, a Papist, and a Traitor, and I hope to live to see him hanged.' Truly Doctor, said I, now let me give you a little advice to govern your tongue and your passions. I assure you, they will do neither you nor your cause good, it may do you a great deal of hurt in time, if you do not take care.

Sol. Gen. Call sir William Jennings.

Att. Gen. Truly, my lord, I think we need call no more, though we have multitudes of them, it is his daily discourse.

L. C. J. Call whom you will, Mr. Attorney; for though it be the last day of the term, and it is an unusual thing to have a jury at the bar on that day, and more unusual to have them to execute a Writ of Enquiry here: yet in regard of the greatness of the person that is concerned, and the extraordinary nature of the cause, we have ordered it thus, that all the world may see how his royal highness has been abused and scandalized by this person.

Att. Gen. The defendant, my lord, has been a person pretty much talked of too.

L. C. J. Yes, truly, it is done with regard to him too; for he has been an eminent man in his way.

Sol. Gen. Then swear sir William Jennings. [Which was done.]

Att. Gen. Now, sir William Jennings, speak out, you hear the question, What have you heard Oates say of the duke of York?

Sir W. Jennings. My lord, at the time of the sitting of the parliament at Oxford, I was in a tavern there with Mr. Cranfield, one of the king's gentlemen-ushers, who seeing Mr. Oates going along by the room, invites him to drink a glass of wine, there were a matter of some eight or nine at the table; there was a little partition-curtain, it being a long room, and there was some company beyond that curtain, somebody in that company named James Duke of York, and the King's health being drank at our table, Mr. Cranfield began a health to the duke: says Mr. Oates, 'Do not you drink York's health.' Why should we not, says Mr. Cranfield, and a gentleman or two more in the company: 'Why,' says he, 'he has ruined the nation; and if the devil has a place in Hell more hot than others, I hope he will bestow it upon him.' Several words past between Mr. Cranfield and him upon it, and the king was told of it presently.

Att. Gen. Swear Justice Warcup, [Which was done.] Pray tell what you know of this man's discoursing concerning the duke.

Mr. Warcup. My lord, I went into the company where sir William Jennings was that he spoke last of, and being desired to drink a glass of wine with them, I did so, and they told me what Dr. Oates had said there.

L. C. J. Mr. Oates, Titus Oates you mean?

Mr. Warcup. Yes, my lord, the room had a partition by a hanging or curtain, and I was first in the other company beyond the partition, and there somebody began a health to his royal highness the duke of York, this health went round, and Oates was, it seems in the next room and heard this health I suppose: when I came into sir William Jennings's company Oates was gone; the company there told me what Oates had said, as sir William Jennings had declared, they all agreed those to be the words, 'That he had ruined or betrayed the nation; and if the devil had a hotter place in Hell than other, he hoped he would bestow it upon him.' I met Oates afterwards, and asked him why he would speak such irreverent words of the Duke? His answer was, 'He was a traitor, and was in the plot;' and he told me, 'I was a Yorkist, and he would remember me for it.'

Att. Gen. Did not that fright you, Mr. Warcup, to have him threaten you so?

Mr. Warcup. I had then an impeachment against me, and truly I think I might well be afraid.

L. C. J. You say, he owned the words they told you of.

Mr. Warcup. They did all agree those to be the words; and I met him afterwards, and asked him why he would speak so irreverently of the duke, considering he was the king's brother and as virtuous a prince as trod upon the earth? Says he, 'He is a traitor, and in the plot; and

you are a Yorkist, and I will remember you for it.'

Sol. Gen. We shall only call one more, to shew in what mind he continues to be, ever since this action was brought. Swear Mr. Charles Chapman. [Which was done.] Pray Sir, tell what you know.

Chapman. My lord, I met Mr. Swift, the duke of York's attorney, when he was going over, as he told me, to demand a plea of the defendant Mr. Oates, and he desired me to go along with him, I did so; and when we came to him, Mr. Swift told Oates the rules were out, and desired to know what he intended to do, whether he would plead or no. Oates asked him, 'If he were the duke's attorney?' He answered him, Yes; says he, 'I do not value the Duke nor his Attorney neither, I will plead as I shall see cause according to law; I declare I neither love the Duke, nor fear him.' And so turned his back, and was going away, and comes up again, and says to him, 'It may be I may be in for one hundred thousand pounds here, but if ever parliament sit, I do not question but to have somebody else in my place.' Mr. Swift asked him to explain himself who he meant, says he, 'Do you come to trepan me?' And away he went.

Att. Gen. My lord, we have done, if the jury please to consider of it.

L. C. J. Is there any body here for Mr. Oates, to offer any thing to lessen the damages? [To which nobody answered.]

Then, Gentlemen of the Jury, your business now is to enquire what damages you think fit to assess to his royal highness, by reason of the speaking of the words mentioned in the declaration, there being in this action judgment by default obtained by his royal highness; and you have nothing now to do, but only to assess to the plaintiff such damages as you shall think fit.

Now, Gentlemen, though the acknowledgment of this judgment (for so it is in effect, it being by default) be a sufficient confession of the words being spoken as they are laid in the declaration, yet they have given you proof of the very words.

The Declaration is in an action grounded upon the statute De Scandalis Magnatum, taking notice that his royal highness is a great peer of this kingdom, and his majesty's only brother; and that Oates the defendant knowing him to be so, to bring him under reproach and calumny, and to cause discord to arise between the king and him, and between him and other great men, did speak the words laid in the declaration which you have heard read, and which are these.

The first are, 'This Letter' (Oates having a letter in his hand) 'cost me nine pence, and might have been brought for a penny; I know nobody is the better for it, but that traitor James duke of York.' This is laid over again with a very little variation, 'This letter cost me nine pence, and might have been afforded for a penny, I know nobody is

'the better for it but that traitor James duke of York;' which are words of the same sound, and to the same purpose with the former; they differ only in some minute circumstances, a word or so, but import the same thing.

The next words are these, 'The duke of York is a traitor;' and these words too are hid two several ways, differing but in very small circumstances, (is a traitor, and was a traitor,) the substance of the words is the same.

Now I say, Gentlemen, Though it is not your business to enquire whether or no Oates spoke these words, for by letting judgment go against him by default, he doth in law confess the words, but you are to enquire what damages may be fit to be given to the plaintiff by reason of these words; yet in as much as this case is a case of an extraordinary nature, weight and moment, having relation to so great a prince, his royal highness the king's only brother, requires this extraordinary solemnity, it having not been usual heretofore, that is to have writs of enquiry executed at the bar. But the occasion is extraordinary, such as has not happened before this age, this corrupt age, this profligate age, wherein we live, and wherein common ordinary fellows, the mere scum and scoundrels of the factious party, have taken the liberty to reproach and calumniate magistracy and government, and the greatest personages concerned in it, not sparing even majesty itself, nor him, who is next in degree to his sacred person, his only dear and royal brother. And therefore as the case is extraordinary in its nature, so ought the example to be made as public as can be, in order to satisfy all people what a sort of fellow this defendant is, who has been so much adored and looked upon with an eye of admiration, courted with so wonderful an affection, and so, I had almost said, Hosanna'd among people that have been factious and tumultuous to the government.

Such as he ought to be made public examples of; and therefore the king's counsel have desired that this cause might be canvassed here at the bar, and the defendant, as he has made himself eminent for some particular qualifications, might be made a public example for this offence.

Thus this writ comes to be executed here. Now though the words laid in this declaration are words that do import in themselves so much scandal and reproach, so much malice and venom, that they need no aggravation besides themselves; and his suffering it to go by default shews they are no way to be extenuated, but are thereby acknowledged: yet, however, to satisfy all people that desire or have any inclination to be satisfied, that this prosecution is highly reasonable, nay absolutely necessary; they come here and give you an account that these in the declaration are but a small part of the scandalous and malicious words that the defendant useth concerning the plaintiff. And indeed it doth plainly appear, that the malice of the defendant is at-

tended with all the most unchristian and uncharitable, as well as disloyal and disobedient circumstances that any thing can be, with design to traduce and disparage a subject so loyal, and a person so great and illustrious as his royal highness.

As to the first words, you have the first witness Mr. Smith, and he gives you this account, he was in a coffee-house where he met the defendant Oates; and the defendant in a vain-glorious huffing sort of manner takes occasion, though none was offered him by any thing spoken to him by any body, but only on set purpose to express his malice and venom against the plaintiff. He takes up a letter that it seems came to him by the post, and to gratify his own malicious inclination, and to give it vent, he proclaims, 'This letter cost me nine pence, it might have been brought or afforded for a penny; and I know nobody is the better for it but that traitor James duke of York.'

So you see, Gentlemen, he takes hold of every little occasion, if he can but happen upon an opportunity, such as this was in an open coffee-house, to wreck his malice upon his royal highness. And sure there can be no greater imputation of scandal brought upon any man than this upon the plaintiff. That the first and greatest subject of the king of England's should be taxed with the greatest crime in the law, disloyalty and treason to his sovereign. And so at once not only chargeth him with being perfidious to his only brother, against that affection which by nature he is obliged to pay him, and which all that know any thing, cannot but observe to have always been extraordinary; but also touches that which is much dearer to him than his life, his honour, by charging him with the foulest of crimes, treason and breach of his allegiance, which as a subject he owes to his sovereign. And thus besides the defendant's confession by this judgment you have the very words proved that are in the declaration.

The next witness is one Mr. Whaley, and he gives you an account of another passage which I cannot but take notice of by the way, to shew you what a wonderful Christian temper this man is endued with. Mr. Whaley says, that being at the bishop of Ely's house upon a public festival either of Easter or Whitsuntide, (and he is sure it was one of those two, because, says he, 'I never use to receive the Sacrament in London but upon one of those two days; and therefore I take it upon me to say, it was one of those two days that I heard these words') Oates having, it seems, received the holy sacrament at the bishop of Ely's chapel with Mr. Whaley that day. When a body would have thought, that if Mr. Oates would have been believed to be so hearty and pious a protestant as he pretends to be, he should have remembered that he ought, according to the Protestant doctrine, to have left behind him, at his approach to the altar, all malice and rancour, and ill will and hatred to every body:

But you see what kind of deportment his was.

For after such time as he had been at the sacrament, he takes occasion without any provocation to fall foul immediately upon his royal highness, giving him the name of 'a profligate wretch,' and then particularly he comes to say, 'The duke of York was a traitor.' This gentleman being concerned, as every honest and loyal man ought to be, and I hope every good subject is, and ever will be, to hear so great a prince, the king's only brother, so traduced and vilified, reproved him for it; but so far was he from taking the correction due to his extravagant tongue in a becoming manner, that he presently (as the gentleman phraseth it) calls for his myrmidons, two fellows that he had along with him, to come to him; upon which the gentleman was pleased to say to him, 'Nay, good Mr. Oates, you need not be in so very much fear of yourself as to call for your men, nobody here intends you any harm.' Nay certainly, Mr. Oates did apprehend himself to be secure from all manner of correction, or he would never have been so impudent to speak such words.

But you will no doubt take notice, as all men cannot but do, of what an excellent gospel-spirit, what a delicate christian temper the man is of, after, the receiving the sacrament, that very morning to come and belch out such extravagant words of calumny and reproach.

And it seems this person had obtained to make such a wonderful figure in the world, that every body was afraid to speak to him; for you hear what the witness says when he came to beg the bishop of Ely's pardon for being so loud and hot at his table; the bishop gave him thanks for it, and told him, 'None of us dared to speak to him.' Such a considerable man hath he been, that he might rail against the king, and the duke, and the government without controul. He was got into such a post that nobody durst meddle with him, but he must have liberty to say any thing of any body. To what an height of corruption were we grown, that we could suffer such a fellow's insolence, at which no man living, that has any spark of modesty or loyalty left in him, but must blush and tremble.

Then they produce to you one Mr. Johnson, who gives you an account, that after some discourse between him and the defendant Oates, about the duke of York, he immediately told Johnson, that the duke was either to be hanged or banished; it seems he was so ill a man in his eye, but of the two, hanging was the fitter for him. So the doctor sheweth what a wonderful kindness and affection he has for the duke, and what thoughts he has of his great deserts.

Mr. Bowring is the next witness, and he comes and tells you, that the doctor could not be prevailed with to dine with the gentlemen of the parish of Foster-lane, because some of them had dined with the duke, which he calls dining with the devil. It seems he made as though he would preach there to them, he got

up into the pulpit and took a text, and pretended to preach, and if he would have preached according to the duty of a church of England divine, he was by that to have preached not only obedience and submission to authority; but respect to superiors, and charity among all subjects towards one another; and if he did preach it, it was worse in him not to practise it. But you see after he had performed his painful laborious preaching, after he had taken such a wonderful deal of pains, as no doubt he did in instructing his auditors, what his language is in answer to a civil invitation to dinner by the church wardens: 'Have any of you dined with York at the city feasts? And they not answering; but being silently amazed at the impertinent impudence of the question, 'why truly he would not dine with those that had dined with the devil.' It seems his royal highness had been pleased to honour some societies of loyal men in the city of London with his company at some entertainments they made, and that is a great offence to the defendant; and as for those that had received that royal favour from his highness, he takes notice of them as such whom he would neither eat nor drink with, for truly they had eaten and drank with the devil; but immediately the doctor, in his great zeal and wonderful concern for the protestant religion, broke up from the company, would neither eat nor drink with them, but chose rather to dine at a private brasier's by London-wall; a properer place in good truth for him, than any such conversation they offered him.

Then further to shew what mean thoughts he had of the plaintiff, Mr. Fairfax he comes and testifies, that there being some talk of a presentment or indictment against the duke of York by the grand jury here, but that meeting with a disappointment, he met Oates, and asked him, 'What he would do, for says he, 'now you are non-suited? That is, you have happened not to obtain the end that you designed.' Oh, says Oates, 'No matter for that, that is all one, we will at him next sessions; and for my part, I will have no more regard to him than I would to a scavenger.' Nay, and because they should see the very utmost of his malice, and the low thoughts he had of his royal highness, as if it had not been malicious enough to have compared him to a scavenger of London or Westminster, no, that was a station too honourable for him in his thoughts, but he must necessarily be compared to a scavenger of Kent-street; which we all know to be one of the meanest, filthiest, and most beggarly parts of the town.

The next piece of evidence is, that which is given by one Mr. Philips; and when he came to him, he began to have some reflections about the House of Commons and the duke; 'and truly he did not doubt but he should see him at the bar of the House of Commons; and it would be no disparagement to him to come there, for there were a great many members there that were as good men or better than

'he.' And even by this fancy of his he would sin degrade his royal highness; for in case he had him in no other consideration but as a peer, he should know that no peer of this realm can be forced by any vote or order of the House of Commons to come to their bar. But he had a mind to take off his very privilege of peerage, and it would be no lessening of his greatness, since that House had in it many members better men than the duke himself. I presume he meant some particular friends of his own in that House.

The next man is one Mr. Ashlock, and he tells you, That because he would engage all people into an hatred of the duke's person, he must as a thing of the greatest consequence in order to it, make it be believed, that the duke had a great hand and concern in the dismal fire of London in 1666, that thereby he might make him obnoxious to the rancour and malice of all that suffered in that dreadful calamity. And with what handsome expression he clothes it? 'He fired the city of London, he is the son of a whore, and we will have him hanged or sent out of England for it, when every parliament meets.'

So that here is not only a personal reflection, and malicious indignity done to his royal highness, but carries in it a great reflection upon his sacred majesty himself in his relations; and he is not contented only to belch out his venom and malice against those that are alive, but even against those that are dead too. For you see it is a most foul imputation and slander against her late majesty the queen, mother to our sovereign and his brother, by calling him the son of a whore; which is an expression of that impudent and insolent nature, as is not fit to be mentioned in a civil government.

These things I think myself obliged to take notice of for example's sake, and to induce all people to consider to what a height of corruption we were grown, when such scoundrel fellows as this dare to take such base words into his mouth, of the royal family.

Then comes captain Cressett, and he gives you an account, That when his royal highness and the dutchess were going last to Scotland, as the captain returned from the duke's lodgings, he met with the defendant, who fell upon him, What, you have been with James? It seems he was one of his intimate acquaintance, and very familiar he was with his name. Indeed a man would have thought, if in case he had spoke as one man ought to speak of another, that he had been speaking of one of his myrmidons, and it would have been a very hard matter to have known who else he meant by that familiar appellation. Says the captain, What James? Why York. And he was very kind that he gave him that addition to let him know what James he meant; but when the captain chid him, and told him, 'Sure you might either say the duke of York, or his royal highness;' then immediately, instead of that, he flies out, 'He is a Papist, he is a traitor, and I hope to live to see him hanged,

and you will go near to lose your reputation if you go so often thither.'

So that I perceive, if he will not be advised by this gentleman, he should lose all his credit; and yet I presume it is wonderfully for the advantage of Mr. Cressett, to lose the credit he could get by any characters or commendations such an one as he could give him.

Then captain Cressett kindly advised him to take care of injuring his party by his passion and his indecent behaviour, and told him, it would turn to his prejudice at last. And truly now, I think, if all his party were in his condition, and made to smart for the lavishness of their tongues, I think it were a good accomplishment of his prophecy, and if we were rid of them, we should be more at peace. And we may without offence hope to see that sooner, than what the defendant says he hoped to see.

The next is sir William Jennings, who tells you of a passage at the parliament at Oxford, which shews his wonderful gospel and Christian temper, when a company of gentlemen were met together to drink a glass of wine, and were wishing health and long life to his sacred majesty, his royal highness, and the royal family, he would not be contented to refuse the glass, but to shew how wonderful a Christian spirit he was of, and to evidence his true Protestant charity (and by his carriage who was one of the heads of the faction, we may guess at the temper of all the party) he cries out, 'He has ruined the nation, and if there be any hotter place in hell than other, I hope the devil will preserve it for him.'

I presume his great conversation with him he spoke of, hath given him some intelligence there is in hell some hotter places than others, and who they are reserved for. But, gentlemen, I speak not this that I think any thing that is thus proved by the by doth in the least aggravate the damages, for the words in the declaration are as bad as bad can be; but to let you see the disposition of this man that has been so much admired and courted.

After him comes Mr. Warcup, who tells you, he was not in the room with Oates when the last words were spoken; but coming in immediately after, they all told him the same words, and he afterwards meeting with Oates, and reproving him for his indecent behaviour and expression, instead of any remorse or concern that he had upon him, by reason of his having spoken such words, he doth still add to it, 'The duke of York is a traitor, he is in the plot; and because you take his part you are a Yorkist, and we will be even with you for it at one time or another.' So he threatens him only for asking him why he behaved himself in such an indecent manner towards his royal highness.

The last witness, Mr. Chapman, is produced to shew what mind he continues in. After all this is past, and a body would have thought he might by this time have been brought to some consideration and submission to authority; yet

you see how the man is. The witness tells you since the beginning of this term, the declaration being delivered, and by the course of the court he ought to plead within such a time, the attorney goeth to him for a plea in order to make his defence if he could in the action now before you, but he lets judgment go by default; and so far is he from repenting of what he had formerly done, that he persists in it, and tells him, Are you the duke's attorney? Yes. Well, I care not a farthing for the duke nor his attorney neither; it may be I may be in here for 100,000*l.* (and that I believe is one of the truest things he ever spoke in his life) but suppose I be, I do not doubt but when a parliament meets, a time will come, when some other people may come in my place. But truly since he has declared his hopes, I think it may not be amiss for us to declare our's too; and for my part, to

say I hope I shall never see such a parliament.

Mr. Under-Sheriff. Lay your heads together, gentlemen, and consider of your verdict.

They did so standing at the bar.

Under-Sheriff. Are you all agreed of your verdict?—*Omnes.* Yes.

Under-Sheriff. Who shall say for you?

Omnes. Foreman.

Under-Sheriff. What damages do you find?
Sir Charles Lee. Full damages, An Hundred Thousand Pounds.

Under-Sheriff. What costs?

Sir Charles Lee. Twenty shillings.

Which Verdict being recorded in an inquisition intended, taken under the hands of all the jury, was afterwards annexed as the return to the writ of Inquiry.

309. The Trial of THOMAS ROSEWELL,* a Dissenting Teacher, at the King's-Bench, for High Treason: 36 CHARLES II. A. D. 1684.

23 Oct. A. D. 1684.

THIS day, being the first of the term, Mr. Attorney-General moved the court of King's-bench for an Habeas Corpus, directed to the keeper of the Gatehouse, to bring up the body

* " There were two famous trials in Michaelmas term: three women came and deposed against Rosewell, a Presbyterian preacher, treasonable words that he had delivered at a conventicle. They swore to two or three periods, in which they agreed so exactly together, that there was not the smallest variation in their depositions. Rosewell on the other hand made a strong defence: he proved, that the witnesses were lewd and infamous persons. He proved, that he had always been a loyal man, even in Cromwell's days; that he prayed constantly for the king in his family, and that in his sermons he often insisted on the obligations to loyalty. And as for that sermon, in which the witnesses swore he delivered those words, he shewed what his text was, which the witnesses could not remember, as they remembered nothing else in his sermon besides the words they had deposed. That text, and his sermon upon it, had no relation to any such matter. Several witnesses who heard the sermon, and some who writ it in short hand declared, he said no such words, nor any thing to that purpose. He offered his own notes to prove this farther: but no regard was had to them. The women could not prove by any circumstance that they were at his meeting; or that any person saw them there on that day. The words they swore against him were so gross, that it was not to be imagined any man in his wits could express himself so, were he ever so wickedly set, before

of Thomas Rosewell, clerk, to be arraigned upon an indictment of High-Treason, found against him at a late session of Oyer and Terminer, held at Kingston in the county of Surrey; and it was desired returnable to morrow, but was not taken out till that day, return-

a mixed assembly. It was also urged, that it was highly improbable, that three women could remember so long a period upon one single hearing; and that they should all remember it so exactly, as to agree in the same deposition! He offered to put the whole upon this issue: he would pronounce a period, as long as that which they had sworn, with his usual tone of voice with which he preached, and then leave it to them to repeat it, if they could. I set down all this defence more particularly, that it may appear what a spirit was in that time, when a verdict could be brought in upon such an evidence, and against such a defence. Jefferies urged the matter with his ordinary vehemence: he laid it for a foundation, that all preaching at conventicles was treasonable, and that this ought to dispose the jury to believe any evidence whatsoever upon that head, and that here were three positive concurring witnesses, so the jury brought him in guilty. And there was a shameful rejoicing upon this. It was thought, now conventicles would be all suppressed by it; since any person that would witness that treasonable words were delivered at them would be believed, how improbable soever it might be. But when the importance of the words came to be examined, by men learned in the law, they were found not to be treason by any statute. So Rosewell moved for an arrest of judgment, till counsel should be heard to that point, whether the words were

able immediately, and upon Saturday it was returned.

Die Sabbati, 25 Oct. 1684. B. Regis.

DOMINUS REX *vers.* ROSEWELL.

This day Mr. Rosewell was brought upon the Writ of Habeas Corpus, to the bar of the court of King's-bench, and was thus arraigned:

Cl. of Cr. Thomas Rosewell, hold up thy hand. [Which he did.]

“Thou standest indicted by the name of Thomas Rosewell, late of the parish of Rotherhith, in the county of Sarrey, clerk; For that thou, as a false traitor, against the most serene and most excellent prince our sovereign lord Charles the Second, by the grace of God, king of England, Scotland, France, and Ireland, defender of the faith, &c. thy supreme and natural lord; not having the fear of God in thy heart, nor weighing the duty of thy 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 said sovereign lord the king doth, and of right ought to bear towards him, altogether withdrawing; and contriving and intending to disturb the peace and common tranquillity of this his kingdom of

treason, or not. In Sidney's case they refused to grant that, unless he would first confess the fact. And, though that was much censured, yet it was more doubtful, whether council ought to be heard after the jury had brought in the verdict. But the king was so put out of countenance with the many stories that were brought him of his witnesses, that the attorney general had orders to yield to the arrest of judgment; though it had been more to the king's honour to have put an end to the business by a pardon. It was thought a good point gained, which might turn to the advantage of the subject, to allow that a point of law might be argued after conviction. The impudence of this verdict was the more shameful, since, though we had a popish successor in view, here was a precedent made, by which positive witnesses, swearing to any thing as said in a sermon, were to be believed against so many probabilities, and so much proof, to the contrary, which might have been at another time very fatal to the clergy.” Burnet's History of his Own Times, vol. 1, p. 597.

“Rosewell was attaint, by verdict, of high-treason in London, and having made his peace with the Lord Chief Justice, moved by his counsel to arrest the judgment for an error of fact in the record: The Lord Chief Justice could not contain himself, or be concealed, but openly rejoiced at the accident, and was tickled with mirth and laughing at the king's counsel. But the serious observation was that, after he had urged the prosecution of Rosewell, and a fault slept, he should so merrily discharge his.” North's Life of Lord Keeper Guilford. Vol. 1, p. 107, 8vo edit. of 1808.

England, and to sow sedition and rebellion within the kingdom, and to depose our said sovereign lord the king from the stile, honour, and regal name of the imperial crown of this realm, and to bring our said sovereign lord the king to death and final destruction, the 14th day of September, in the 36th year of the reign of our said sovereign lord the king that now is, at the parish of Rotherhith aforesaid, in the county of Surrey aforesaid; didst propose, compass and imagine to sow sedition, and raise rebellion against our said sovereign lord the king, within this kingdom of England, and to make a miserable slaughter among the subjects of our said sovereign lord the king, and to cause our said sovereign lord the king to be deposed from the regal state, title, and honour of the imperial crown of this realm, and to put to death, and final destruction, our said sovereign lord the king; and the government of this his kingdom of England at thine own will and pleasure to change and alter; and the state of this kingdom of England, in all its parts well ordered and constituted, to overthrow and subvert; and to levy war against our said sovereign lord the king, within this kingdom; And to complete thy said most wicked treasons, and traiterous purposes, and imaginations; and to raise discord between our said sovereign lord the king and his people, Thou the said Thomas Rosewell, the aforesaid 14th day of September, in the 36th year aforesaid, at the parish aforesaid, in the county aforesaid; falsely, unlawfully, seditiously, maliciously and traiterously, in a certain unlawful assembly, and in the presence and hearing of divers subjects of our said sovereign lord the king, then and there unlawfully and seditiously, and against the laws of this land, assembled and gathered together: didst speak, assert and declare, ‘That the People’ (meaning the subjects of our said sovereign lord the king), ‘made a flocking to our said sovereign lord the king, upon pretence of healing the king's evil, which he’ (meaning our said sovereign lord the king) ‘could not do; but that we’ (meaning thyself, and other traiterous persons, subjects of our said lord the king) ‘are they to whom they’ (meaning the subjects of our said lord the king) ‘ought to flock, because we’ (meaning thyself, and the said other traiterous persons) ‘are priests and prophets, that by our prayers can heal the dolours and griefs of the people. We’ (meaning the subjects of our said sovereign lord the king) ‘have had two wicked kings’ (the most serene Charles the First, late king of England, and our said sovereign lord the king that now is, meaning together, who have permitted popery to enter in under their noses; whom (meaning the said Charles the first, late king of England, and our said sovereign lord the king that now is) ‘we can resemble to no other person but to most wicked Jeroboam.’ And that if they, (meaning the said evil-disposed persons then and there, so as aforesaid with thee unlawfully assembled, and gathered together) ‘would

'stand to their principles, thou' (meaning thyself) 'didst not fear, but they' (meaning thyself, and the said evil-disposed persons) 'would overcome their enemies,' (meaning our said sovereign lord the king and his subjects) 'as in former times, with rams-horns, broken platters, and a stone in a sling ;' against the duty of thy 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." How sayest thou, Thomas Rosewell ; Art thou guilty of this High-Treason whereof thou standest indicted, and has been now arraigned, or not Guilty ?

Mr. Rosewell. My lord, I humbly crave the favour to speak a word.

Just. Holloway. What is it you would say, Sir ? You must plead.

Ros. My lord, my charge is very high ; and I bless my God, I am not conscious to myself of any guilt as to those things that you have heard read, and charged upon me—

Just. Hol. If you will plead, Sir, to this indictment, so ; that is all you have to do now.

Ros. My innocence is my great comfort under the God of heaven, who knows they have laid to my charge things that I know not. I do protest my abhorrence of these things alleged to be said by me against my sovereign, whom I honour in my heart, and daily pray for ; I bless my God for it.

Just. Hol. I hope then your innocence will clear you. But we have nothing to do now but to take your answer to this question, whether you are guilty or not guilty, of what you stand indicted for ?

Ros. I humbly crave your lordship's patience a little. Pray, my lord, give me leave—

Just. Hol. Sir, you will be heard whatever you have to say, at the time of your trial.

Ros. Pray hear me a few words, my lord ; I would not trespass upon your patience ; I have but a few words to say.

Just. Walcot. You must plead, guilty, or not guilty, first.

Ros. My lord, I beseech you—

Just. Hol. Sir, we cannot hear you in a case of so great weight and moment as this, till you have pleaded. You will have time enough at your trial to make your defence ; and all we can do now is to take your plea of guilty or not guilty.

Ros. May it please your honours, you are sensible of my great weakness and ignorance in matter of law, and things of this nature ; I therefore humbly beg I may have counsel to assist me in this business.

Just. Walcot. If there be any thing of matter of law doth arise upon your trial, the court will assign you counsel.

Just. Hol. We cannot assign you counsel at present, for we have nothing to assign it upon. If there do any question of law arise in your case, then the court will (as they are bound to do) take care of you, that you suffer no prejudice for want of the assistance of counsel ; and in matters of fact upon your trial, the court are of counsel for you.

Ros. I humbly thank you, my lord ; I hope you will pardon my weakness and ignorance. I crave the favour to have a copy of my indictment.

Just. Hol. We cannot allow it. You cannot be ignorant of that, it has been denied in many cases of late.

Just. Walcot. We cannot grant it, except Mr. Attorney will consent to it.

Just. Hol. You must positively say guilty, or not guilty. Sir Samuel Astry, call him to his plea.

Cl. of Cr. How sayest thou, Art thou Guilty or not Guilty ?

Just. Hol. Look you, Sir, you shall not be straitened, you shall have convenient time to consider what defence you have to make. In the mean time, we have nothing to say, but to know of you what you plead ; Guilty or not Guilty.

Att. Gen. (Sir Robert Sawyer) If you desire to have the words read again to you, you shall.

Just. Hol. Ay, with all our hearts.

Ros. I thank you, Sir, and my good lords. I desire, if you please, to have it read in Latin.

Just. Hol. Read it in Latin. [Which was done.]

Cl. of Cr. How sayest thou, Art thou Guilty, or not Guilty ?

Just. Holloway. Now what do you say to it. Are you guilty or not guilty ? for indeed we cannot spend our time impertinently, we have other business. Here is a question you ought to make a direct answer to one way or other.

Rosewell. My lord, I humbly crave the favour it may be read once more in English.

Att. Gen. Sir Samuel Astry, read the words without the innuendos.

Cl. of Cr. (Reads.) 'That the people made a flocking to the king, upon pretence of healing the king's evil, which he could not do ; but we are they to whom they ought to flock, because we are priests and prophets, who can heal their griefs. We have now had two wicked kings together, who have permitted Popery to enter under their noses, whom we can resemble to no other person but to the most wicked Jeroboam : and if you will stand to your principles I do not fear but we shall be able to overcome our enemies, as in former times, with rams horns, broken platters, and a stone in a sling.'

Just. Holloway. Now you hear your charge both in Latin and English ; pray, therefore let the court know what you do plead ; guilty or not guilty to it.

Rosewell. Not Guilty, my lord ; and I bless my God for it.

Cl. of Cr. Culprit, how will thou be tried ?

Rosewell. By God and my country.

Cl. of Cr. God send thee a good deliverance.

Rosewell. These are things that my soul abhors, I thank my God.

Att. Gen. Mr. Justice Holloway, will you please to appoint some time for his trial ?

Justice Holloway. What time would you have, Mr. Attorney? When can you be ready, Mr. Rosewell?

Rosewell. I desire, my lord, it may be on the 19th of November.

Just. Holloway. What day of the week is that?—*Mr. Clerk.* Upon Wednesday.

Just. Holloway. Are there no arguments appointed for that day?

Clerk. There is a jury of Northamptonshire for that day.

Just. Holloway. Then it cannot be that day.

Rosewell. Then, if it please your honours, I desire it may be the next day; upon Thursday.

Att. Gen. When it is most convenient for the business of the court.

Just. Holloway. Sir Samuel, you will see when it will be most convenient at the return of the Venire.

Cl. of Cr. Must I return it?

Att. Gen. No; the sheriff must: and the course is to make it returnable the same day the case is tried.

Rosewell. My lord, I humbly desire I may have counsel allowed to come to me.

Att. Gen. You can have no counsel allowed you.

Rosewell. My lord, I request that my friends may be allowed to come to me in the mean time; I have been a prisoner above this month, and not permitted to see my friends, nor they to see me.

Just. Holloway. What friends would you have?—*Rosewell.* My relations.

Just. Walcot. That relations is a large word.

Att. Gen. Truly, Sir, I think he may have liberty to discourse with any person in the presence of the keeper, I shall not oppose that.

Rosewell. Yes, my lord, I desire no otherwise.

Just. Walcot. Who do you name to come to you?

Rosewell. I have poor children, that desire and long to see me.

Just. Holloway. Who do you say, you would have come to you?

Rosewell. My wife and children, my lord, that are my bowels.

Att. Gen. In the presence of the keeper I cannot oppose it.

Rosewell. Will your lordships please to allow counsel to come to me?

Just. Holloway. We cannot do it by law. The court is to be of counsel for you when you come to your trial. The court will not suffer any thing to be done to your prejudice against law.

Rosewell. Is there any statute, my lord, that forbids the giving of counsel?

Just. Holloway. The law forbids the allowing of counsel in capital causes: unless where matter of law doth arise.

Rosewell. My lord, as I remember, Fitzharris had counsel allowed him.

Just. Holloway. That was in a different case, in a matter where there were special pleadings; this is a general issue.

Att. Gen. That was in a matter of law, that was insisted upon, but it is not so here; if this gentleman had any matter of law to plead, he should have counsel assigned him too. But, Sir, I think Tuesday the 18th of November will be the freest and most convenient day.

Just. Holloway. Let it be that day then.

Cl. of Cr. The 18th of November is the day of your trial.

Rosewell. But my lord, was not counsel allowed him before his trial came on?

Just. Holloway. Yes: but that was upon a special plea, of a matter in law.

Rosewell. I hope you will consider my case as of one that knows not the law.

Cl. of Cr. Tuesday the 18th of November is the day.

Rosewell. My lord, I humbly request the favour that any person that can speak of my integrity, may come and testify for me.

Att. Gen. Ay, ay; you may have subpoenas out of the office for any body who you will, that are to be witnesses for you.

Just. Walcot. The officers of the court will do all things that are requisite and legal for you.

Just. Holloway. Then take back your prisoner, Keeper.

Att. Gen. I do not know truly, whether the practice of the court is not to commit to the Marshalsea, being the prison of the county of Surrey

Cl. of Cr. Sir, it may be one or the other way, as the court thinks fit. As long as the King's-bench sits in Middlesex, he may be prisoner still in the Gate-house.

Keeper. Then the rule of the court is that he shall come again then.

Cl. of Cr. Yes, he is, by rule, to appear here the 18th of November next.

Whereupon he was carried back to the Gate-house.

Die Martis, Nov. 18, 1684.

This day the prisoner was brought, by rule, from the Gate-house to the bar of the King's-bench court to his trial, at which all the judges of the said court were present.

Cl. of Cr. Thomas Rosewell, hold up thy hand. [Which he did.] Those men that thou shalt hear called, and do personally appear, are to pass between our sovereign lord and thee, upon the trial of thy life and thy death: If therefore thou wilt challenge them, or any of them, thou art to speak unto them as they come to the book to be sworn. Sir George Sheeres, baronet.

Rosewell. My lord, I would humbly crave the favour of your lordship, that I may have the use of pen, and ink.

L. C. J. (Sir G. Jeffreys) Ay, in God's name let him have pen and ink.

Cl. of Cr. Swear sir George Sheeres, bart.

Rosewell. I beg I may have pen, ink and paper, before he be sworn.

L. C. J. Ay, let him.

Crier. Look upon the prisoner. Sir, you shall well and truly try, and true deliverance make between our sovereign lord the king, and the prisoner at the bar, whom you shall have in charge; and a true verdict give according to your evidence. So help you God. [*Jurat*' Sir George Sheeres.]

Rosewell. My lord, I challenge him.

L. C. J. That you cannot do now he is sworn.

Rosewell. I was surprised, my lord; I did not know it.

L. C. J. I cannot help it, Mr. Rosewell, you must mind your business. We cannot unswear him again. Go on.

Cl. of Cr. Sir St. John Broderick.

Crier. Look upon the prisoner, Sir; You shall well, &c. [*Jurat*' Sir St. John Broderick.]

Rosewell. I challenge him.

L. C. J. You cannot, Sir; he is sworn now.

Rosewell. I beg your lordship's pardon; I was surprized.

L. C. J. Let us not spend time in such talk as is to no purpose; I tell you we cannot unswear him.

Rosewell. I desire, my lord, my challenge may be received, I was going to speak—

L. C. J. It cannot be after he is sworn; we cannot make a new law for you. Mind what was said to you; if you have a mind to challenge any body, you must challenge them before they come to be sworn.

Cl. of Cr. Sir Robert Knightley.

L. C. J. Mind the thing you are about, man: speak now, if you have a mind to challenge him.

Ros. I do not challenge him.

Cl. of Cr. Then swear him.

Crier. Look upon the prisoner, &c. [*Jurat*' sir Robert Knightley.]

L. C. J. Pray now mind the thing you are about; you are looking about you for some private mark, or hint to be given you by some body, and so lose your time of challenging. You must challenge them as they come to the book to be sworn, and before they are sworn.

Ros. I beg your lordship's pardon; I was minding to set down the names in my paper, because I am to take notice of those I challenge for their number.

L. C. J. You shall have all the fair advantages that the law will allow; you shall have your full number to challenge, which you may do peremptorily, and without cause as to 35; and as many more as you can with cause.

Ros. Is there any one to note the number?

L. C. J. There shall be sure to be notice taken that you be not surprized that way. You shall have all fair advantages, I tell you.

Ros. I humbly thank your lordship.

Cl. of Cr. Sir William Elliot.

Crier. Look upon the prisoner.

Ros. I challenge him.

Cl. of Cr. Sir George Woodroefe.

Ros. I challenge him.

Cl. of Cr. Sir Corawall Bradshaw.

Ros. I challenge him.

Cl. of Cr. Sir Thomas Bludworth.

Ros. I challenge him.

Cl. of Cr. Anthony Thomas, esq.

Crier. Look upon the prisoner.

Ros. I do not challenge him.

Crier. You shall well and truly, &c. [*Jurat*' Anthony Thomas.]

Cl. of Cr. Francis Brend, esq.

Ros. I challenge him.

Cl. of Cr. James Reading, esq.

Ros. Is it Mr. Justice Reading of Southwark?

L. C. J. Do you challenge him or not? you may if you will.

Ros. My lord, my reason is, I have heard much of him, but never had an opportunity to know him till now. I have no exception against him.

L. C. J. Then swear him.

Cl. of Cr. Thomas Newton, esq.

Ros. I challenge him.

Cl. of Cr. Thomas Vincent, esq.

Ros. I challenge him.

Cl. of Cr. Ambrose Muschamp, esq.

Ros. I challenge him.

Cl. of Cr. Ralph Freeman, esq.

Ros. I challenge him.

Cl. of Cr. Joseph Reeves, esq.

Ros. I challenge him.

Cl. of Cr. Anthony Rawlins, esq.

Ros. I do not challenge him. [*He was sworn.*]

Cl. of Cr. Thomas Overman, esq.

Ros. I have no exception against him. [*He was sworn.*]

Cl. of Cr. George Meggot, esq.

Ros. I challenge him.

L. C. J. Crier, Be sure you bid them look upon the prisoner, and the prisoner look upon them, that he may see what he does.

Crier. I do so, my lord.

Cl. of Cr. Samuel Lewin, esq.

Ros. I have nothing to say against him.

[*He was sworn.*]

Cl. of Cr. Lawrence Marsh, esq.

Ros. My lord, I desire to know how many I have challenged.

L. C. J. He shall tell you. Count them.*

Cl. of Cr. Twelve. What say you to Mr. Marsh?—*Ros.* I challenge him.

Cl. of Cr. Ambrose Brown, esq.

Ros. I challenge him.

Cl. of Cr. John Halsey, esq.

Ros. I challenge him.

Cl. of Cr. John Awburn, esq.

Ros. I challenge him.

Cl. of Cr. Henry Flood, esq.

Ros. I challenge him.

Cl. of Cr. John Parsons, esq.

Ros. I challenge him.

Cl. of Cr. John Pettyward, esq.

* See a Note to the Case of Don Pantaleon Sa, vol. 5, p. 466.

Ros. I do not challenge him. [He was sworn.]

Cl. of Cr. Richard Coldham, esq.

Ros. I do not challenge him. [He was sworn.]

Cl. of Cr. Robert Sanders, esq.

Ros. I challenge him.

Cl. of Cr. John Heather, esq.

Ros. I do not challenge him. [He was sworn.]

Cl. of Cr. John Austin, esq.

Ros. Pray, Sir, doth this make twelve, if he be sworn?—Cl. of Cr. Yes, Sir.

Ros. Then I do not challenge him. [He was sworn.]

Cl. of Cr. Crier, count these. Sir George Sheers.

Crier. One, &c.

Cl. of Cr. John Austin.

Crier. Twelve. Good men and true, stand together and hear your evidence.

The twelve sworn were these: Sir George Sheers, sir St. John Broderick, sir Robert Knightley, Anthony Thomas, James Reading, Anthony Rawlins, Thomas Overman, Samuel Lewin, John Pettyward, Richard Coldham, John Heather, and John Austin.

Cl. of Cr. Thomas Rosewell, hold up thy hand. [Which he did.] Gentlemen, you of the jury, look upon the prisoner, and hearken to his cause. He stands indicted by the name of Thomas Rosewell, &c. (Prout) in the indictment, *mutatis mutandis*.—Upon this Indictment, he hath been arraigned, and thereunto hath pleaded not Guilty; and for his trial hath put himself upon God and his country, which country you are. Your charge is to enquire whether he be Guilty of this high treason, in manner and form as he stands indicted, or not Guilty. If you find him guilty, you are to enquire what goods or chattels, lands or tenements, he had at the time of the high treason committed, or at any time since, to your knowledge. If you find him not guilty, you are to enquire whether he fled for it; if you find that he fled for it, you are to enquire of his goods and chattels as if you had found him guilty. If you find him not Guilty, and that he did not fly for it, you are to say so, and no more, and hear your evidence. Crier, make proclamation.

Crier. O yes, O yes, O yes! If any one can inform my lords the king's justices, the king's serjeant, the king's attorney-general, or this inquest now taken, of the high-treason wherof the prisoner at the bar stands indicted, let them come forth, and they shall be heard: and all manner of persons that are bound to give evidence on the behalf of our sovereign let the king against the prisoner at the bar, let them come forth and give their evidence; for now the prisoner stands at the bar upon his deliverance: or they forfeit their recognizance.

Mr. Phipps. May it please your lordship, and you gentlemen of the jury—

Ros. Hold! Hold! I crave the favour that the Indictment may be read in Latin.

L. C. J. Ay, with all my heart, let it be read in Latin. [Which was done.]

Ros. My lord, I humbly crave leave to speak a word or two.

L. C. J. What would you have?

Ros. I beg your patience for a word or two. I find, my lord, as I told my lords upon the day of my arraignment, that my charge is very black and high: and truly if I were guilty of those things that are laid to my charge—

L. C. J. You are now going to be tried for them. I hope you are innocent.

Ros. I humbly thank your lordship: I beg you would hear me but a word or two.

L. C. J. You must keep up the method of proceedings, your time is not yet come. What is it you would have?

Ros. My lord, my soul abhors these things, I thank my God for it. I was going to speak to your lordship, to know whether the words of a natural or a mad-man be treason in law.

L. C. J. No.

Ros. Then, my lord, the ground of the question is this, I find by recollection and consideration of the words laid to my charge, that my malicious enemies have accused me of what any man in his senses—

L. C. J. This is not proper, Mr. Rosewell, at this time; for this is but an anticipation. You must hear what is first proved against you. We must keep up to the forms of law, you shall have your full time to be heard whatsoever you will say for yourself; but you must not anticipate the cause with previous discourses.

Ros. I would only assert my own innocency.

L. C. J. Not yet; you must not do it, nor you shall not do it. When it comes to your turn to speak, you shall have liberty enough to make your defence as long as you will. Go on, Sir.

Mr. Phipps. May it please your lordship, and you gentlemen that are sworn: the prisoner at the bar, Thomas Rosewell, stands indicted, That he, as a false traitor, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and endeavouring to disturb the peace and tranquillity of the kingdom, and to depose the king, the 14th of September in the 36th year of this king, at the parish of Rotherith, in your county, did falsely, maliciously, and traitorously, purpose and imagine to raise a rebellion within the kingdom, and to deprive the king, and depose, and put him to death and destruction, and the government to change and alter, and to levy war against the king within the kingdom: and these wicked purposes to bring to pass, he the said Thomas Rosewell, the said 14th of September in the 36th year aforesaid, at the place aforesaid, falsely, unlawfully, maliciously, seditiously and traitorously, in a certain unlawful assembly, then and there

congregated, did say and declare, 'The people make a flocking to the king, upon pretence of healing the king's evil, which he cannot do; but we are they to whom they ought to flock: for we are priests, and prophets, that can heal their grievances. We have now had two wicked kings together, who have permitted popery to come in under their noses; and whom we can compare to none but the most wicked Jeroboan. But if they would stand to their principles, he did not doubt, but they should overcome their enemies, as in former times, with rams-horns, broken platters, and a stone in a sling.' And this is laid to be against the duty of his allegiance, against the peace of the king, his crown and dignity; and against the form of the statute in that case made and provided. To this indictment he has pleaded not guilty: if we prove him guilty of this matter, you are to find him guilty.

Att. Gen. May it please your lordship, and you gentlemen of the jury; these traitorous words, that the prisoner at the bar is accused of, were spoken of in a Sermon,* or preaching at a conventicle. And though the gentleman does pretend to much innocency; yet you will find, that in open defiance of the law, he takes upon him to preach against the law, not only of the land, but even against the laws of Almighty God: for he takes upon him to be a preacher against a rule, than which nothing is more plain in all the Word of God, viz. 'That he should not speak evil of dignities, nor revile the prince of his people.' He knows this to be the rule of the Scripture; and yet in his constant discourses, (as we shall prove) he makes it his practice to revile the government on all sides. And by these doings at this day, gentlemen, you will easily understand what the designs of these conventicles are; only to nurse up people in sedition, and train them up to rebellion; that they may be ready to break out into it when their teachers advise them to it. We shall call our witnesses, and prove to you, that this is, and has been the constant tenor of his discourse, viz. Reviling of the government; and there is almost no text of Scripture, but, in his way of perverting it, he has turned against the government. We shall shew this to be the habitual course and practice of him who pretends to be so honest and so innocent a man. Crier, call Elizabeth Smith,——Hilton, and Farrar.

Then some of the counsel at the bar, being talking among themselves, the Lord Chief Justice reproved them for it.

L. C. J. Look you, gentlemen, you must not have interlocutions among yourselves.

* See something concerning a Sermon being an overt act of treason in the arguments concerning the examination of Daniel Stuart, when he was for the third time produced, as a witness for the prisoner in Hardy's Case, A. D. 1794, in this Collection.

And you, Gentlemen of the 'Jury, I must tell you, if any one whisper any of you, you ought to acquaint the court with it. It is your duty to be directed by the court, and the evidence. Here is a man's life in question, and that is a very weighty thing: and you must not take any private insinuations, but only hearken to your evidence, and mind what is spoken publicly, that the prisoner may be able to give answer to it.

Ros. I humbly thank your lordship.

Att. Gen. Where are Mrs. Hilton and Mrs. Smith? [They were all sworn.]

Ros. I do humbly request one favour of the court.

L. C. J. What would you have?

Ros. I humbly beg they may be examined *separatim*.

L. C. J. They shall.

Ros. I humbly thank your lordship,

L. C. J. Who do you begin withal, Mr. Attorney?

Mr. Jones. My lord, we shall begin with Mrs. Smith.

L. C. J. Then you must make way, that the other witnesses may go out of hearing. You Crier, make way for them; and see that they be set where they may not hear. [Which was done.]

Att. Gen. Come, Mrs. Smith, pray give my lord and the jury an account whether you have been at any meeting, where this gentleman has been? Whether you know him? and what you heard of him?

Smith. I heard him say this——

L. C. J. Hold a little. What is this woman's name, Elizabeth Smith?

Att. Gen. Yes, my lord. Were you by at any of his conventicles?

Smith. Sir, I have been ever since the 20th of July, until that day for which he was taken, but one Sunday.

Att. Gen. Give my lord an account of what you heard.—*Smith.* Yes, Sir.

L. C. J. Where was it that his meeting-house was?

Smith. He had several houses, private houses, and a public house of his own.

L. C. J. Where? In what place?

Smith. In Salisbury-street, near his own dwelling.

L. C. J. Where is that?

Smith. In Rotherhith.

L. C. J. You were frequently there you say?—*Smith.* Yes, my lord.

L. C. J. What number of people might be there, as you guess?

Smith. I believe there might be 400 people, or 300 commonly.

L. C. J. What sort of people were they?

Smith. Men and women, house-keepers.

L. C. J. Well, what did you hear him say?

Smith. I can give you an account of his sermons several days.

L. C. J. Do so.

Smith. The first notice that I took of any thing concerning the government, was upon

the 17th of August, and that was concerning his majesty ; and then in his prayer after sermon, he wished he might not offend God in praying for the king ; but that it might please God to open his eyes, and the times might turn.

Att. Gen. What other things have you heard him say ?

Smith. The next time that I heard him was the next Sunday again, and that was in West-lane, in a house there, and then he was speaking of Sodom and Gomorrah, and he brought in this proof, not doubting but if there had been ten righteous persons, the city had not been destroyed : but he did not mean recorders, nor lord-mayors.

Ros. What day was that, mistress ?

Smith. The 29d of August.

Att. Gen. Well, what did you hear him speak upon the day in the indictment, the 14th of September ?

Smith. He said, ' The people made a flocking to the king, to cure the king's-evil, which he could not do ; but,' says he, ' we are they they should flock unto, for we are priests and prophets, that by our prayers can cure their grievances.' He said, ' We have now had two wicked kings together, which have permitted Popery to come in under their noses, and could he be compared to nothing but to most wicked Jeroboam.' And then after he had preached a good while, again he said, ' If they would stand to their principles, he did not fear but they should overcome their enemies, as in former times, with broken platters, rams-horns, and a stone in a sling.'

L. C. J. When was this ?

Smith. This was upon the 14th of September.

L. C. J. Where was it ?

Smith. At one Captain Daniel Weldy's house.

L. C. J. What is he, a seaman ?

Smith. Yes, and he prayed for him, being then at sea, and his son both, who was ill.

L. C. J. How many do you think might be present there at that time ?

Smith. There was a low parlour full, and a little room up six steps ; and where he preached was up one pair of stairs, there was a large room and a garret.

L. C. J. Where did he stand ?

Smith. In the door-case of that room, that the sound might go up and down.

L. C. J. How many people in number might there be, think you ?

Smith. I cannot tell, my lord ; a great many.

L. C. J. How many, as nigh as you can guess or think ?

Smith. Several hundreds of them.

L. C. J. Do you know any of them ? Were they people of any quality ?

Smith. Yes, I know a great many of them ; several of them are in the court, and about the bed now.

L. C. J. Who stood at the door and let you in ?

Smith. One Mr. Paul Shed ; and he was angry at my coming with pattens, for they made an impression in the ground, and gave notice to others, that there was company there : and I promised him I would come no more with them.

Just. Walcot. Was he door-keeper ? What is he ?

Smith. A brasier, I think.

Just. Holloway. Had you any notice of a conventicle that was to be there ?

L. C. J. Ay ; tell us how you came thither ?

Recorder. (Sir Thomas Jenner.) How came you to find it out that there was a meeting at such a place ?

Smith. At first I found it by dogging of people as they went along ; and afterwards, there were people set commonly at a place called Cherry-garden stairs to give notice ; and sometimes I asked there, and sometimes I went to Mr. Shed's house to enquire.

L. C. J. Shed, you say, was present there then ?

Smith. Yes, he let me in.

L. C. J. What, he was the man that managed the conventicle. He was clerk, I suppose ; was he not ?

Smith. I never heard him say Amen ; but I have heard him expound in the conventicle sometimes.

L. C. J. Oh, he was a journeyman preacher, it seems.

Recorder. Pray was there any store of Watermen and Seamen there ?

Smith. Yes, abundance from Rotherhith, or thereabouts.

L. C. J. Which way came all the people that were there ?

Smith. From Deptford and Rotherhith, and all thereabouts.

L. C. J. Was it near the water-side ?

Smith. Yes, not far from it.

L. C. J. Well, Mr. Attorney, have you any more questions to ask her ?

Att. Gen. No, I think not. Mrs. Smith, you have heard him, you say, at other days ; how did he use to treat the government in his preaching at other times ?

Ros. My lord, I beseech your lordships to tell me whether these questions are proper to be put, it not relating to the matter that I am accused of ?

L. C. J. Yes, yes, to give an account of the disposition of your mind ; very proper as can be.

Ros. Because it is not part of my charge, and I cannot be prepared to answer it.

L. C. J. When the king's counsel have done with her, you may ask her any questions ; but you must let them go on first.

Att. Gen. My lord, it is charged that he spoke these words with a traitorous, malicious mind ; and what better evidence of such a mind than his usual discourses ?

Smith. The 31st of August, I heard him preach at Paul Shed's house ; and there he preached that there was a certain great man, that

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lived at the upper-end of Grace-church-street, about this time eighteen years ago; I name no body, says he, you all know him whom I mean; And there came a certain poor man to him; he was not a poor man neither, but a carpenter by trade, one that wrought for his living, a labouring man; and told that great man, if he would take his advice, he would tell him how to quench the fire, but he pished at it, and made light of it, and would not take his advice. Which if it had not been for that great man, and the lord mayors and sheriffs that have been since, neither that fire in London, nor the fire at Wapping, nor the fire at Southwark, had gone so far or come to what they did.

L. C. J. There was a great man that lived at the upper-end of Grace-church-street! Who did he mean by that?

Recorder. He meant, we suppose, sir Thomas Bloodworth, that was lord-mayor at the fire-time.

L. C. J. He did not live there then.

Recorder. It seems he said so.

Att. Gen. Pray Mrs. Smith, let me ask you one question. How far were you off from him; and where did you sit this 14th day of September, when you heard him say those words you speak of?

Smith. I sat upon the bed, and he was standing at the door.

Att. Gen. My lord, we have done with this witness at the present.

L. C. J. Now, Mr. Rosewell, if you will, you may ask her what questions you please.

Ros. My lord, I was before going to beg your pardon for my weakness, being altogether unacquainted with these things: and that you would look upon me as one that is *inops consilii*, and pardon any thing that comes from me impertinently. I cannot speak to her as a lawyer to sift her, and search out the truth; will your lordship give me leave to speak to her as a divine?

L. C. J. Ask her what questions you will, but we will not have any of your preachments here. You must consider where you are, you are not now in your pulpit, but at the bar; I assure you we do not intend to make a conventicle of the King's-bench court.

Ros. My lord, I meant only to endeavour to convince her, by putting some questions like a divine, to her. For I pity them though they envy me; and I bless my God, have prayed for them many times since my imprisonment.

L. C. J. Well, well; do not stand to commend yourself now, this is not your time of making your defence: Only, if you will ask this witness any questions, you may.

Ros. You are under an oath, mistress.

Smith. I am so, Mr. Rosewell.

Ros. Are you sensible what an oath is, and the great obligation you are under by it to testify nothing but the truth? As you will answer it to the great God—

L. C. J. Look you, Mr. Rosewell, ask her any questions to the business that she has here

testified; but do not preach to her. It is not your work to catechise the witnesses, that is the duty of the court, and we shall, no doubt, take care to do our duty. And I will tell her, to save your preachment, she is in the presence of the great God of heaven and earth, before whom we must appear at the great day of judgment, to give an account of every word we speak. And you are under an oath, and if in case you tell one tittle of a lye in your testimony against the prisoner at the bar, who stands now to be tried for his life, it will be just with the great God to sink you down into hell-fire immediately. Therefore, I require you, upon your oath, not to speak one word but what is truth.

Smith. My lord, I assure you, I will rather say less, than add any one tittle.

L. C. J. Mr. Rosewell, ask her what you will, but do not give yourself, nor us, the trouble of a preachment to teach her the obligation of an oath; for she very well knows, it seems, what it is, and says she will rather speak less than more than the truth.

Ros. I humbly thank your lordship for what you have said to her. Mrs. Smith, pray was you at Rotherhith the 14th day of September?

Smith. Yes, that I was.

Ros. Did you come alone? or whom came with you?

Smith. Mrs. Hilton came along with me, and another gentlewoman, and Mr. Shed let us in all together.

Ros. Who is that, Mrs. Hilton?

Att. Gen. You will see her by and by, Mr. Rosewell.

Ros. Where did you meet together?

Smith. Mrs. Hilton lay with me all night, and we were together the day before.

Ros. What time did you come thither, pray, mistress?

Smith. I came thither before seven of the clock, before you came, Sir.

Ros. And I pray whose house came you to at Rotherhith?

Smith. We are informed it was captain Weldy's house.

Ros. Are you sure it was his house?

Smith. As they did tell us, it was captain Daniel Weldy's.

Ros. I pray, mistress, what room were you in there?

Smith. We were up one pair of stairs. There is a little room we come at sooner; but we were in the room with the bed; and there was one Mr. Atkinson there that was in mourning, and there were two or three boys of his with him that sat upon the bed, and their shoes were plucked off, that they might not dirt the bed; and I gave him his boy's shoes from under the bed.

Ros. Pray where did I stand, mistress, do you say?

Smith. In the door-case.

L. C. J. What boy is that you speak of?

Smith. Two boys that came in with one

Mr. Atkinson; his relations, I suppose they were.

Ros. Pray how did the service begin?

Smith. You took your text out of the 21st of Genesis; that was the chapter, to the best of my remembrance.

Ros. But I ask you, Mistress, how did the worship, the service begin?

L. C. J. You mean your prayer, you do not use to call it service.

Smith. You made a prayer.

Ros. Was it begun with a chapter, or a Psalm, or how?

Smith. There was no psalm; a long prayer you made, as you used to do formerly.

Ros. How long was that?

Smith. It was always used to be about three quarters of an hour long.

Ros. Was there any chapter read?

Smith. There was no chapter before you took your text, as I heard, and I was there before you.

Ros. Upon what occasion then were these words spoke, if there was no chapter read?

Smith. I say there was none till you took your text, and then you spoke those words.

Ros. But how came those words in?

Smith. You always took a whole chapter, and expounded all along.

Ros. A long text for one sermon, mistress.

L. C. J. Yes, yes, we know you have a fine way of preaching.

Ros. Well, Mistress. Upon what verse of the chapter were these words spoke, about flocking to the king to cure the king's evil?

Smith. I cannot be punctual to the particular verse.

L. C. J. Nay, I suppose you seldom keep to your text. I am sure there was never a verse in any chapter that warranted the speaking of any such words as these.

Smith. My lord, I cannot be punctual to the particular verse. It was within five or six verses of the beginning, I believe.

Ros. Then upon what occasion came in the words about the two wicked kings?

Smith. In preaching you brought it in by other proofs.

L. C. J. Why, man, there can be no occasion for speaking of those words. You spoke them without any occasion at all. No body can tell what occasion you had to speak them.

Ros. But, my lord, I suppose there may be some coherence in my discourse. I would know how they were brought in?

L. C. J. Who can tell the occasion? Do you ask me what reason any man has to speak treason? I tell you there is none at all to be given for it.

Smith. One of your proofs in your preaching was concerning Dalilah and Sampson, and you brought in that proof concerning the king's using of women, it was out of the Judges. And he said he did not question, but that in the end the whores would serve the king, as that whore Dalilah did Sampson.

L. C. J. Was this at the same time, upon the same day?

Smith. Yes, it was upon the 14th of September.

Ros. If it please you, my lord, these are not words that are charged in the information—

L. C. J. You draw it upon yourself by your questions.

Ros. If they were spoken, (upon that hypothesis, I say, if they were spoken; but I deny the thesis, I abhor the thoughts of them) I would know how they were brought in, under what verse?

L. C. J. Ay, I take you right as to that, you do deny it; and they are not in the indictment.

Smith. I cannot be punctual as to the verse.

Ros. Pray upon what account did come in the two wicked kings?

Smith. I cannot tell the verse, truly.

Ros. How came in that about Jeroboam?

L. C. J. How can she tell how you bring in treason?—*Ros.* My lord—

L. C. J. Nay, pray, Sir, hear me a little. You shall have all the liberty to defend yourself that the law can allow of. We are accountable to the law upon our oaths to do justice, and are as much accountable to Heaven for our actions, as you or any prisoner that comes to this bar is to the law for your actions. But do you ask what reason you spoke treason for? I tell you no reason can be given for it.

Just. Hol. Do you think any of your auditors can give an account of the connection of your whole sermon?

L. C. J. When you talk besides the cushion, do you think any man alive is able to give an account how you come to ramble and talk treason?

Ros. Can you tell, mistress, when that was spoken, of standing to their principles, and their rams'-horns, &c.

Smith. That was at the latter end of your sermon.

L. C. J. When you had said there were two wicked kings, then presently you were for standing to your principles, and overcoming your enemies.

Just. Hol. It seems she was very intent upon your sermon.

L. C. J. For my part, I wonder she can remember so much as she does. It is much she can remember such stuff as this.

Ros. The God of truth, my lord, I hope will manifest the truth. Pray, mistress, were these words spoken one just after another in my discourse?

Smith. No, they were not; but they were all spoken at that time.

Just. Hol. Have you done with her?

Ros. No, my lord, I humbly beseech your favour and patience a little. Pray, mistress Smith, did you write?

Smith. I did not write till I came home, and after I came home I did write it down. Several that were there did write down your sermon.

Ros. Several of whom, do you mean?

Smith. Several of your congregation, Sir.

Ros. Did your companions write? And pray where did you first write down these words?

Smith. After I came home I set them down, word for word to a tittle, as they were spoken, as near as I could remember what you spoke.

Ros. Was any body with you when you set them down?

Smith. Yes, my own family saw me write them down; and the other witness was with me; and afterwards we went to the Bull and Mouth, the Quaker's meeting-house.

Ros. What other witnesses were by when you set them down?

Smith. There was my husband, my apprentice, and my child.

Ros. And did you set them down just exactly as you have sworn them upon this indictment?

Smith. Yes, to the best of my knowledge.

Ros. Upon your oath, in the presence of the great God, did you set them down as they were spoken?—*Smith.* Yes, I tell you.

L. C. J. Ay, I would ask you that question; did you (I speak to you as in the presence of the great God, and upon your oath) set down his words just as he spoke them in substance?

Smith. Yes, I did to the same substance as near as I could remember.

Ros. Pray what other words were spoken between these words in the indictment, if they were not all spoken together?

Smith. One thing I do remember more that you said that day. You said there was a word they called canting; but for your part you did not understand what it meant, unless it were this; You said, you chanced to go by one of the great churches; where peeping in, you saw a man with a white surplice, and the organs were going, and they were canting, and singing the Litany, the Creed, and the Ten Commandments, with a Ha-ha-ha-ha-ha. For your part, you were ashamed to hear it: and this you said was all the canting you knew.

Att. Gen. You will draw this upon yourself.

Ros. I am sorry to hear this indeed, my lord.

L. C. J. So am I too, with all my heart, I will assure you.

Ros. You say you set down the words the same day, when you came home?

Smith. Yes, I resolved so to do, when I came away from the meeting, to write them down as soon as I came home.

Ros. Did you confer with any body about these words?

Smith. Not till I came to a justice of peace, and discovered it.

Ros. What justice of peace was that whom you discovered it to?

Smith. The Recorder of London.

Ros. And you swear these were the words that I spoke?

Smith. Yes, as near as I can remember.

L. C. J. If she swear the substantial part of them, it is enough, though the very exact words she doth not swear: for the words are laid in

this indictment in Latin, and by way of assertion.

Ros. Your lordship will pardon my weakness, I am ignorant of the law.

L. C. J. And we will take care you shall have nothing done to your prejudice that is against law.

Ros. I humbly thank your lordship. Mistress Smith, upon your oath, you say Mr. Shed was at that conventicle?

Smith. Yes, he let me in at the door, and was angry with me that I would come so near the place with my pattens; he said it might give occasion of suspicion.

Ros. You were saying you heard him ex-pound. Where was that pray?

Smith. Yes, that I did, at Mr. Crookshanks's house; and I heard him another time—

Ros. What was the day in August that you say you came first to hear me?

Smith. I do not say it was in August, but in July, that I came first to hear you, the 20th of July.

Ros. You say I preached in the public meeting-place; what day was that, pray?

Smith. The 10th of August, to the best of my remembrance; it was the fourth Sunday, as I remember, that I heard you there.

Ros. Have you not sworn against conventicles in other places?—*Smith.* Yes.

Ros. What conventicles?

Smith. If my lords please to ask me, I shall give an account.

Ros. Have you, or have you not?

Smith. Yes, several; though I never heard any thing spoken in any of them against the king, but at your's.

Ros. Did you swear a conventicle against one Mr. Hales?

Smith. I swore it by confession.

Ros. Were you at that conventicle?

Smith. No, I was not, but I swore it by confession.

Ros. What day was that conventicle?

Smith. As they told us, it was the 13th of July.

Ros. Was there any thing done upon that conviction?

Smith. Yes, he paid his money that was set upon him, and never made any appeal; his wife confessed it.

Ros. What other conventicles have you been at?

Smith. Concerning you, do you mean?

Ros. No, any other conventicles of the Fanatics that you have sworn against?

Smith. I do not know whether that be a proper question.

Ros. What say you, mistress Smith?

L. C. J. No, no; that you must not ask her, that is to accuse herself.

Just. Hol. You must not ask her any thing but that you stand here charged with.

L. C. J. You must not ask her any thing that may make her obnoxious to any penalty.

Just. Walcot. Do you ask her any other questions?

Res. I will presently, my lord, I beg your patience.

L. C. J. Ay, ay, take your own time.

Res. Pray, Mistress Smith, were you a witness against a conventicle at one Mistress Batho's?

Smith. Yes, that I had by confession of her own mouth.

Res. Was there not some money offered her—

L. C. J. That is not to be asked, you must not ask her any question that may make her accuse herself criminally.

Smith. Never by me, Mr. Rosewell.

Res. I beg your lordship's pardon—

L. C. J. I will tell you the reason for it, and it is that which ought to be satisfactory to you or any body. They are not bound to answer any questions that you ask the witnesses, whereby they charge themselves with any crime, or by answering may subject themselves to any penalty. Whether it be so, or no, you must not ask them, but prove it.

Smith. I never did offer any, my lord.

Res. I thought I might offer any thing against what she had sworn.

L. C. J. Prove what you can in your time; but do not ask her any such questions. The law is so, and the same for you as it is for every body else.

Res. Mistress Smith, you swear these words were spoken in the forenoon upon that place, the 21st of Genesis, one after another?

Smith. Yes; those words, as near as I can speak them, were spoken then.

L. C. J. Are those the words you heard at that time?

Smith. In substance they are, my lord; as near as I can discover.

Res. I have no more questions to ask her at present, my lord.

Att. Gen. Pray, Mistress Smith, since he has started such a question; have you been tampered with, and been offered any money; and what, and for what?

Smith. There came one Cartwright, and one Norton to me one day, I cannot give an account exactly what day it was; and first they spake to me about Mistress Batho's business, and afterwards they fell into discourse about Mr. Rosewell, and they told me. They wondered I would have my hand in any man's blood. Said I to them, Suppose you had heard what I did, what would you have done? Says Mr. Norton, you had better take 50 guineas, and not appear against him; said he; not that any body that I know of that he is concerned with, will give you that sum of money, but you had better take it. Says I, what is the truth no money nor gold shall buy me off from telling. What was truth I would speak, and no more; and I had already given evidence of it, and would not retract it. Said Mr. Cartwright then to me, but if you had not discovered it, no body else would. Said I, yes, others heard it as well as I.

Att. Gen. Has any body else tampered

with you? Have you had any letter sent to you?

Smith. Nothing till yesterday morning: a letter came then.

Att. Gen. What was that?

Smith. I suppose my lord saw it.

Att. Gen. Ay, but you must tell the jury what it was.

Smith. One came to my brother's, and brought a letter thither, which I read over; and he said to my brother, if I could be any ways assistant to Mr. Rosewell in not coming in against him, I might have 500*l.* paid down to-morrow; not that Mr. Rosewell knew of it, or would give it me, but it was a wager that was laid. Some laid he would be hanged, and some laid he would not; and so he said he would come and give me an account who it was that spake to him.

Att. Gen. My lord, we have done with her now. Call Mrs. Hilton.

Rosewell. Will your lordship please to indulge me so far, that I may ask her another question or two?

L. C. J. What is it you would have, Sir?

Rosewell. I desire her before she goes out to recollect one thing.

L. C. J. Nay, nay, she shall not go away: If you have a mind to ask her any thing before she goes away, do so; or she shall come again, if you have any questions to put to her.

Att. Gen. My lord, she is big with child, and cannot well crowd in and out.

L. C. J. If she be with child, then let her sit upon the stool there.

Rosewell. With your lordship's indulgence, I would ask Mrs. Smith this question; the gentlewoman that was with you, Mrs. Hilton I think you called her, did she agree with you as to the same words, and as to time and place?

Smith. If you please to examine her, I suppose she will give you an account.

Rosewell. Then I would ask her this question, with your leave, my lord; whether was that other gentlewoman with you in the same room?

Smith. Yes, she was, and sat upon the bed with me, and I pulled her by the sleeve when the words were spoken, to take notice of them.

Att. Gen. Come, Mrs. Hilton, give my lord and the jury an account: have you been at this conventicle at any time, and what have you heard there?

Hilton. I came to Mrs. Smith's on Saturday night, and on Sunday morning I went with her to this place; I was never there before in my life, they said it was one Daniel's house, one captain Daniel's: it was near West-lane in Rotherhith. And when we came there, there was one that Mrs. Smith knew, that stood at the door, they call him Paul Shed, a little man: and when we came to the door, he said to us, Pull off your pattens, says he, for they will give too much occasion of distrust of people's coming: So we pulled off our pattens, and said we would take care the next time. When we came in, we went through a kind of

a hall, and when we came there into the hall, there were a little parlour against it: we went up the stairs, and when we came up stairs, there were two more rooms; that room we came into was hung with sad-coloured paper, and upon the left hand there stood a sweet-wood kind of chest, a little cabinet, and a little glass over that, Mr. Rosewell came, and stood at the entrance of the door; so there was a little child in bed when we came up, and we sat down on the other side of the bed; and the child was taken out of the bed presently afterwards. Mr. Rosewell preached upon the 20th or 21st chapter of Genesis, I cannot be positive which of them, but of one of them it was—

Rosewell. But upon your oath cannot you tell which it was?

L. C. J. You must not interrupt her, Sir; you shall have your time to ask her what you will.

Hilton. It was the 20th or 21st of Genesis. I will not be positive which of them it was. But the thing was as to Abraham and Sarah; that was the contents of the chapter that Mr. Rosewell was then pleased to preach upon. After he had took his text, and preached a little while, he said, 'The people went flocking to the king to cure the king's evil, which he could not do, for they ought to flock to them, that were priests and prophets, who by their prayers could cure their grievances.' Then he preached a great while of the chapter following again; and then says he, 'We have had two wicked kings that have suffered popery to come in under their noses, which I can compare to nothing but the most wicked Jeroboam.' There was another king named, and I think it was Rehoboam. I cannot be positive as to that, but Jeroboam I am sure was named. Then he said, 'If the people would stand to their principles, he did not question but to overcome all their enemies with broken platters, rams-horns, and a stone in a sling.' These were the words Mr. Rosewell was pleased to say.

L. C. J. Can you remember what day of the month this was?

Hilton. It was the 14th of September, my lord.

L. C. J. Do you remember what number of people were there?

Hilton. I believe there were 4 or 500 people; there was a garret full, and two rooms below, the parlour full, and the hall full; and one Paul Shed (as Mrs. Smith told me his name was) let us in. I did not know any of them; nor ever had convicted any of them; that was the first time I ever was at a meeting in my life, and I had enough of it then.

L. C. J. You say you came on Saturday night to Mrs. Smith's house?

Hilton. Yes, my lord.

L. C. J. What time that night?

Hilton. About eight or nine o'clock.

L. C. J. What time in the morning did you go along with her to this place?

Hilton. We went by 7 o'clock in the morning.

L. C. J. Did Mr. Rosewell come before you, or after you?

Hilton. No, he came presently after we were there.

L. C. J. Do you remember any other words he uttered there that day?

Hilton. He was pleased to talk of several things between whites in his sermon; among the rest, I heard him speak about canting. He said there was a word they called canting, but he did not understand what that word meant, except it were the fellows in their white gowns. For he was going by one of their churches, where he heard them sing the Lord's Prayer, the Creed, and the Ten Commandments, with a Ha-ha-ha-ha-ha: for my part, says he, I was ashamed to hear it.

L. C. J. Do you remember any other part of the discourse?

Hilton. He had a great many other of those things, that I cannot now remember; it affrighted me to hear it out of my wits.

L. C. J. Where did you go from thence?

Hilton. We went home to Mrs. Smith's. It was two o'clock, and we had not eat a bit of bread all the while; and as soon as she came home, Mrs. Smith took her pen and ink presently, and writ down those words; her husband and I and she were together; and when we had done this, we went to the Quaker's meeting.

L. C. J. What Quaker's meeting is that?

Hilton. It is that by Cheapside; I do not well remember the name, I think it was called the Bull and Mouth.

Just. Holloway. What time of the day was it that the meeting was done at Mr. Rosewell's?

Hilton. We came from Mr. Rosewell's a little after two o'clock.

L. C. J. From seven to two did he hold; that is pretty long-winded.

Hilton. No, he went in to dinner, and left us there, and abundance in the congregation eat sweet-meats, or biscuits, or such things as they had. But I am sure we had nothing there. I was never among you before, nor ever convicted any of you.

Ros. I humbly beseech your lordship to make her sensible of the obligation she is under by her oath.

L. C. J. Ay, Ay: I will. Look you mistress, you must take notice, here is the life of a man in question, which is a thing of great consideration. And for you to have any concern in taking away the life of a man, if it be upon false grounds, is a very dismal thing; besides, that there is a thing which is yet of greater weight and moment to you yourself, it concerns your own immortal soul. You must consider what guilt you contract upon yourself if you tell a lye; but there is a much greater guilt contracted, if you offer to swear a lye in a court of justice, upon a cause of this concernment. Consider, I tell you, you are in the presence of Almighty God, that seeth into the hearts of all

making; that is the avenger of all lying and perjury: that may justly sink you into Hell, if you offer to swear a falsehood. Therefore, I charge you, in the name and presence of that great God, the judge of heaven and earth, to answer me truly to this question: are these things that you have sworn here true?

Hilton. My lord, they are every word true. There is a gentlewoman here, one Mrs. Colingwood, that shall witness I set them down that day; and went away to the recorder, and gave him an account of them.

Att. Gen. Well, if you have done, go over.

L. C. J. No, hold, Sir, will the prisoner ask her any questions?

Ros. Yes, my lord, with your leave.

L. C. J. Ay, in God's name, what you will, that is fitting to ask.

Ros. Mistress, what is your name?

Hilton. My name is Hilton.

Ros. Was your name ever Shaftoe?

Hilton. Yes, but my name now is Hilton.

Ros. Or otherwise Smith, I suppose: for I have heard so.

Hilton. No, Sir.

Ros. Then, Mrs. Hilton, upon the oath you have taken (for I hope you have observed what my lord has said to you about the sin and danger of false swearing)——

Hilton. Mr. Rosewell, God forbid I should stand here to tell such a lie as this, if it were not all truth to my knowledge; I would rather speak less than more.

Ros. Were you at Rotherhith that 14th day of September?

Hilton. Yes, I was. I was with Mrs. Smith at her house over night, and went with her to Rotherhith at seven o'clock next morning.

Ros. Whose house were you at there?

Hilton. I cannot say at whose house it was of my own knowledge, for I was never there before in all my life; but they said it was one captain Daniel's house.

Ros. What street was it in?

Hilton. I do not know what street it was in, it was near West-lane.

Ros. What kind of buildings were there in the street?

Hilton. Over-against it, a little way from the house, is a bridge, that we went over; I believe it may be some ten or twelve doors from the house.

Ros. In the street, you say over-against the house?

Hilton. A little way from it. Mr. Rosewell, if you do remember (I can remember these things very well) therewere shutters in the windows, and the sun came in, and you were afraid lest the people that went by should hear you. First, There was not light enough, and you desired that one part of the shutters might be opened; which was done: and then you desired that half might be shut again, for fear the people should over-hear you.

Ros. What kind of entrance is there into the house?

Hilton. There is an entry, and from the entry

we went into a little hall; the rooms were but of a low height.

Ros. Was it in an upper room, or a lower room that I preached?

Hilton. It was in an upper room, you were up two pair of stairs, the chamber was hung with sad-coloured paper, and a sad coloured bed was in the room; upon the left-hand, as you stood, there was a chest of sweet wood stood, and a little cabinet upon it, and a glass over that: and upon the right-hand, on the side of the chimney, was a closet; I took very good notice of all these things.

Ros. Two pair of stairs, upon your oath, you say it was?

Hilton. Yes, it was two pair of stairs upon my oath, Sir.

Ros. How many steps, Mrs. Hilton, were there?

Hilton. They were low stairs, eight or nine to a pair, I think; I did not number them, Mr. Rosewell.

Ros. The other says, there was a little room up six steps and that I was but one pair of stairs high.

Hilton. And there was a garret, my lord; which I am sure there was above 400 people there at that meeting.

Ros. Did you see that number of people there?—*Hilton.* Yes, I did.

Ros. If you were within in the room, how could you see them all there that were below, and in the garret, as you say?

Hilton. When you went down to refresh yourself, to dinner, as I suppose; said I to Mrs. Smith, for the Lord's sake, let me go out, for I am affrighted out of my wits to hear such stuff as this.

L. C. J. Frightful stuff indeed.

Hilton. Says she, you cannot go out till they all go; there is nobody to let you out; but I would fain have been got out thence.

Ros. What time did you come thither, say you?

Hilton. We came by seven o'clock in the morning.

Ros. How did the exercise begin?

Hilton. Between seven and eight.

Ros. I do not ask you what time, but how it began?

Hilton. You made a kind of a prayer, I do not understand your way, for I never was used to your meetings, I never was at any before in my life. You took your text (I cannot be positive which, but it was) either out of the 20th or 21st chapter of Genesis.

Ros. But can you remember these words, and not the chapter?

Hilton. I can tell you more that you said, if you please.

Ros. Mrs. Hilton——

L. C. J. Let her go on; you ask her a question, and will not stay for an answer, but go to another thing. She is telling you what was done.

Hilton. This I am positive in, it was the 20th or 21st chapter of Genesis: the story was

about Abraham and Sarah, how he bid her call herself his sister.

Ros. That is the 20th chapter.

L. C. J. Nay, I suppose you can remember the text better than this woman.

Hilton. I believe it was the 20th, that you did most expound upon that day; for you said at last Ahimelech made Abraham a present, which you did think might be about 20 guineas.

Ros. I see you are thorough-paced.

L. C. J. Methinks she brought away much of your precious stuff for one time, upon my word.

Ros. How long did you stay there, Mrs. Hilton?

Hilton. I staid there from the time you came in to the end of all: about eleven or twelve o'clock you went down to dinner; They that were there staid till you came up again, which was in the afternoon; and then you began upon a text which you took in the Psalms, I think; I cannot positively say where; but a new text you did take, that you did.

Ros. In the Psalms did you say?

Hilton. And if it please you, Sir, I never saw you but then, and now, in my life.

Ros. What habit was it in?

Hilton. You had a camblet cloak on that had an eye of blue in it, and a mourning hat-band about your hat; and upon the bedside by me sat Mr. Atkinson in a mourning cloak, and his two boys.

Ros. There was some stop or pause you say; you call it a dinner?

Hilton. You went to dinner, I suppose; I know not where you were.

Ros. Pray how did the exercise begin in the afternoon?

Hilton. I cannot very well tell.

Ros. Was you there to the end of it?

Hilton. To the very end of all.

Ros. What Psalm was read, or what chapter that I preached upon?

Hilton. Sir, I cannot remember what your Psalm is. These are the words that you said, and that you preached. Sir, I cannot remember how all these came in, nor all the stuff that was said.

L. C. J. She says she cannot remember all your stuff.

Hilton. I was never used to a conventicle in my life: and I would I had not been there then.

Ros. What was the text I preached upon?

Hilton. In the morning it was, I tell you, the 20th or 21st chapter of Genesis. But the heads of your sermon, and after you had talked about the king, and all those things, was about Abraham and Sarah—

Ros. But what was the text in the afternoon?

Hilton. I cannot tell that truly.

Ros. Then upon what occasion were those words in the morning about flocking to the king to cure the evil?

Hilton. Sir, you said—

L. C. J. How can any body tell what oc-

asion you could have. You had no occasion from that text, nor any other text that I know of; to talk of the king or the king's evil.

Ros. But I speak of the coherence of the discourse, my lord.

L. C. J. You preach without any coherence, or you never had been brought here. When you give yourself the liberty to talk of these things, you ramble from your text.

Ros. I mean by it, my lord, what part of the chapter it was that did lead to it?

L. C. J. No man living can tell; it was the devil led you to talk treason: The indictment tells you so, that you had not the fear of God before your eyes, but were moved and seduced by the instigation of the devil to do it. Who leads people to do all sorts of wickedness but the devil? You can give no reason for it yourself, nor no one else.

Ros. Were these words delivered in the forenoon discourse?

Hilton. I do not know what you call forenoon, or afternoon: I am sure we had no dinner.

Ros. But was it all before, or after I broke off, and went down?

Hilton. Before, Sir.

L. C. J. She says it was before you went to dinner: but for her part she had no dinner at all, she says. If you have done with her, then go on, Mr. Attorney.

Att. Gen. Where is Mrs. Joan Farrar?

Farrar. Here I am, Sir.

Att. Gen. Pray, will you tell my lord and the jury, were you present at this house when Mr. Rosewell preached there?

Far. Yes, Sir, I was.

Att. Gen. What did you hear him say?

Far. Do you ask me of the 14th of September, first, Sir?—*Att. Gen.* Yes.

L. C. J. Why, were you there at any other time?—*Far.* Yes, several times.

Att. Gen. Well, take your own way of delivering your evidence, and give an account of what you know of the prisoner.

L. C. J. But, hark you, be sure you tell nothing but what is truth. You must consider, here is the life of a man at the stake, and your own immortal soul is at stake too. You are in the presence of the great God of heaven and earth, that seeth into all your actions and thoughts, and searcheth the hearts of all mankind, and therefore have a care of contracting any guilt upon yourself by telling any lye; be sure to say nothing but what is truth.

Far. Sir, I was not in the room with him; I was in a parlour or hall, what do you call it, a low room; and he was up stairs above it.

Att. Gen. But were you in the congregation? Were there any other of the hearers in that room among whom you were?

Far. Yes, Sir; there were a great many of them there, Sir.

Att. Gen. Well, what did you hear him say?

Far. Sir, concerning the evil was the first thing I heard him say; and he made it so, that it was not the king that cured it, but it was

they should flock to. It is we they should flock to, says he; for we are they which are the priests and the prophets, that by our prayers do cure the grievances of the people.

Att. Gen. What did you hear him say more in that discourse?

Far. The next that I observed was, he said, we had now two wicked kings together; but I could not tell who he compared them two wicked kings to; but he bid the people stand to their principles, and in time they should overcome their enemies.

Recorder. Pray, have you heard him at any other time?

Far. Yes, I have heard him at other times.

Recorder. Did you take notice of any thing he said against the government?

Ros. I beseech your lordship, may these leading questions be asked?

L. C. J. Yes, I have told you already; to shew your practice. It is not at all a leading question. What did you hear him say at any other time about the government?

Far. In a mill, it was by Rotherhith-wall, at one Hudson's, he prayed that he might not offend the Lord in not praying for the king; but the Lord might please to open his eyes, or turn the times.

L. C. J. Can you remember when that was?

Far. It was the 17th day of July,——no, of August, to my best remembrance; and upon the 17th chapter of Genesis.

L. C. J. That he preached upon there, did he?—*Far.* Yes, Sir.

L. C. J. Did you hear him say any thing at any other time?—*Far.* Yes, Sir.

Recorder. What do you remember about people in scarlet?

L. C. J. Tell us what you heard him say else?

Far. At West-lane end, at one Paul Shed's, I heard him preach concerning the fire of London about eighteen years ago. That there was a certain great rich man, that lived in Gracechurch-street; he said, he needed not name him, he supposed they all knew who he was; and he said there went a poor man to him, not a poor man neither, but a carpenter, an house-keeper, a labouring man, and told him how to quench the fire; and then he preached, that if it had not been for that great man, that fire had not been, nor the fires in Southwark or Wapping, if it had not been for the lord mayors and sheriffs since.

L. C. J. Have you any more to ask her?

Recorder. What have you heard him say else?

Att. Gen. No, my lord, we have done, I think.

L. C. J. Answer my brother Jenner's question.

Recorder. What about people in scarlet?

Far. Then after he had preached concerning the fire, he said it was a fine sight to see fools in scarlet gowns; and he heard the Recorder was to be made a judge.

L. C. J. He hears strange stories it seems. What do you make of this, brother Jenner?

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Ros. God forbid, my lord, this should be true.

L. C. J. You see she swears it.

Just. Withins. Mr. Rosewell, will you ask her any questions?

Ros. Mistress, you say you were at the meeting on the 14th of September; pray in whose house was it?

Far. It was at a house at the end of West-lane; there are a row of houses that face to the fields.—*Ros.* But whose house was it?

Far. They said it was one Daniel's house.

Ros. In what room of the house were you?

Far. In the lower room.

Ros. Did you see me there?

Far. Sir, you were gone up stairs before I came in.

Ros. You did not see me there upon your oath?

Far. No, my lord, I did not see him.

L. C. J. She said at first, you were gone up before she came, and she was in a lower room.

Far. But I knew his voice.

L. C. J. Did you know his voice?

Far. Yes, Sir; I had heard him several times.

Ros. Did not you tell somebody that you heard none of these words?

L. C. J. Were you asleep all the while?

Far. No, Sir, I was not asleep, I did not sleep while I was in the room. I never slept in your presence in my life.

Ros. Were you there at the beginning? What time came you in?

Far. Sir, I believe you had read half your prayer; I was at the beginning of the sermon.

Ros. Who came along with you?

Far. I came alone; my child was not well, and so I came late.

Ros. What was the chapter I was upon?

Far. It was upon the 21st of Genesis, Sir.

Ros. Upon what verse of the 21st of Genesis was it, that you heard these words?

Far. I cannot tell what verse it was.

Ros. I ask, my lord, because I went distinctly upon verses.

L. C. J. Prithee, man, I care not how thou wentest on.

Ros. Cannot you tell how they came in?

Far. No, Sir.

L. C. J. Nor any one else, I dare say, how such words can come in?

Ros. Were the words spoken together in that exercise that you have sworn?

Far. Yes, in that exercise.

Ros. How long did you stay there?

Far. Till you had done, I believe it was two o'clock.

Ros. Was it in the forenoon?

Far. We had no dinner at all; I cannot tell what you call forenoon, or afternoon.

Ros. Was it all spoken upon that chapter, upon your oath?

Far. Truly, Sir, I think it was upon your first text.

L. C. J. If you have done with her, let her go over.

N

Att. Gen. We shall call one or two more of his auditors at other times, that will give some account of his way. Where is your man, Mr. Atterbury? What is his name?

Atterbury. Peter. But here is one of the witnesses.

Att. Gen. Swear him then. What is his name? [He was sworn.]

Atterbury. Robert Cook, he says.

Recorder. Were you an officer in this place?

Cook. Yes, in St. Mary Maudlin's I was; St. Mary Magdalen, Bermondsey parish.

Recorder. Were you at the executing of any process against Rosewell's conventicle?

Cook. If it please you, my lord, I had a warrant from sir Thomas Jenner, to serve at one Weldy's house, a bricklayer in Rotherhith; and when I came to the house to serve it, there was abundance of people, and a great riot was made, but no blows I confess; but a great tumult of people, that had not I and the beadle, one Samuel Bennet by name, caused the people to stand clear, I do not know but there might have been mischief done. Of which we upon that gave an account to sir Thomas Jenner, and he hath bound some of the people over to the sessions.

L. C. J. What do you mean by this, gentlemen?

Att. Gen. My lord, we have done; this is only about some disturbances that the king's officers meet with, in executing process against these conventicles.

L. C. J. But what is this to the prisoner?

Att. Gen. Here is some would have him called; but I confess we cannot make any use of his evidence against the prisoner, only as to what is hinted in the indictment, that he did it to disturb the peace—

L. C. J. Pish, that is nothing, the officer did his duty; but what is that to this business? Have you done, gentlemen, for the king?

Att. Gen. Yes, my lord, we have done.

L. C. J. Then, Mr. Rosewell, now is your time to make your defence; and you shall have time to make it as full as you will.

Ros. My lord, may I have the favour to have the indictment read again in Latin?

L. C. J. Yes, yes, if you will. Read it again.

Ros. I humbly thank your lordship, only the words, my lord.

Cl. of Crown [reads.] 'In quadam illicite assemblat', in presentia et auditu diversorum subdit' dicti Domini Regis, adtunc et ibidem illicite et seditiose assemblat' et congregat', asseruit et declaravit quod populus (subdit' dicti Domini Regis nunc, innuendo) coadunationem fecere (Anglice made a flocking) dicto Domino Regi nunc, sub pretexta sanandi morbum regni (Anglice the king's evil) quod ipse (dictum Dominum regem nunc, iterum innuendo) facere non potest; sed nos sumus illi (seipsum Thomam Rosewell et al' seditiosos et proditor' person' innuendo) ad quos illi (ligesos subdit' dicti Domini regis nunc, innuendo) debent accedere (Anglice,

'flock to) quia nos (seipsum predict' Thomam Rosewell et al' sedit' et proditor' person' iterum innuendo) sumus sacerdotes et prophetae, qui precibus dolores ipsorum (ligesos subdit' dicti Domini regis nunc, iterum innuendo) sanaremus: Nos (subdit' et ligesos hujus regni Angliæ innuendo) habuimus nunc duos iniquos reges (Serenissimum Carolum primum nuper regem Angliæ, et dict' dominum regem nunc, innuendo) insinual, qui permiserunt Romanam superstitionem (Anglice Popery) ingredi (infra hoc regnum Angliæ, innuendo) in eorum conspectu (Anglice under their noses) qui predictum Carolum primum nuper regem Angliæ, et dictum Dominum regem nunc, innuendo) assimulari possunt ad nullam personam nisi ad nequissimum Jeroboam. Et si ipsi (divers' maledisposit' et sedit' person' adtunc et ibidem cum prefat' Thomam Rosewell illicite et seditiose assemblat' et congregat' existen' innuendo) ad fundamenta' ipsorum permanent (Anglice would stand to their principles) ipse (seipsum Thomam Rosewell innuendo) non timebat quia ipsi (seipsum Thomam Rosewell et predict' maledisposit' et sedit' person' sic ut preferunt assemblat' innuendo) inimicos suos (dictum Dominum regem nunc, et ligesos subdit' ipsius Domini regis nunc, innuendo) vincerent, sit ut in pristino tempore cum cornibus ariet', patinis fractis (Anglice broken platters) et lapide in funda (Anglice Sling) &c.'

Ros. If it please you, my lord, that which I object against, and desire to be satisfied in by your lordship, is this; I am charged with speaking words about flocking to the king to cure the king's evil; and it is in the indictment called 'Morbus Regni Anglici,' that is the disease of the English kingdom—

L. C. J. No; no; it is 'Morbus Regni, Anglice' the king's evil.

Ros. I do not understand how 'Morbus Regni' can be the King's evil.

L. C. J. Therefore because there is no apt word in the law for that distemper, they help it up by the word 'Anglice,' to shew what they meant.

Ros. But, my lord, I understand there are proper words for the disease; as Struma, and Scrofula, those are proper words for it, not 'Morbus Regni.'

L. C. J. Not at all in law, those may be the words used among physicians; but in legal proceedings we are to keep up exactly to the legal names and phrases; and where we have not an usual word, then we help it up by Anglice's: and so we here express that very distemper, which is called by the name of the king's evil, by a word framed as near to a law phrase as we can; and to shew our meaning in it, we add, 'Anglice' the king's evil.

Ros. My lord, is that the phrase that is proper for it in law?

L. C. J. Yes, yes, it is very well expressed to shew what it meant.

Rosewell. But, my lord, 'Morbus Regni,'

is in English properly the disease of the kingdom.

L. C. J. It is so, the disease of the kingdom; if they had gone no further, but left it there, it might have had such an interpretation put upon it. But because the words are so ambiguous in Latin, they are reduced to a certainty, by putting an 'Anglice' to them.

Ros. I thought it had been Anglice. My lord, there is another phrase that I object against, it says, 'Nos habuimus nunc duos' 'unicos Reges insimul.' My lord, this cannot be understood of two kings one after another; but *insimul* makes it to be both at once.

L. C. J. No, we have had now together two wicked kings.

Ros. That we do not use to express so in Latin.

L. C. J. The words do thus sound in English.

Ros. Here are two words *insimul* and *nunc* that do signify the present time. My lord, I am now only speaking all this while upon the hypothesis that these words were spoken by me; for I still do, and always must deny the thesis.

L. C. J. We take it so.

Ros. It should have been *successive*.

L. C. J. Then it had not agreed with your words. For the witnesses swear that you said, We have now had two wicked kings together, and not successively.

Ros. If that be an Anglicism, this cannot be true Latin.

L. C. J. Nay, if it be a blunder in the Latin, it was a blunder of your making; for you spoke it so in English, and the Indictment in Latin must exactly pursue your English.

Ros. Then, my lord, here is another expression, that they suffered, 'Romam super-stitionem,' Popery, to come in.

L. C. J. Ay, is not that well expressed?

Ros. My lord, there may be superstition in the worship of the Church of Rome, and yet that not be the thing we call Popery.

L. C. J. There may so, you say right; but then this comes under the same reason, as the former phrase you objected against about 'Morbus Regni.' Because 'Romana Super-stitio' is such a general word, and because there are several superstitions in the Romish Church, abundance of them; and this may make it uncertain; and because we have no other word to express what we call popery by, therefore there is an Anglice put in, to shew what is meant.

Ros. Then, my lord, it is said 'in eorum conspectu:' is that right, my lord?

L. C. J. Yes, Anglice under their noses?

Ros. That is in their sight.

L. C. J. Pray, how would you put that into Latin, under their noses?

Ros. My lord, if I should speak according to the other parts of the Latin of this Indictment, which your lordship says must exactly pursue the English, I would render it 'sub naribus illorum.'

L. C. J. Such people suffer convulcutes under their noses, 'in eorum conspectu.'

Just. Holloway. It is not your nose that sees.

L. C. J. Suffer rebellion under your noses; are these things 'Sub naribus,' or 'in conspectu'?

Ros. My lord, this could not possibly be spoken of the late king, and this king; when the precedent king died a professed zealous Protestant; and his present majesty has so often, and earnestly declared against it.

L. C. J. We know that very well; but yet withal we know, it was the pretence of Popery and arbitrary power, and those things, that brought that blessed Martyr to the scaffold; and the great cry now at this day, by all factious and seditious busy fellows, is against popery; as if it were just breaking in upon us, and the government abetted it; when it is all false, nothing more untrue: the Indictment calls it so, says these words are spoken 'falso et malitiose;' and all treasons are so.

Ros. Then, my lord, there is another thing, 'Si ipsi starent ad Fundamentalialia eorum, Anglice,' If they would stand to their principles, or principals; for I know not how it is in the indictment. Pray, my lord, how comes 'Fundamentalialia' to signify principles?

L. C. J. Their principles, that is, their foundations, or fundamentals. 'If the foundations be destroyed, what can the righteous do?' says the Psalmist. The Latin bible expresseth it by 'Fundamentalialia.'

Ros. Then it is 'si ipsi' in the third person; now, my lord, in common sense that must needs refer to the two wicked kings that were spoken of just before, or to the king, and his subjects spoken of afterwards; and then sure it cannot be treason.

L. C. J. No, 'they' that is, I and you that are here. It was spoken to your congregation. If they would stand to their principles, then come the broken platters, &c.

Ros. If it were spoken to them, and of them, it must have been 'you' or 'we.' Then it is added in the end, my lord, 'Fratis Patinis,' broken platters: your lordship has remembered me of that word. My lord, I did hear that Mrs. Smith did swear at Kingston assizes, it was Pewter platters.

L. C. J. I do not know what she swore there; now I am sure she swears as it is in the Indictment.

Ros. Mistress Smith, Pray did not you swear it was pewter platters at Kingston?

Smith. No, I never said otherwise than I do now, and that is, broken platters.

Ros. I did hear she swore pewter then. But, my lord, I conceive if it refers to me, and the people that were there, it should have been, as the former sentence is, in the first person? 'We' have had, &c. but here it is changed into the third person, and therefore cannot be so meant.

L. C. J. But it plainly speaks its own meaning, that it is meant of the people there.

Ros. My lord, then as to the *Inuendo's*, I

see there are eight or ten of them. Whether are these to make such a construction of a man's meaning, which doth not otherwise sufficiently appear, as to bring a man under the guilt of treason?

L. C. J. I tell you the meaning is plain; if you and we, such false traitors as are said to be there assembled with you, will but stand to our principles, we shall overthrow and destroy our enemies with broken platters and ram's-horns.

Ros. It is said here 'ipse non timebat quin'—Of whom should I speak that 'ipse'?

L. C. J. You were speaking of yourself and your congregation.

Ros. But that is in the third person, and the singular number.

Sol. Gen. (Mr. Finch) No, the jurors that find this Indictment say, that he said so, and that must be in the third person.

Ros. That is not according to the rest.

Just. Withins. 'They,' is the people with him; and 'he,' is he himself; that is plain, and can have no other construction.

Ros. Now, my lord, will your lordship please to accept a free declaration of the truth of this matter?

L. C. J. Ay, ay, go now to the fact; now we are got over the exceptions to the indictment. To answer the fact is most proper at this time.

Rosewell. Then here in the presence of the great God of Heaven, the righteous judge of all the earth; before whom you and I, and all that are here, must one day appear, at that terrible bar of impartial justice (and a glorious tribunal it will be), to give an account of all things that we have done in the body, whether they be good or evil: and I am told by my blessed Redeemer (who shall also be my judge that day), that an account must be given of every idle word that I shall utter, how much more for lying and perjury, and false-witness bearing? as your lordship (I humbly thank you for it) did very seasonably suggest to those that have witnessed these things against me; I say in the presence of that great God, and this honourable bench of reverend judges, and you gentlemen of the jury, and my dear countrymen, that have been now sworn, as well as returned by the process of law for that end; I do here most solemnly declare the truth unto you, as in the presence of this God I shall answer it hereafter. And I shall begin with the latter part of these words first, where this indictment ends; for that seems to refer to some things of the late times; and also to my treasonable intentions now. My lord, and dear countrymen, because I heard something mentioned as to the late unhappy civil wars in these nations; I can declare, my father was no ways concerned in those wars, for he was dead before they began; and I was then but a child, and did not understand the thing. But for the death of the king, (death did I say? that is too soft a word; the murder, the barbarous murder of his majesty king Charles the First, whom

I had once the happiness to see the face of, or rather the unhappiness to see in respect of his condition at that time, being at dinner under a tree, with some few persons about him, which very much affected my heart, though then but young. So far was I from being one that would compare him to Jeroboam, &c. as your lordship will hear, that) I always bewailed and abhorred that act. For my present sovereign, I declare in the presence of God, I honour him with my soul, and daily pray for him; and if I could do him any real good, I would sacrifice my life most cheerfully to do it; I would die at his foot to do him any real good. My lord, I was once threatened with the loss of my life for declaring for his majesty in his exile; when it is well known, few durst appear in those days on the behalf of an injured prince. It was objected against me, that I never prayed for Oliver Cromwell, that had usurped the government. My lord, I knew he stood upon a false bottom; he was an usurper. And for declaring, that the kingdom would never be at peace till the right heir, our sovereign that now is, were restored to his right, I was threatened that a gibbet should be set at my church-porch, and I hanged upon it, or at my own door. I preached upon that place of scripture, Ezek. xxi. and the 27th verse, 'I will overturn, overturn, overturn; and it shall be no more until he come whose right it is, and I will give it him.' And I declared in my sermon the several overturnings that God had given them then in power. And though they threatened me, yet God preserved me then here at home, as he did my dear sovereign abroad; for whom I have prayed many hundreds and thousands of times. And it is well known, immediately after his majesty's happy restoration, I did upon one of his majesty's days preach upon that subject: 'For the transgressions of a land many shall be the princes thereof;' I preached concerning the excellency of monarchy, which I shewed to be the chiefest and best of governments, practised almost every where: and I proved it from the example of the great God of Heaven, the monarch of all the world, down to some of the meanest species of creatures. I shewed it was the government God had set up in his church, appointing the Lord Christ to be the king there; among the angels there was the prince of them; among the celestial bodies, the sun in the firmament.

L. C. J. Mr. Rosewell, I am very unwilling to give you any interruption, because of the condition you stand in, being a prisoner pleading for your life, upon an accusation of high-treason. But I tell you, these things that you have now insisted upon are not at all to the purpose as to what you are brought here for. You are not here arraigned for your good works, but for your evil works. If you commend yourself for two hours together it signifies not one farthing; and the gentlemen of the jury must let it go for nothing. It only serves to please your humour of talking, and captivate the au-

duery; but it is not at all to the purpose. Keep close to the matter, that it is incumbent upon you to answer, to the business you are upon here. It is our duty, who are upon our oaths, and who are accountable to the government and the law for what we do, to see that things be done according to law. You are not here called in question for your good works or actions, but for treasonable and seditious words. I would to God, you had never done worse than what you have said of yourself. But here is an indictment for traitorous preaching at one particular place and one particular time; answer to that. The jury must go, not according to your way of speaking; but according to the evidence relating to the matters laid in this indictment. Do not talk of your preaching for monarchy; and your overturn, overturn, overturn; for if this betruer, that the witnesses have sworn against you, you have at once overturned all the good you ever did, or said in your life before.

Ros. My lord, I know very well, one such evil action is enough to marr a life of former good ones. But this that I have said, was to shew, how inconsistent those things that they have sworn, are with my constantly declared judgment and former practice.

L. C. J. There are abundance of people to whom the king has formerly extended mercy, not only his pardon, but even all the promotions their ambitious fancies could make them pretend to: but it is well known, the devil has not had more ready instruments to carry on bloody designs for the murdering this gracious king, their princely benefactor, than these very men that were thus gratified and advanced by him. Therefore we can say nothing to what is alleged of former loyalty; the devil surprizes men into these things: they do them, as the indictment says, by the instigation of the devil. Keep to the matter before you.

Ros. Well then, my lord, to cut short. As to the business since his majesty's return: I have been a constant observer of his days, and particularly the 30th of January I have always observed as a day of humiliation: and I did upon one of those days preach upon that text—

L. C. J. And all this signifies just nothing, and upon that day you went to a conventicle against the law, and preached there; which shews, what a conformable man to the government and the law you are. You can have your congregations of hundreds of people, and I know not what; now I tell you all this makes nothing against you, nor doth all your commendation make any thing for you.

Ros. My lord, I do not know any law of the land that is against preaching the Gospel.

L. C. J. Yes, in conventicles to preach, is against the law of the land.

Ros. My lord, I humbly conceive it is the circumstance of number that makes the transgression.

L. C. J. It is not only a circumstance, but the substance to preach in a conventicle, and all against law.

Ros. If you call that a transgression to preach the gospel, I humbly acknowledge myself a transgressor.

L. C. J. I tell you it is a transgression; but it is not such a transgression as that for which you are here indicted: but, because you commend yourself so much; a man, I must tell you, that every day doth notoriously transgress the laws of the land, need not be so fond of giving himself commendations for his obedience to the government and the laws.

Ros. My lord, I was only saying that upon the 30th of January I preached upon that text 1 Tim. ii. 1, 2. "I exhort, therefore, that first of all, supplications, prayers, intercessions, and giving of thanks be made for all men; for kings and all that are in authority; that under them we may lead quiet and peaceable lives, in all godliness and honesty."

L. C. J. Amen! I say to that petition.

Ros. Amen! I am sure I say to it, with all my soul; and it is my daily prayer to my God for my sovereign. And here I shewed, that it was the duty of subjects to pray for their prince—

L. C. J. I tell thee, I care not a farthing what thy text was, nor thy doctrine; I wish you had been at church though, and been conformable to the laws. But this is nothing to our business.

Ros. I had therein a sharp reproof and inductive against those that instead of praying for their civil head cut it off; and those that design and plot against the government.

L. C. J. You did abundance of good by your sermon, no doubt; I shall not now stand to examine that.

Ros. So far was I from harbouring any traitorous thought—

L. C. J. Come, come; all this is besides the cushion; come to the matter that is here before us, man. I would not restrain you of any part of your defence, either in time, or any thing else; but let us not have the time taken up with that which no way concerns our question. Our business relates to what was said at your meeting, at that time the witnesses speak of.

Ros. Then, my lord, as to the truth of this particular case, I shall now declare all that past then; as in the presence of that God who searcheth the heart, and trieth the reins, and who shall judge us all. Upon the 14th day of September last, I did preach to some people that were met at a friend's house, one Capt. Daniel in Rotherhith: and as my course hath been to expound the Scriptures (to make them understand them), I was, my lord, that day upon the 20th chapter of Genesis. The chapter is about Abraham and Abimelech king of Gerar. Now, my lord, will you please that I shall deliver to you what was said, by repeating it by word of mouth, or read it?

L. C. J. No, no; I do not desire any of your expositions, or preachments: answer to the Indictment, and what is charged upon you there.

Ros. My lord, I am about it, in telling you

what was really said; and I ask the favour of delivering in court what I then delivered to them. My lord, it was thus: In the 3d verse it is said, 'And Abraham said of Sarah his wife, she is my sister;' from whence I observed; that he had been guilty of this once before, in the 12th chapter, when he told the very same lie to Pharaoh king of Egypt. And thence I raised this note, 'That a good man, or a friend of God, might fall into the same sin once and again.' And in proof of it, I brought three or four instances. That of Lot in the foregoing chapter, his falling twice into the same sins, of drunkenness and incest with his own daughters. That of Samson, in the 16th of Judges,) and there came in the mention of Dalilah, that she spoke of, she only remembers the name of, and not the truth of the quotation), that of Peter's denying his master, once, twice, and again; first, with a lie; secondly, with an oath; and thirdly, with an imprecation. But the proof which they in this point have most distorted, is that of Jehoshaphat, who sinfully joined with two wicked kings: first, with a wicked father Ahab in his expedition into the land of the Syrians against Ramoth-Gilead, 2 Chron. 18th chapter, for which he is reproved as a great transgressor, and threatened by the prophet in the 19th chapter, and the beginning: and yet he afterwards joined with another wicked king, Ahaziah, Ahab's wicked son, to go to Tarshish; as we may see in the 20th chapter, and the latter end. And here, my lord, is the whole of the business concerning the two wicked kings. In the presence of the holy and great God there was not one word spoken of the kings of England, either king Charles the first, or his present majesty. This was as to the two wicked kings. And then, my lord, I came to the 7th verse, which has these words, 'He is a Prophet, and he shall pray for thee, and thou shalt live.' Upon this I observed, 'That the prayers of God's prophets have been very prevalent for the healing, and helping of others in a time of need.' And three proofs I brought of this: The last of which, was that of the prophet Isaiah's praying for king Hezekiah in the time of his great and dangerous sickness. But that which has reference to this business, was that out of the 1 Kings xiii. and the beginning; 'When the prophet came to Bethel, and there rebuked Jeroboam, and prophesied against the altar there; Jeroboam put forth his hand, and shook it at him, and said; lay hold of him; upon which the king's hand was dried up. Thereupon the king intreated the prophet, that he would pray unto the Lord his God for him, that his hand might be restored, which the prophet did; and the king's hand was restored again and became as it was before.' And here is the business of Jeroboam. In the presence of God, I speak it, there was not any the least comparison of my dear sovereign to that accursed wicked prince Jeroboam, who made Israel to sin; No, my very soul trembled at the thoughts of it when I heard it. Upon

this head I had this sentence, or observation (which I will give you to a word) if I were to die the next moment, and appear before the glorious tribunal of the heavenly majesty, I tell not the least lie, or equivocation, or prevarication, 'That a godly man's prayer is a sovereign cure of the king's evil; whereby the meanest, or the poorest christian may gratify, and serve the greatest monarch.' And this is not my saying neither, but the saying of an expostor upon that very place of scripture, out of whom I did quote it. Nor did I speak of it, or he write of it, with respect to that particular disease that the indictment calls 'Morbus Regni,' but the king's evil as the king's own disease, in reference to Abimelech; who was king of Gerar. For it followeth in the close of the chapter, 'God heard Abraham's prayer, and healed Abimelech and all his house.' But as for that word they speak of; 'of the people's flocking to his majesty to cure the king's evil, which he could not do; and that we were priests and prophets to whom they must come for cure;' in the presence of the eternal God there was not a word of it. Then, my lord, for that of the rams-horns; I shall observe how that came in by and by; but first I will premise, that all this that has been now spoken of, was upon the exposition of that chapter in the morning. In the afternoon I preached upon a particular text; I began with the reading of a Psalm and a chapter; and so far I conceive it was after the manner and usage of the church of England, which enjoins the reading of the scriptures as part of its worship. I preached upon the 11th of the Epistle to the Hebrews, and the 18th verse (though one of the witnesses said it was a Psalm)——

L. C. J. She would not be positive, but she thought a Psalm, she could not tell.

Rox. My lord, it was the 11th of Heb. ver. 12. the words are these, 'Therefore sprang there of one, and him as good as dead, so many as the stars of the sky in multitude, and as the sand which is by the sea-shore innumerable.' Upon which I had this note, 'That the great God can effect great matters by very small and unlikely means.' As here (of one) what was less than one? None at all: And this one too as good as dead; and yet from him to raise as many as the stars in the sky, and the sands on the sea-shore. What great things did God effect by the rod of Moses? which was but a little wand in his hand, and yet a sign and symbol of authority; as our sheriffs white staves are. Never was there any great plague to be sent upon the enemy of God, and his church, Pharaoh and his Egyptians, but upon the stretching forth that little rod, it came. And so, at the siege of Jericho; What dreadful dilapidations in that great city did the sound of the rams-horns make? What a terrible army of the enemies of the Israelites did Gideon's small host destroy with a few broken pots or pitchers? (much less did I mention platters, or pewter dishes; as I have been in-

formed they first swore). And what a tremendous champion did David strike down with a stone in a sling? And what a glorious work did our Lord Christ, the son of David, do in his curing a blind man with a little clay and spittle; more likely to dam up the eyes of one that could well see, than to open the eyes of one that was born blind. Now here, my lord, is the whole truth in the presence of the eternal God. Here your lordship sees is mention made upon the second verse of the 30th of Genesis of two wicked kings; but how, not (as they have represented it) with any reflection upon the kings of England; nor were they spoken in that order as they have sworn them, but as I have now repeated them. Here is mention of healing the king's evil, and of Jeroboam; but no way in that manner as they say. And here is likewise mention of ramshorn, broken pitchers, and a stone in a sling; but not with the least application to the government, or reference to it, or reflection upon it, or the king: and this is the truth. I have made an ingenuous confession of the whole as it passed, that your lordship may see how much I am abused by these false wretches. And if they have so good memories as really and faded to remember what was then said, their memories and their consciences cannot but go along with me, and confirm what I have said; that all that was spoken by me that day, was as I have related it, without the least reflection upon, or application to his former majesty and our present sovereigns, or either of them, or any thing relating to the government. And if you be not convinced here, I am sure there will be a day come wherein you will find and see, that these are some of the king's friends, but his enemies, that thus have falsely accused an innocent, faithful, loyal subject of treason; a crime which my very soul abhors the thoughts of. In proof whereof, if your lordship will give me leave, I will now call my witnesses to testify the truth of all this matter. And after this free and ingenuous confession of the truth, and what the witnesses I shall call will testify about it, I hope, and trust in my good God, that he will let you, my dear countrymen, see the truth and sincerity of my heart in whatever words are spoken by me. Had I been guilty of those things that are laid to my charge, I were not worthy to live. Pray, Mr. Crier, call Mr. Thomas Hudson.

L. C. J. Ay; come call your witnesses.

Ra. My lord, one thing I would desire to speak to your lordship. Your lordship was speaking, that what I declared of my former loyalty was nothing to what the witnesses have deposed; My lord, I have read in a true history (I think the scriptures will be owned by persons that are here to be such) of two false witnesses, they were such; they are called sons of Belial (I pray God these be not accounted daughters of Belial) that swore, 'Behold did blaspheme God and the king.' Did your lordship believe it?

L. C. J. What would you have of us, man, by that question?

Ra. I am confident, my lord, your lordship and the court do not believe he did so.

L. C. J. The Scriptures tell us it was not true; Do you think we do not believe the scriptures, because we do not hear you preach in your conventicles? We do believe the scriptures, man; and we believe too they have been perverted by you, and other people, to very ill purposes. Yes, I do remember the story of Naboth; and to shew you that I can remember some holy history as well as you, I can tell you of another story, and that is the story of Susanna and the elders, and there was circumstance of time and place testified to; but it seems they were defective in their proof, and thereby discovered. You would do well to detect the witnesses, if you can, in some contradiction, or falsehood; that will do you more service, than harangues and speeches.

Rosewell. The God of Heaven will do it this day, I trust; for to him I have opened my cause.

L. C. J. Well, well, call your witnesses, and prove what you can.

Rosewell. My dear Redeemer himself was served so; nay condemned by the testimony of false witnesses. [Mr. Hudson came in.]

L. C. J. Come, here is your witness; what say you to him?

Rosewell. Mr. Hudson, were you present at the meeting at Rotherhith on Lord's Day the 14th of September last?

Hudson. Yes, Sir, I was so.

Rosewell. Here is Mrs. Smith hath sworn, that since the beginning of August we had a meeting in our public Meeting-house: Was there any, pray Sir?

Hudson. There was none such, that I know of.

Rosewell. She swears, that we were at the house of captain Daniel Weldy's the 14th of September. Was it so?—*Hudson.* No, Sir.

Rosewell. What place was it then?

Hudson. It was one captain Daniel's.

L. C. J. That is the same as they say.

Rosewell. The first witness, Mrs. Smith, said captain Weldy's: indeed, the other said, captain Daniel's.

L. C. J. She said she was told so, but she could not tell; but she remembers you prayed for him, and his child too, who was then ill.

Rosewell. Pray Sir, as to the truth of the business; Did you hear me speak of two wicked kings? That, my lord, came in, I say upon the second verse of the 30th of Genesis, which I then was expounding.

L. C. J. Nay ask him in general what he heard you say; and whether he heard you say any thing of two wicked kings, and what it was.

Rosewell. Ay, about Ahab, and Abaziah his son—

L. C. J. Nay, nay, I must have none of those things, we must have fair questions put; for, as you see we will not admit the king's counsel to put any questions to the witnesses, nor produce any witnesses against you, that are leading, or not proper, so nor must you:

But if you have a mind to ask him any questions, what he heard concerning two wicked kings generally, do so.

Hudson. Upon the 2d verse he was then.

L. C. J. Of what chapter?

Hudson. Of the 20th of Genesis. I was then in the place, and writ. He was upon the 2nd verse, and concerning Abraham's denying of Sarah his wife. Says Mr. Roswell, Doth Abraham here fall again into lying? I thought he had smarted enough in the 12th chapter, for the same he told to Pharaoh: And doth he fall again, and not take warning by it? From that you may take notice, that the best of God's children may fall again and again into the same sin. And there you quoted what mischief good Jehoshaphat had like to have brought upon himself, by joining with two wicked kings: first, with wicked Ahab king of Israel; and after he was reprov'd for it by the prophet, yet he fell into the same sin again, by joining with Ahab's wicked son king Ahaziah. And so he quoted Samson, who got mischief by taking a wife among the daughters of the Philistines; and yet after he had felt some smart and hurt by it, yet like good Jehoshaphat, and good Abraham, he falls into the same sin again, by going to Timnah, and taking Dalilah.

Roswell. What said I, pray upon the 7th verse?

Hudson. The 7th verse was concerning God's appearing to Abimelech in a dream; where God says, 'He shall pray for thee, for he is a prophet, and thou shalt be healed.' And there Mr. Roswell spoke concerning the worth and value of the prayers of God's prophets; wherein he instanceth in one thing, that they were good to cure the king's evil. And he quoted several texts of scripture of the worth and value of them; and among the rest was that in the first book of Kings, the 13th chapter, and 6th verse, wherein the prophet came to reprove Jeroboam at the altar at Bethel; and the king stretched forth his arm, and bid lay hold on him, and the king's hand was dried up: Upon which the king said to the prophet, 'Intreat now the face of thy God for me,' and he did so; the prophet prayed unto the Lord, and the king's arm was restored whole as the other. And he did quote that of Hezekiah too.

Roswell. My lord, this man did take notes; and therefore may be the more exact.

Hudson. Yes, my lord, I have my notes, and can read them at large; and I did generally write, my lord.

Roswell. Then pray, Mr. Hudson, will you declare, whether you heard any thing in that exposition or discourse, concerning rams-horns, broken platters, and a stone in a sling?

Hudson. That was in the sermon, Sir, in the afternoon.

Roswell. She swears it was all in the morning discourse.

Hudson. There was not such a word in that, as I know of. The sermon was not in the

morning; you did only expound, as you used to do in the morning.

L. C. J. If you have done with him, I should ask him a question or two. Hark you, Sir, Pray what time did this exercise begin?—*Hudson.* It begun about 8 o'clock.

L. C. J. What number of people do you think there were there?

Hudson. I cannot judge how many they were.

L. C. J. How many do you think?

Hudson. I believe there were a matter of 40 or 50 there.

L. C. J. No more than 40 or 50?

Hudson. Alas, we could see but in one room.

L. C. J. What room were you in?

Hudson. I was in one of the chambers.

L. C. J. How many pair of stairs high?

Hudson. Two pair of stairs high.

L. C. J. Did you see Mr. Roswell?

Hudson. No, I could not see him at all.

L. C. J. Was there ever a bed in the room where you were?

Hudson. No, my lord, there was not.

L. C. J. Was there a dinner time between?

Hudson. There was: at noon a resting a little while.

L. C. J. Did Mr. Roswell go down?

Hudson. Yes, my lord, he did, I believe, go down stairs.

L. C. J. Do you remember any thing that was spoken of Samson and Dalilah?

Hudson. Yes, as I said before, there was about Samson's going down to Timnah to take Dalilah; shewing his failing, how he fell twice into the same sin.

L. C. J. Did you hear any discourse about canting? Did you observe he used that word canting?

Hudson. No, not that day, as I know of.

L. C. J. Did you ever hear him use that word?—*Hudson.* Yes I did one day.

L. C. J. Ay; What did he say that day about canting?

Hudson. I am not able to tell you very exactly.

L. C. J. You must, you must indeed.

Hudson. I do assure your lordship, I knew not how to repeat his expressions about it.

L. C. J. For look you, Sir; though you are not upon your oath, because the law doth not allow it; yet the same thing that I told those witnesses before, the same I must tell you; you must consider, friend, you come here to serve no turn, nor party; you are in the presence of the great God of Heaven and earth, who will call you to account for every thing you testify here; and therefore without any subterfuges, tell us the truth, and the whole plain truth without welt or guard.

Hudson. My lord, I will not deny one tittle of the truth, nor tell any thing that is untrue; I know I am in the presence of a great court of justice, and in the presence of the God of Heaven.

L. C. J. Tell us then, what the prisoner said about canting.

Hudson. He was speaking of the wicked men of the world, that when they spoke concerning serious religion, called it canting, and says he, What is canting? Canting, says he, is a whining tone.

L. C. J. Did you hear him speak any thing concerning organs, and surplices, and white gowns?

Hudson. No, my lord; nothing of surplices nor white gowns.

L. C. J. Nor any thing concerning organs?

Hudson. No; but something he had concerning the cathedrals, and their canting tone there.

Rosewell. Will your lordship accept an ingenious confession from me myself about this matter?

L. C. J. No, no, Mr. Rosewell, that will not be evidence; you can neither acquit, nor condemn yourself by these things either confessed or denied. It is your witnesses that I must ask, and that I expect an account from. Therefore I ask you, friend, and pray recollect yourself, How was it that he talked concerning the canting in cathedrals?

Hudson. Truly, my lord, I cannot give a better description of it than I have done. For I neither do particularly remember what time it was that I heard him use that expression, nor can I tell you where it was; neither where nor when.

Rosewell. Shall I tell your lordship the occasion?

L. C. J. Why, do you think I believe any word you say, notwithstanding any imprecations or asseverations you make about yourself? It must neither weigh with the court nor the jury: we must go according to the evidence. St. Peter himself, that you say you talked of, denied all with a great many asseverations; but that denial did not make him innocent, no, it was his sin. So all your imprecations, and asseverations, and affirmations of your own innocence, do not signify one farthing to this cause.

Att. Gen. Hark you, Mr. Hudson; let me ask you one question, Pray when Mr. Rosewell had explained those texts of scripture, did he not use frequently to make application of his quotations?—*Hudson.* Yes, my lord.

Att. Gen. Then, pray, Sir, after he had spoken of the two wicked kings, how did he apply that?

Hudson. My lord, I will tell you how he applied it. After he had made those quotations, says he, Take notice, if Abraham fell, and good Jehoshaphat fell, and Samson fell, and Peter fell, then what are we? Let him that standeth take heed lest he fall: and that was the application he made of it.

Att. Gen. Do you speak to all that Mr. Rosewell spoke in that discourse at that time touching these matters?

Hudson. No, Sir, not all; I cannot remember all: But the substance of the distinct heads I do remember.

Rosewell. Then about the king's evil; how did you apprehend it was meant?

Hudson. My lord, I do not believe he spoke it with respect to that disease which we call the king's evil; because he spoke it with reference to the disease that the king was under.

Rosewell. Did you hear any thing about 20 guineas?

Hudson. No, I did not hear a word of any guineas that day.

Sol. Gen. Did you hear him say any thing about the people's flocking to the king?

Hudson. No indeed, Sir, not I.

Rosewell. Pray, Mr. Hudson, did I name the word priests?

Hudson. No, Sir, I did not hear you name priests, but ministers and prophets; and what a judgment it was to have the prophets taken away.

Att. Gen. Pray recollect yourself; Is that a phrase they use, ministers and prophets; or do not they call themselves priests?

Hudson. Ministers and prophets, my lord, are the usual words.

Att. Gen. Priests is the word I am told they have.

Rosewell. Then, Sir, pray will you give an account how that about the rams-horns came in?

Hudson. That, my lord, was upon that text, xi. Heb. 12——

Rosewell. Do you remember what time it was; forenoon or afternoon?

Hudson. I do remember it was in your sermon in the afternoon. The words are these, 'Therefore sprang there even of one, and him as good as dead, so many as the stars in the sky in multitude, and as the sand by the sea-shore innumerable.' From whence he raised this note, or doctrine; 'That the great God could by very small means bring great things to pass.' And then he came to prove his doctrine, by several instances. Says he, what works did God do by Moses's rod? And by Gideon's broken pitchers routing a whole army? What great works has God done by small means? That by the sounding of rams-horns the walls of Jericho should fall down! And what great wonders he wrought when David slew the tremendous giant Goliath with a stone out of a sling! And what great works and wonders did the son of David, our Lord Jesus Christ do in opening the eyes of him that was born blind, with a little clay and spittle? The application of that was, A little grace——

L. C. J. We do not desire to hear your applications.

Smith. My lord, if your lordship please, Mr. Hudson used to expound himself.

Hudson. My lord, I used to repeat what I writ in my own family, that is all.

L. C. J. Yes, no doubt he is a most excellent expositor; there are several people take upon them to expound, that can neither read, nor write. But pray, friend, let me ask you one question more? Was the captain, at whose

house you were, the 14th of September, at home or at sea?

Hudson. My lord, he was not at home, but at sea; and is still at sea.

L. C. J. Do you remember that he prayed for him at that time?

Hudson. Yes, my lord, it was his common practice to pray for the family wherever he came.

L. C. J. And did he pray for his son that was sick?

Hudson. I cannot tell whether he were sick, or no, I do not remember that; but he prayed for the father and all his children, the whole family.

Ros. Pray did you hear any one word mentioned of the kings of England, or of his present majesty but only in praying for him, as I bless God I daily do, that God would give him grace and all good things here, and his glory hereafter?

Hudson. Not one word did I hear named of the kings of England; nor of any kings, but those mentioned in the Scriptures, that were quoted, the kings of Israel, and the like.

Ros. Was there any word spoken about popery being permitted to come in under their noses?

Hudson. Not one word of that was spoken, that I know of.

L. C. J. Did you hear the king of England mentioned at all that day?

Hudson. Yes, in his prayer. It was his constant course to pray for the king.

L. C. J. Ay; what did he pray for?

Hudson. He used to express himself very heartily in prayer, that God would enable him to rule and govern the people under his charge, and bless him. And he used to say, God forbid that he should sin against God in neglecting to pray for the king.

Ros. It was Samuel's speech to Saul. Pray, Sir, did you hear that?

L. C. J. Nay, nay, ask him what he did hear you pray.

Ros. Did I pray about opening the eyes—

L. C. J. But you must not open your witness eyes: Do not lead him.

Hudson. It was his common practice to pray for the king, that God would preserve him from all his enemies.

L. C. J. And we say the same thing too.

Hudson. And that God would remove all evil counsellors from him.

L. C. J. Ay, no question.

Hudson. And establish his throne in righteousness, and lengthen his life, and prosper his reign; and he used to pray as heartily and as savourily for the king as I ever heard any man in my life.

L. C. J. So there was praying in this hall, I remember, for his late majesty; for the doing of him justice: We all know what that meant, and where it ended.

Ros. Mr. Crier, pray call Mr. George Hall. [Who came in.] Mr. Hall, were you present this 14th day of September at Rotherhith?

Hall. Yes, Sir, I was.

Ros. When I expounded upon the 20th of Genesis?—*Hall.* Yes, you did so, Sir.

Ros. Pray will you inform my lords what you heard me say?

Hall. I will inform them to the best of my memory.

L. C. J. What trade are you, friend?

Hall. I am a meal-man, my lord.

L. C. J. Well, what say you?

Hall. The 14th of September last it was my lot to hear Mr. Roswell expound the 20th chapter of Genesis; as it was his usual course to expound a chapter.

Ros. It was not of choice, but taken in course. And pray what do you remember was said by me about two wicked kings?

Hall. Sir, I remember you brought a scripture concerning Jehoshaphat joining with two; first of all with wicked Ahab, and afterwards with wicked Ahaziah his son; and you proved it out of 2 Chron. xviii. chap. and 19th and 20th verses.

Ros. Do you remember there was any one word spoken of the kings of England?

Hall. There was not one word of his present majesty, nor his father, nor any of the kings of England; but of the kings of Israel, Ahab and his son.

Ros. Well then, concerning Jeroboam; what do you remember of that?

Hall. As to Jeroboam—* You were expounding from the 7th verse of the 20th chapter of Genesis—And in the opening of that 7th verse among several texts of scripture, Mr. Roswell had this Note,—Hold—Jeroboam—

L. C. J. Ay, about Jeroboam.

Hall. My memory fails me—

L. C. J. Ay, so I perceive it doth wonderfully.

Hall. As to Jeroboam, he brought a text from the 2d book of Kings, the 13th, and the former part of the chapter. There was a man of God that came to Bethel, and prophesied against Dan and Bethel, and there were these words, that Jeroboam—

Ros. He had his hand dried up—

L. C. J. What do you mean by that? If your witness be out in his story, must you prompt him? Go on, friend.

Hall. He prophesied, that the bones of the priests should be laid upon the altar and burnt, as we read in that text of Scripture, 2 Kings 13, and the beginning. And Jeroboam was there, and put forth his hand—and bid somebody take hold of him—Whereat the hand of Jeroboam dried up.

Ros. If it please your lordship, I will call another.

L. C. J. Ay, ay, you may set him going, for he is out.

“* This witness was wont to say, that some person or persons pinched his legs as he was giving his evidence, which occasioned these frequent breaks.” Orig. Edit.

Hall. If it please you, I can go a little farther. I have something to say as to that—

L. C. J. You had best go out, and recollect yourself; you have forgot your cue at present.

Ros. Mr. Crier, pray call Mr. James Atkinson. [Who came in.]

L. C. J. You, Mrs. Smith, I will ask you, (I will not ask him himself, because he may accuse himself by it) Is this the miller, at whose house one of the meetings was?

Smith. No, my lord, the former witness Hudson is the miller where he preached.

L. C. J. Well, what do you ask this witness?

Ros. Mr. Atkinson, were you at our meeting the 14th of September last?

Atkinson. Yes, I was there the 14th of September.

Ros. Were you there at the beginning?

Atkinson. I was there from the beginning to the end.

L. C. J. Pray, what trade are you, Sir?

Atkinson. My lord, I am a mathematical instrument-maker.

Ros. What chapter was I upon?

Atkinson. The 30th of Genesis in course, and not out of choice. His usual custom was to expound a chapter before he preached.

Ros. Pray, what do you remember was said by me of two wicked kings?

Atkinson. Of two wicked kings! I remember that was upon the second verse; how Abraham said of Sarah his wife, 'She is my sister:' and upon that Mr. Rosewell had this note, 'That a child of God may fall into the commission of the same sin again and again, after he had been reprov'd and smarted for it.' And he quoted several instances: as that of Lot committing incest over and over again; that of Peter denying his Lord three times; that of Samson out of Judges taking two wives among the Philistines, one after another: and then quoted that of Jehoshaphat joining with two wicked kings; Ahab, in the 2d of Chron. xviii. chap. and afterwards, though reprov'd by the prophet Jehu, he joined with Ahab's wicked son Abaziah.

Ros. Pray, what did you hear of the king of England?

Atkinson. Not a word, unless it were in his prayer; in which he always used to pray earnestly for the king.*

Ros. What do you remember was spoken about the king's evil?

* See in this Collection the Arguments of Mr. Erskine and other counsel upon the proposed Examination of Daniel Stuart, when call'd for the third time in the Case of Hardy, A. D. 1794. See, too, the like examinations in Lord Russell's Case, vol. 9. p. 596, in Mr. Hampden's Case, vol. 9, p. 1071, of this Collection. See also the two first questions which Fitzharris put to Smith, vol. 8, p. 350, all which, among others, are referred to by Mr. Erskine in his argument in Hardy's Case as above.

Atkinson. There was an expression concerning the evil, upon the 7th verse; 'he is a prophet, and he shall pray for thee, and thou shalt be healed.' And he had this expression or to this same effect, for I hope you cannot expect I should speak every word exactly; but I shall endeavour to speak the sense, and the truth, as near as I can, and nothing else. He said, the prayers of God's prophets were very prevalent for the healing and helping others in time of need. And he quoted several instances, as that out of the prophet Jeremy, xxvii. chap. and 18th verse, to the best of my remembrance. And he also quoted that of the 1 Kings 13, concerning Jeroboam. The Prophet came to reprove him, and Jeroboam stretched out his hand against him, and it dried up; and then he desired of the prophet to pray for him; which he did, and his hand was healed.

L. C. J. Look you, what you say may be true, and so may what they say too; for he might say both. You used to say abundance of good things, as well as some bad ones; therefore I would ask him this question, whether he heard any thing of the king's evil, or that had any reference to the king of England?

Atkinson. This is all that I heard that comes to my memory concerning the king's evil: 'That a godly man by his prayers may help to cure the king's evil, and thereby (the poorest Christian may gratify the greatest king,' as says our English Annotator upon that 7th verse; but I never understood him to mean it of the disease of the king's evil.

Ros. Do you remember that I preached in this discourse about rams-horns, or broken platters?

Atkinson. I did not hear of any such thing upon all that chapter.

L. C. J. But did you hear him speak of any such thing at all that day?

Atkinson. Yes, my lord, I did.

L. C. J. Come then, let us have it. What was it?

Atkinson. His course was, after the exposition, to preach a sermon.

Ros. Was it in the forenoon, or in the afternoon?

Atkinson. It was after the exposition; he prayed, and then ceased for a quarter of an hour.

Ros. Was it distinct in the afternoon?

Atkinson. It was another distinct discourse after the people had received some refectation in the afternoon; I cannot tell exactly the time. But the discourse was preached from Heb. xi. 12. I suppose that I need not repeat the words.

L. C. J. No, no, I care not for that.

Atkinson. But he thence raised this doctrine, 'That the great God can effect great matters by very unlikely means;' and he instanced in several particulars to prove it. As the miracles of God wrought by Moses's rod; and the walls of Jericho falling down at the sound of rams-horns, in the 6th of Joshua; and then he

quoted that of Gideon, a dreadful rout of a great army by a few earthen pots and pitchers; and what a tremendous champion did David smite down with a sling and a stone!

Ros. I have this one question more to ask you; did you hear me speak any thing of standing to their principles?

Atkinson. Not one word; and I was there all that live-long day, from beginning to end.

L. C. J. Then, Sir, I would ask you a question or two, if Mr. Roswell have done with you?—*Ros.* I have, my lord.

L. C. J. Pray, what room were you in?

Atkinson. I was in the same room that Mr. Roswell was, he stood at the door.

L. C. J. What, one pair of stairs?

Atkinson. Yes.

L. C. J. Is there not another room between the floor, or the ground room, and that you were in?

Atkinson. Yes, Sir; there is another little room, a little lower than that.

L. C. J. Was there a bed in that room you were in?—*Atkinson.* Yes, Sir.

L. C. J. Did you sit upon the bed?

Atkinson. I did sit upon the bed sometimes.

L. C. J. Had you a mourning cloak on that day?—*Atkinson.* Yes, I had.

L. C. J. Had you a mourning hatband?

Atkinson. Yes, I had.

L. C. J. Do you remember who sat by you?

Atkinson. No, my lord, I do not know.

L. C. J. Do you remember any body gave you your boys shoes from under the bed?

Atkinson. Yes, my lord; but I cannot tell who.

L. C. J. Well then, I ask you, did you hear any mention made that day about Dalilah and Samson?—*Atkinson.* Yes, my lord.

L. C. J. You did?

Atkinson. Yes, my lord, as an instance of a good man's falling twice into the same sin.

L. C. J. Did you hear any mention made at that time concerning any other matter that you remember?

Atkinson. My lord, that of Samson and Dalilah was one of the instances that I repeated before.

L. C. J. Mrs. Smith, was it the same day that he spoke about canting?

Smith. Yes, it was.

L. C. J. Do you remember, friend, any thing, that was spoken by him that day concerning church-music?

Atkinson. No, my lord, not a word that day that I know of.

L. C. J. Did you hear any thing about canting that day?—*Atkinson.* No, not a word.

L. C. J. Did you hear him talk any thing of surplices or white gowns?

Atkinson. No, my lord, not one word all that day; but that of Samson and Dalilah, my lord.

L. C. J. You remember that?

Atkinson. Yes, it was one instance of a good man's committing the same crime once and again.

Ros. Yes, I own it was so; but not as the other witnesses swear.

Atkinson. Truly, my lord, I would not tell one title of a lie; to the best of my remembrance—

Sol. Gen. Pray, Sir, let me ask you one question: I see you are very perfect in the proofs of the sermon; did you take notes that day?—*Atkinson.* No, I did not, Sir.

Sol. Gen. Can you remember then any one observation that he made upon any other verse. Pray what observation did he make upon the eighth verse?

Atkinson. None at all.

Sol. Gen. What upon the 13th or 15th verses?

Atkinson. I cannot tell; I can upon the 5th.

Ros. Will your lordship give me leave to acquaint you with that?

Atkinson. He only explained that which was difficult; but when it was a little historical, he only read it. But what he observed upon the second and the seventh verses, was the substance of the whole exposition almost.

Att. Gen. Has nobody read the notes of that sermon to you since?

Atkinson. I endeavoured to recollect myself, after I heard Mr. Roswell was accused; and writ, what I could remember, down.

Att. Gen. But did any body read their notes to you since?

Atkinson. No, indeed, there has nobody read any notes to me.

Att. Gen. Upon your oath how came you to remember the word Tremendous?

L. C. J. He is not upon his oath, Mr. Attorney.

Atkinson. Because when he made such short notes, I endeavoured to remember them; I thank God I have a pretty good memory.

Att. Gen. Ay, upon my word, a very strong one.

Atkinson. He did use the word 'Tremendous champion.'

Recorder. Had you and Mr. Hudson any discourse about this matter since?

Atkinson. Yes, Sir, we might talk what we did remember to one another.

Sol. Gen. Did he write down the sermon?

Atkinson. Yes, I suppose he did; but I did not sit by him.

Ros. Mr. Crier, Pray call Mr. William Smith [Who came in.] Were you at this meeting the 14th of September last?

Smith. Yes, I was, Sir.

Ros. Pray will you acquaint my lords, what you heard me say there? What chapter did I expound?

Smith. The 20th chapter of Genesis.

Ros. What do you remember of it?

Smith. I remember the chapter concerned Abraham and Abimelech.

Ros. What did you hear of the people's flocking to the king to cure the king's evil?

Smith. I heard no such word.

Ros. Or that his majesty could not cure the king's evil?

Smith. No, Sir, not a word of it.

Ra. Did you hear any thing at all concerning the king's evil?

Smith. Sir, you did quote something out of the annotator about the king's evil.

Ra. Do you remember what that was?

Smith. I cannot remember it fully at length, Sir.

Ra. Pray did you understand it as meant of the king's evil; or of the evil of Abimelech king of Gerar?

Smith. I did not understand it of the disease so called; but of the evil of Abimelech.

Rosewell. What did you hear concerning priests and prophets?

Smith. You said it was the function of the prophets to pray for the people.

Rosewell. What do you remember was said of two wicked kings?

Smith. You did make mention of two wicked kings, Ahab and Ahaziah; that Jehoshaphat named, in joining with them one after another.

Rosewell. Was there any thing of the kings of England, or of my sovereign?

Smith. No, not at all, Sir.

L. C. J. Did you hear any thing concerning Jeroboam?

Smith. Yes, that Jeroboam stretched forth his hand, and his hand withered; and the prophet prayed for him, and his hand was restored.

L. C. J. Did you hear any thing in the exposition of broken pitchers, I mean in the forenoon?—*Smith.* No, I think not.

L. C. J. What did you hear of them; and when?

Smith. To the best of my remembrance it was in the afternoon; That God could do great matters by small means; and you quoted several things. I did not stand well, so that I could not hear all the particulars.

L. C. J. But what did you hear?

Rosewell. Pray did you hear any word of standing to their principles, or of overcoming, that day?—*Smith.* No, I did not.

Just. Holloway. It seems you did not stand in a good place to hear.

Rosewell. Mr. Crier, pray call Mr. William Bates. [Which he did, but he did not appear.]

Crier. He is not here, Sir.

Rosewell. Pray, Sir, call Mr. George Hales then. [Who came in.] Were you this 14th day of September at this meeting, Sir?

Hales. Yes, I was, Sir.

Rosewell. Were you there from the beginning to the end?—*Hales.* Yes, I was, Sir.

Rosewell. Pray then will you tell my lord what you heard me say, with reference to flocking to the king; or curing the king's evil.

Hales. I heard nothing that you should say of people's flocking to the king; but you were speaking of the king's evil, and that was thus: My lord, it was from the 7th verse of the 20th chapter of Genesis, He is a prophet, and shall pray for thee, and thou shalt be healed. God is speaking to Abimelech in a dream; and after a little paraphrase upon the words, Mr. Rosewell said, That a godly man's prayer

was a sovereign cure for the king's evil; and quoted some scripture instances, as in 1 Kings, where God having sent a man of God to reprove Jeroboam for his idolatry, he stretched out his hand, and his hand withered; and he desired the prophet to pray to the Lord his God, that his hand might be restored; and accordingly it was accomplished.

Rosewell. Did you hear any thing of the kings of England?

Hales. No, not one word all that day; only you prayed for his majesty, as you used to do.

Rosewell. What do you remember was said about rams-horns?

Hales. I remember you were preaching out of the xi. Heb. 12, and the words were these, 'Therefore sprang there of one, and him as good as dead, as many as the stars in the sky for multitude, and as the sand upon the sea shore innumerable.' From whence he had this observation, That God is able to bring great matters to pass by small means. And so accordingly Mr. Rosewell instanced how the walls of Jericho were shook down by the sounding of rams-horns; or something to that purpose.

Rosewell. What do you remember of broken platters?

Hales. I remember you brought in an instance concerning Gideon, and I think it was thus, that by breaking a few earthen pitchers he routed a great army.

Rosewell. And so of a stone and a sling. But was there any thing of standing to principles?—*Hales.* Not a word.

L. C. J. As you heard?

Hales. That I heard.

L. C. J. Or that you remember?

Hales. Yes, my lord. But you said, What a tremendous champion did David slay with a sling and a stone!

L. C. J. Did you take notes?

Hales. No, my lord.

L. C. J. Then pray how came you to remember that word tremendous?

Hales. I do remember he did use that word.

L. C. J. Have you had any discourse about this matter since?—*Hales.* Yes, I have.

L. C. J. With whom?

Hales. With several friends.

L. C. J. Did you discourse with Atkinson about it?—*Hales.* Yes, I did.

L. C. J. Did you with William Smith?

Hales. No, I do not remember I did.

L. C. J. Did you discourse with Hudson?

Hales. I cannot say I did.

Att. Gen. Nor you cannot say you did not.

L. C. J. Did you hear any notes read?

Hales. I think I did.

L. C. J. Whose notes were they you heard?

Hales. Thomas Hudson's notes, I think; I am not sure of it.

L. C. J. It is so hard and difficult to get out the truth from this sort of people; they do so turn and wind. How long after the sermon was preached was it that you heard the notes read?

Hales. I was in the country when Mr. Roswell was taken; and when I came home again, I heard of it.

L. C. J. But you did not remember it till after he was taken?

Hales. No, my lord; and I read the chapter myself, and remembered these things.

Sol. Gen. Pray is the word tremendous in Hudson's notes, or no?

Hales. I cannot tell whether it be, or no.

Att. Gen. Pray, when was the next day after this?

Hales. I cannot tell, I was in the country.

L. C. J. Did he take notes in long-hand, or short?

A Stranger that stood by. In characters, my lord.

Att. Gen. Have you not heard him preach since that time?

Hales. Sir, I went into the country soon after.

Att. Gen. Where was his text at any other time, can you tell?—*Hales*. No, I cannot readily.

Att. Gen. Nor what he discoursed upon?

Hales. As to any particular time I cannot.

Att. Gen. Do not you remember his text at any other time?

L. C. J. When was the time before this 14th of September, that you did hear him preach? You have heard him before?

Hales. Yes, my lord, I have.

L. C. J. Was that upon a Sunday?

Hales. Yes, it was.

L. C. J. Did you hear him the Sunday before?—*Hales*. Yes, I did.

L. C. J. Well, what did he preach upon then?

Hales. This I know, that in his course of reading and exposition, he was upon the 19th of Genesis.

L. C. J. What was his discourse upon that chapter?—*Hales*. That I cannot tell.

L. C. J. Nor the day afterward?

Hales. No, my lord.

L. C. J. Upon my word, you have a lucky memory for this purpose; to serve a turn, it can just hit to this very day. You are very punctually instructed.

Sol. Gen. Do you remember any other part of the sermon of this day than what you have related?—*Hales*. Yes.

L. C. J. Ay; tell us what you remember besides.

Hales. I must consider a little; I am not so ready at it.

L. C. J. Ay, come let us hear it.

Ros. These things he might have more occasion to recollect by reason of my charge.

L. C. J. You say right, just occasion for this purpose. But I thought these men that have such stupendous memories as to tell you they remember the chapter and the verse, and particular words, when it serves a turn, might remember something before or after, at least in the same sermon. Why do you think they were enlightened to understand and remember that one day more than any other? They can

remember particularly as to such things, and can clan it together to answer such particular questions; but as to any thing before or after, they are not prepared.

Just. Withins. Have you any more witnesses, Mr. Roswell?

Ros. Mr. Crier, pray call Mr. John Warton. [Who came in.]

Just. Holloway. Where do you dwell, Wharton?—*Wharton*. At Rotherhith.

Just. Holloway. What calling are you of?

Wharton. A gardener.

Ros. Were you at the meeting the 14th of September.—*Wharton*. Yes, I was, Sir.

Ros. What do you remember, pray, of the exposition then concerning flocking of the people to the king to be cured of the king's evil?

Wharton. Sir, I do remember upon your exposition of the 30th of Genesis, you were speaking concerning Abimelech king of Gerar; and you took your exposition thus, that Abimelech had taken away the wife of faithful Abraham, that I do remember very well; and that you did say in your exposition, that the prayers of the prophet were prevalent for the curing of the king's evil. And then you brought your proof, to the best of my remembrance, concerning king Jeroboam: that Jeroboam stretched out his hand against the prophet of the Lord, and that the king cried, lay hold of him, when he came to cry against the altar at Bethel, and his hand dried up; whereupon the king desired the prophet to pray to the Lord that his hand might be restored; and he did so. This was the exposition that you made upon that verse in part.

Ros. Do you remember any thing of comparing the king of England to Jeroboam?

Wharton. I do not remember any such passage.

Ros. Do you remember any thing about two wicked kings?

Wharton. I do remember this passage, concerning Jehoshaphat, that he had fallen twice into the same sin, by taking part, first, with wicked Ahab, and then with his wicked son Ahaziah.

Ros. Was there any thing of the kings of England mentioned in this discourse?

Wharton. No, nothing, Sir. It was but an accidental thing that I heard you then. I heard nothing of the king of England in your exposition or sermon, but only in your prayers; when you prayed for his long life and happy reign.

L. C. J. Did you ever hear him before that time?—*Wharton*. Yes, my lord.

L. C. J. Did you ever hear him since?

Wharton. Yes, once since.

L. C. J. Now let us know his text, and the subject matter he was upon since.

Wharton Truly, as to the time since I did not take much account; for I did not write.

L. C. J. Canst thou tell us of what past at any time before?

Wharton. Once before I heard him upon the

in of Genesis, where he made his exposition—
—Truly, I have not any notes—

L. C. J. Then hark you, friend, have you spoken with any body since that 14th of September that did take notes?

Wharton. I am not acquainted much with them that were his constant hearers, that did take notes.

L. C. J. But answer my question that I ask you; did you ever discourse at all about this matter, and with whom?

Wharton. I came thither by myself, I say; I had not much acquaintance with them.

L. C. J. Nay, do not prevaricate, friend, with the court, but speak the truth out plainly. I ask you in the presence of Almighty God, did you ever speak with any body since the 14th of September about this business?

Wharton. Mr. Hudson did speak with me about it.

L. C. J. Did he read his notes to you?

Wharton. Yes, he did.

L. C. J. It is a strange thing, truth will not come out without this wire-drawing. You cannot help this canting for your life; this is canting, if you would know what canting is. Did you ever speak with Hales, or Atkinson, or Smith about it.

Wharton. I do not know Atkinson or Hales, I know Mr. Smith, but I never spoke with him about it; nor be with me.

L. C. J. When was it that Hudson and you spoke together of this thing?

Wharton. It was last Thursday.

L. C. J. Did he come to you, or you to him?—Wharton. I met him.

L. C. J. Where did you meet him?

Wharton. At Rotherhith.

L. C. J. Did he speak to you of it first, or you to him?—Wharton. He spoke to me.

L. C. J. Then I ask you (and remember, though you are not upon your oath, yet you are to testify the truth, as if you were upon your oath) did he mention any thing of Jerusalem?—Wharton. Yes, he did.

L. C. J. Of Jehoshaphat? and of Abimelech?

Wharton. Yes, he did.

L. C. J. Did you mention any of these things to him?

Wharton. Yes, Sir, I repeated more then than I have done now.

Att. Gen. Was your meeting accidental or appointed?

Wharton. It was accidental in the street; I dwell below him a great deal.

Att. Gen. And where was it?

Wharton. We were talking in the street.

Just. Withins. Did not you go into some house?

Sol. Gen. Had you any discourse at that time of being present at the trial of Mr. Rosewell?

Wharton. No, I did not know any thing of it till I saw the Subpoena.

Att. Gen. Before you discoursed with him did you remember all these things?

Wharton. Yes, I could remember them as well as he; and a great deal more then.

Att. Gen. Then cannot you remember what was done the next day?

Wharton. No, I cannot.

Att. Gen. How came you then to remember so well what was said that day?

Wharton. Because there was a remarkable passage, that I had never heard before expounded. I had not staid at that time, but that he was expounding of a very remarkable thing, which I had never heard expounded before.

L. C. J. Have you any more witnesses, Mr. Rosewell.

Ros. I have some witnesses to call more, if your lordship pleases, to testify concerning my life; and that I always prayed for the king, that God would crown him with grace here, and glory hereafter; and that he would remove all his enemies from him.

L. C. J. Ay, Mr. Rosewell, first remove all his friends from him; and then remove his evil counsellors.

Ros. Pray, Crier, call Mr. Charles Arthur. [But he did not appear.]

Just. Withins. Come, it seems, he is not here, call another.

Ros. Call Mr. Thomas Jolliff. [Who appeared.]

L. C. J. What do you call this man to?

Ros. My lord, this person I call to testify with respect to my conversation and carriage towards his majesty and the government.*

L. C. J. What is your name, Sir?

Jolliff. Thomas Jolliff.

Just. Hol. Where do you live, Sir?

Jolliff. In Mary Magdalen's parish.

L. C. J. Why not St. Mary Magdalen's?

Ros. He is my neighbour, my lord.

L. C. J. But, I suppose, he thinks that would have made the name so much the longer; or else, he thinks that there is popery in calling it so.

Jolliff. No, my lord, I have called it a hundred times, and a hundred times, St. Mary Magdalen.

L. C. J. Prithes then do it again, it will never be the worse for thee, I dare say. Well, Mr. Rosewell, what do you ask him?

Ros. Pray, Sir, will you testify what you know of my conversation towards the government, and particularly towards his majesty?

Jolliff. My lord, in the time of indulgence I have heard Mr. Rosewell once, or twice, or more; and I heard him pray for the king, and the peace and welfare of the nation, as heartily as ever I heard any minister in England in my life.

Ros. Pray, Sir, for my conversation; Did you ever hear any thing of my disloyalty or disaffection to his majesty, or the government?

Jolliff. No, Sir, I never heard any thing of any disloyalty, or any such thing in my life;

* See Hardy's case as referred to in the note to p. 197.

but all the parish will give you an account, that you have behaved yourself as an honest man; and I never knew that, either in word or deed, you were accused of any disloyalty. And, my lord, if you please to give me my oath, I will swear it; for it is the same thing to me to testify here in such a court under an oath, or without it; for I ought, I know, to testify the truth.

Ros. My lord, I am confident that what he says he would swear: and he is a very honest man.

L. C. J. Well, Mr. Rosewell, if you have any more witnesses, call them; and make what remarks upon the evidence you please afterwards, for this is not the time for making remarks.

Ros. I humbly thank your lordship for your great favour.

L. C. J. I do not speak it to cramp you in your time; but call your witnesses, and then make what remarks you will: For God forbid we should hinder you from taking your full time; for you stand here for your life.

Ros. Is Mr. Winnicot here? [He did not appear.] Then pray call captain Richard Cotton. [But he did not appear.] Call Mr. Thomas Fipps. [Then capt. Cotton appeared.]

Ros. This gentleman, my lord, hath known me for several years. Captain Cotton, I pray Sir, will you speak what you know of my conversation and life, and loyalty, with respect to the king and government?

Cotton. My lord and gentlemen of the jury, of late I have not frequented Mr. Rosewell's company, or his congregation; but when the door stood open, without opposition, I have been there; and have heard him pray for the king and government several times; and bless God, that we lived under so peaceable a prince, when all our neighbours were in blood and war.

Ros. Pray, Sir, have you ever heard, that either in word, or deed, I should ever declare against his majesty or the government?

Cotton. No, I never heard any such thing in my life; but what I heard now upon this trial up and down the hall, as I was walking below.

Just. Withins. How long ago is it, that you speak of, Mr. Cotton?

Cotton. I was abroad most of the time at sea; but this was three, or four, or five years ago.

Just. Withins. What time was that?

Cotton. It was in the time of the indulgence.

Just. Withins. Ay, then, it may be, he could speak kindly enough of the government.

Ros. He has known me these ten years. Have you not, Sir?

Cotton. Yes, I believe I have, ever since you came thither. [Then Mr. Fipps came in.]

Ros. This gentleman has known me several years, have you not, Sir?

Fipps. Yes, Sir.

Ros. Pray, Sir, will you give my lord and the court an account what you know of my life and conversation, and of my loyalty or disloyalty to the king or government?

Fipps. My lord, I have known this gentleman divers years. He lived in Wiltshire, and there he had the reputation of a very honest man, a good scholar, and a pious man. I never heard him preach in my life; because I never go to conventicles; but I have been in the house, where I have heard him pray in the family; and there he prayed very earnestly for the king and government, for the prosperity of it. Since I came to London he came to London too, and has been here in London about ten years; and has been often in my company since, and in the late times, the Bethelish times, when every body did take liberty to say what they would of the king and government; I have been often in his company, and heard him speak with a great deal of respect of the king, and of the government, and thank God for the liberty he did enjoy, and the protection he had from the government; but I never heard him speak an ill word of the government in my life; and I have known him as much (I believe) as any other man that was not his hearer; he was always reputed a very ingenious man; and that is all I can say. I never heard or knew any thing of ill of him in my life.

Ros. Pray call Mr. Caleb Veering. [Who came in.] Sir, you have known me several years. Pray be pleased to testify to my lord, and the court, what you have known of my conversation with respect to his majesty and the government.

Veering. My lord, I have known Mr. Rosewell these several years; and I have been in company with him upon the occasion of receiving money on account of rent for a friend of mine; and likewise have heard him formerly, when he preached publicly; and never heard any thing from him that reflected upon the government, or shewed any disrespect to the king. I have heard him pray often very heartily for the king, and he never meddled with any public business, nor spoke of any news while I was concerned with him.

Ros. Pray, Sir, did you ever hear of any ill I should speak of my sovereign?

Veering. I have heard him often pray for the king and government; and I never heard any man say that he did otherwise, or that ever he spoke an ill word concerning any of them.

Ros. Call Mr. John Hitchcock. [Who came in.]—Sir, you are a gentleman that has known me for several years; pray, will you testify what you have known concerning me? And if you have heard or known any ill of my conversation towards the king, pray speak it out, and let me be shamed before God, and this great assembly.

Hitchcock. I have known him, my lord, several years, and have heard him formerly, though not of late; and when I heard him, he used constantly to pray for the king and government; I never knew him to speak any thing against the king and government in my life, but always spoke very worthily of them.

Ros. Have you heard me often pray for the king?

Hitchcock. I have so, Sir, a great many
Ques.

Ros. How long is that ago?

Hitchcock. About two or three years ago, my lord: and I never knew him to be but a very worthy gentleman.

Ros. Pray call Mr. Michael Hinman. [Who came in.] My lord, here is another gentleman that hath known me several years. Pray, Sir, will you speak what you know of my conversation, with respect to his majesty and the government?

Hinman. My lord, I have known him many years, and been in his company several times, and never heard him speak any thing of ill relating to the king or government.

Ros. Pray, Sir, have you not been (upon some occasions) present where I have prayed?

Hinman. Yes, Sir, I have heard you pray; and I have heard you pray for the king very heartily.

Ros. Have you heard of any evil I should either say or do? Or any thing by word or deed against the king or government?

Hinman. No, never in all my life, one way or other.

Ros. Pray call Mr. Nicholas Wanley. [Who came in.] Sir, you have known me for these many years; pray will you be pleased to speak the truth of what you know of my conversation, with respect to the king and government.

Wanley. My lord, I have known the prisoner at the bar several years; I have been frequently in his company; and never heard him speak an ill word against the king or government in my life; but have often heard him wish that the king might live, and have a long and prosperous reign: I never heard him say one ill word of the government in my life; but always, when he spoke of it, it was with all the respect that any person could do.

Ros. Did you ever hear from any other person, directly or indirectly, that I have spoken reflectively upon his majesty?

Wanley. Never in my life, my lord.

Ros. One way or other?

Wanley. No, not any way at all.

Ros. Pray, call Mr. John Strong. [Who appeared.] Sir, you are a gentleman that have known me many years too, 10 or 12 years, I believe.—*Strong.* Yes, Sir.

Ros. Pray, will you tell my lord, and the jury, what you know of me with respect to my behaviour in word or deed, in reference to his majesty, or the government?

Strong. Sir, I have heard you teach several times formerly; I was not at this time indeed (for which you now stand accused) at that place: But I never heard you speak a word against his majesty, or the government; but you always prayed very earnestly for his majesty.

Ros. Did you ever hear that I should say any thing ill of the king or government?

Strong. No, never.

Ros. Call Mr. John Cutloe. [Who appear-

ed.] Sir, you have known me too very many years: What do you know, pray, concerning my behaviour towards his majesty and the government?

Cutloe. My lord, I never knew him speak one word disrespectfully of the government, or the king, in my life; though I have known him some years.

Ros. Did you ever hear from any body else, that I did speak ill of the king or government directly or indirectly?

Cutloe. No, never a word, I assure you, Sir.

Ros. Have you been where you have heard me pray for his majesty?

Cutloe. Yes, Sir; I remember at Bristol once occasionally I heard you in the time of liberty: otherwise I cannot say I have heard you. But I never heard any thing against the government; but you always behaved yourself loyally and peaceably that I know of.

Ros. Call Mr. Charles Melsum. [Who appeared.] My lord, I call this gentleman, who will acquaint you that he lived with me many years in an honourable family, a person of quality of this nation, one of the Hungerfords, where, my lord, I was tutor to sir Edward's son for near seven years; a gentleman well known for his great loyalty to the king and government: So that if I had been such an enemy to the king, or so disaffected as these people would make me to be, sure he would never have entertained me. Pray, Mr. Melsum, will you please to acquaint my lord, and the jury, how many years I was in that family?

Melsum. Seven years; and I was above 14 myself.

Ros. Pray, what do you know of my carriage in that honourable family, with respect to the king and government?

Melsum. As far as I know, for my life, I will declare. I do not remember he did trouble himself, or meddle or make with any man's business but his own. He was a man that kept much to his study: And when he came up to prayer, he prayed heartily for the king; and had the good word of all his neighbours thereabout.

Ros. Have you often heard me pray for the king?

Melsum. I have heard him a hundred times pray for the king: I never missed prayers when I was at home; and it was his constant practice.

L. C. J. Did he pray in the family then?

Melsum. Yes, he did.

L. C. J. Did he use to go to church?

Melsum. Yes, he went to church, to the beginning of the prayers; he did frequently attend divine service.

L. C. J. Did he receive the sacrament in all that time?

Melsum. Yes, I believe he did; I cannot say it directly.

Ros. I was a constant attendant upon the public ministry. It is now above a dozen years ago; it was in the year 1664, my lord, and so downward: Sir, you know I was a constant attendant upon the ministry of the church, and the worship of God there.

L. C. J. Did you ever hear him make use of the common-prayer himself in the family?

Melhum. I cannot say he did.

L. C. J. Well; have you any more witnesses, Sir?

Ros. Yes, my lord. Pray call Mr. Robert Medham. [Who appeared.] Here is another gentleman, my lord, that lived in that family. Pray, Mr. Medham, how long did you live in that honourable family?

Medham. About four years.

Ros. Was that in the time that I was there?

Medham. Yes, it was.

Ros. Pray then, Sir, will you declare what you know of my conversation in that family with respect to the public?

Medham. My lord, it is a great while ago; but at that time Mr. Roswell did always keep to the parish-church. He was chaplain to my lady Hungerford; and always prayed for the king at every time of prayer.

Ros. Did you ever hear that I should speak or declare any thing against the king or government, in all my life, all my time, or your time that I was there?

Medham. I must needs say, I never did hear any such thing in my life.

Just. Hol. But it was not the prayers of the church that he used?

Medham. I cannot say that.

L. C. J. Did you ever hear him use the prayers of the church?

Medham. The prayer that I heard, was that which was usually made in the family.

L. C. J. But pray speak plain; did he use the common-prayer?

Medham. No, my lord; I cannot say he used the common-prayer.

L. C. J. I tell you what I mean; Did he pray out of the book of the Common-prayer?

Medham. No, my lord, I cannot say that.

L. C. J. Dost thou take his extempore prayer to be the prayers of the church?

Just. Withins. My lord, he does not know the difference, I believe; I believe he does not go to church.

Medham. Yes, I used to attend upon the public; and so did Mr. Roswell.

Just. Withins. Well, Sir, have you any more witnesses?

Ros. Yes, my lord; pray call Mrs. Anne Broadhurst. [Then Mr. Winnacott appeared and offered himself.]

Winnacott. My lord, I heard I was called; and am come as soon as I could get in.

Ros. Ay, Mr. Winnacott, you have known me many years; I desire you would testify what you know concerning my conversation and behaviour.

Winnacott. Formerly, when I heard him I never heard him speak a word against the king or government; and it is some three years ago since I heard him.

Ros. Have you heard of any evil that I have said or done against the king or the government?

Winnacott. No; but I have heard him often pray for his majesty.

Just. Withins. Well, there is your other witness Anne Broadhurst; what ask you her?

Ros. My lord, this was a servant that lived several years in my family. Pray, Nan, how many years did you live there?

Broadhurst. Four years, my lord.

Ros. Pray declare what you know of me in my family, with respect to the king and government.

Broadhurst. I have generally heard you twice a-day pray in your family; and I never heard you pray in my life, but I heard you pray as earnestly for the king as you did for your own soul. This I can declare during the time that I lived there.

Ros. Did you ever hear me speak evil of the king in my family; or reflectively on the government?

Broadhurst. No: you always prayed for the king (as I say) as earnestly as for yourself or your family.

Ros. If you know any ill carriage in word or deed towards my sovereign, I desire you to speak it out, without favour or affection, or any respect to me in the world.

Broadhurst. No, I never did; but have often heard you heartily pray for him.

Just. Withins. Pray, how long ago is this?

Broadhurst. Two years ago I lived with him.

Ros. Pray, tell my lord again, how long it was, and when that you lived there.

Broadhurst. I lived there four years; and it is two years ago since.

Just. Withins. Pray, how often were you at church in that time?

Broadhurst. When I had occasion to go, I did go; but I did usually hear my master, when I dwelt with him.

Just. Withins. Well, who is your next witness?

Ros. Call Anne Manning. [Who came in.] You lived with me in my family several years?

Manning. Three years, Sir.

Ros. Pray, will you declare what you know of my carriage and behaviour towards the king and government, in my family, while you were there?

Manning. My lord, he prayed for the king, for his long life, in his family duties, morning and evening; and in private, when nobody heard him but myself.

L. C. J. What! you and he were at exercise together?

Manning. My lord, I have gone by his study-door, and have heard him pray for the king's long life, when he knew not that any body heard him.

Ros. This, my lord, is more than I expected; for I little thought that any body could give a testimony of my private devotion; though I never then omitted to pray for the king, and never shall as long as I live.

Manning. My lord, he prayed as heartily for the king's life as for his own soul; and I have heard him often praying, and desiring God to preserve him in his kingdom, and give

his long life; and have heard him insist upon that scripture, 'Speak not evil of the king, no, not in thy bed-chamber; for the birds of the air shall declare it.'

Ros. Pray speak the truth. Did you ever hear me utter an ill word or reflection upon his majesty or the government?

Manning. No, my lord, he was always mighty for the king.

Ros. Speak the truth of what you know; I hope you would speak the truth, and nothing more than the truth, as if you were upon your oath.

Manning. I do speak the truth, and it is what I can declare, and would, if I were to do the next moment; and I can safely swear it.*

* "It was an antient and commonly received practice, [St. Trials 1. passim.] (derived from the civil law, and which also to this day obtains in the kingdom of France) [Domat. publ. law. b. 3. t. 1. Montesq. Sp. L. b. 29. c. 2.] that, as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. And therefore it deserves to be remembered, to the honour of Mary 1, (whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous) [See pag. 17.] that when she appointed sir Richard Morgan chief justice of the common pleas, she enjoined him, 'that notwithstanding the old error, which did not admit any witness to speak, or any other matter to be heard, in favour of the adversary, her majesty being party; her highness's pleasure was, that whatsoever could be brought in favour of the subject should be admitted to be heard: and moreover, that the justices should not persuade themselves to sit in judgment otherwise for her highness than for her subject.' [Hollingsh. 1112. St. Tr. 1. 887.] Afterwards, in one particular instance (when embezzling the queen's military stores was made felony by statute 31 Eliz. c. 4.) it was provided that any person, impeached for such felony, 'should be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his discharge and defence,' and in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath: [2 Bulstr. 147, Cro. Car. 292.] the consequence of which still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the crown. Sir Edward Coke [3 Inst. 79.] protests very strongly against this tyrannical practice: declaring that he never read in any act of parliament, book-case or record, that in criminal cases the party accused should not have witnesses sworn for him; and therefore there was not so much as *sciintilla juris* against it. [See also 2 Hal. P. C. 283. and his summary, 264.] And the House of Commons were so sensible

Ros. Then pray, call Isabella Dickeson— [Who appeared.] My Lord, surely I would not speak evil of his majesty or the government, in public in the congregation, when I prayed for him in my family and my closet. But here is another servant that lived in my family: Pray will you speak what you know concerning my behaviour in my family, with respect to the king and government.

Dickeson. He used to pray twice a-day in his family, morning and evening, and he always prayed earnestly for the king, for his good health, long life, and prosperity.

Ros. Did you ever hear me speak any evil of the king or government in any respect?

Dickeson. No, never, Sir, in my life; nor do I believe you ever had an evil thought of the king.

Ros. Pray then will you call Mr. James Atkinson.

Just. Withins. We have had him already, and I suppose he is gone; he is not here.

Ros. I call him now to testify another thing, if your lordship pleases; and he is at hand, my lord, I suppose.

L. C. J. You should examine your witnesses together, but we will not surprise you; we will stay.

Just. Hol. Pray call any body else, in the mean time, if you have any other.

L. C. J. Nay, brother, it may be he hath observed a method to himself; he is for his life; let him take it. [Then Mr. Atkinson came in.]

Ros. That which I call you now for, Sir, is to testify what you heard upon the 30th of January from me, about praying for the king, and all that are in authority.

Atkinson. My lord, he kept that day, the 30th of January, as a day of fasting and

of this absurdity, that in the bill for abolishing hostilities between England and Scotland, [Stat. 4. Jac. 1. c. 1.] when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties, they insisted on a clause, and carried it [Com. Journ. 4, 5, 12, 13, 15, 29, 30 Jun. 1607.] against the efforts of both the crown and the House of Lords, against the practice of the courts in England, and the express law of Scotland, [Ibid. 4. Jan. 1607.] 'that in all such trials for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the party arraigned the benefit of such credible witnesses, to be examined upon oath, as can be produced for his clearing and justification.' At length by the statute 7. W. 3. c. 3. the same measure of justice was established throughout all the realm, in cases of treason within the act; and it was afterwards declared by statute 1 Ann. st. 2. c. 9. that in all cases of treason and felony, all witnesses for the prisoner should be examined upon oath, in like manner as the witnesses against him." 4 Blackst. 359.

prayer; and he preached from that text on the 1 Tim. ii. 1. pray for kings, and all in authority: And then he did assert that kingly government was most agreeable to the word of God, and the constitution of the government of England, which was the best in the whole world; and had been so approved by writers, both foreign and of our own country: And he did urge it as a duty incumbent upon all people to pray for the king and magistrates, that they might 'live a peaceable and quiet life under them in all godliness and honesty.' [Then he seemed a little faint and stopped.]

Ros. Pray, Sir, will you recollect yourself? My lord will indulge you a little.

Atkinson. I have been acquainted with Mr. Roswell these ten years.

Ros. But, pray, Sir, what do you remember of the application of that sermon upon the text, about praying for kings and all in authority?

Atkinson. That persons were to pray for them, and to obey them, and that it was their duty. This is all that I can remember.

Ros. What do you remember of my invectives against those that practised the contrary?

Atkinson. Why truly as to those things, he did highly condemn those persons that had any way acted against it. And I have heard him, both in public and private, inveigh against those that had any hand in the murder of the late king, and condemned the fact as a diabolical design.

Ros. Is Mr. Smith there?

Atkinson. I was very ill on Sabbath-day last, and I thought I should not have come out now; and I would not, to the best of my remembrance, speak a lie, as I am in the presence of this honourable court, and in the presence of God, to whom I must give an account another day.

Ros. God will reward you for what you come to do for an innocent person this day.

Atkinson. I never heard an ill word against the king or government drop from Mr. Roswell in my life. I am not upon my oath, but know myself to be bound to declare and tell the truth, and nothing but the truth.

Ros. I am confident, my lord, he would not speak what he would not swear.

L. C. J. The jury are judges of that, Mr. Roswell, I must leave it to them.

Ros. Pray, Mr. Atkinson, was Mr. Smith with you?

Atkinson. Yes, and I have sent one to call him.

Ros. Pray, Sir, let me ask you as to what Mistress Smith says, that I should say of the recorder being made a judge?

Atkinson. I never heard you speak any such words in my life.

Ros. Upon the last day of August last, at Mr. Shed's house, she says, that I did use that expression.

Atkinson. As to Shed's house, I was then sick, and was not there. If my lord will give me leave to look upon my note-book, I can tell what day I was there.

Smith. It was at one Daniel Weldy's house, as I think, that you spoke about the mayor, and the sheriffs; but what you said about fools in scarlet gowns was at Shed's house.

Ros. Was there any meeting at the meeting-house, since July last, upon the Sabbath-day?

Atkinson. Truly, I be not able to remember; but if my lord please to give me leave to look upon my note-book, I can give an account; for I writ down every day the place where we met.

L. C. J. Prithee, look upon thy note-book; for I have a mind to know something out of that note-book. Prithee tell me what was insisted upon the 14th of September?

Atkinson. My lord, I only have a note of the day, of the place, and of the text.

Ros. Pray, Sir, did you hear me speak of a great man in Grace-church-street at the upper end; and that if it had not been for him, the fire had been quenched?

Atkinson. I never heard that expression from you in all my life. [Then Mr. Smith came in.]

Ros. Pray, did you hear any such thing, Mr. Smith?—Smith. No, my lord.

Ros. My lord, I can bring all the rest to testify the same thing, if your lordship will let me call them over again.

L. C. J. Do as you will, I would not restrain you from any thing of a legal indulgence, that is fit to give to any man in your condition.

Atkinson. What day of the month do you say it was, Sir, that you spake of the recorder?

Ros. The 31st of August, I think.

Atkinson. At that time I was sick, and was not there.

Ros. Pray, Mr. Smith, have you ever heard me preach upon the 30th of January?

Smith. Yes, Sir; I have heard you upon that day, and upon that text, that we should pray for kings and all in authority. You kept it as a day of humiliation, and you abhorred the action of that day. It was kept very solemnly, for the bewailing the horrid murder of our late king. And you were so far from giving any countenance to the action of that day, that you detested it, and preached very much against it, and you have always preached up kingly government.

Atkinson. Sir, you were asking me, if there were a meeting since July, in the meeting-house?

Ros. Yes, because she says there was one upon the 10th of September.

L. C. J. If you look upon your notes again, Mr. Roswell, you will find it was the 10th of August.

Ros. Where were you upon the 10th of August?

Atkinson. I was at home sick then; it is written down, your lordship may see it.

L. C. J. Do you take notice where you heard the meeting was, when you were sick?

Atkinson. Yes, my lord, I have a short note of it.

L. C. J. Where was the meeting then ?
Atkinson. In the meeting-house, as I heard.
L. C. J. Pray, recollect yourself, and look upon your book, how is it entered there ?

Atkinson. Myself at home the 10th of Aug.
L. C. J. When didst thou take that note, upon your word, now ?

Atkinson. When my family came home, somebody did tell me that day, or the next day.

L. C. J. Well, where was it the time before ?
Atkinson. The 3d of August, at Mr. Crook-shank's; the text was the Heb. xith 7. The 10th at the meeting-house, myself at home; and Canticles the 8th and 13th.

Ros. My lord, these gentlewomen say, they were at several meetings. I desire, my lord, that these witnesses may be called.

L. C. J. Call whom you will. Who do you call first ?

Ros. Thomas How. My lord, I could bring hundreds of witnesses as to this point.

L. C. J. Well, there is Thomas How; to what purpose do you call him ?

Ros. My lord, to testify to that she should swear before sir George Treby, that Mr. How was at a conventicle such a time, when he was not, and therefore I desire him, that he would please to testify the truth of that matter.

How. My lord, I will testify the truth as far as I know it; she sent three ten—

L. C. J. How do you know that ?
How. So they said.

L. C. J. That is no evidence; and I care not what they said: If you know any thing yourself of your own knowledge, speak it.

How. They offered—

L. C. J. I tell you their offering signifies nothing.

How. My lord, it is an year and a half ago.

L. C. J. Let it be never so long ago, if it be only what they said, it signifies nothing, it is no sort of evidence; but if you can say any thing of your own knowledge, you say well; in God's name we will hear it.

Ros. Then my lord, some questions I desire I may have leave to put to Mr. Recorder.

L. C. J. If Mr. Recorder be ready to answer your questions, with all my heart.

Ros. Mr. Recorder, I desire you would please to do me the justice to testify, whether you know any thing concerning Mrs. Bathoe ?

L. C. J. Who is she ?

Ros. My lord, it is whether there was not a conventicle sworn before Mr. Recorder against one Mrs. Bathoe ?

Recorder. I cannot well tell, Mr. Rosewell. There was a conviction before me (as I remember) of one Mrs. Bathoe for a conventicle; and, as I take it (as the witness told you just now) she had it from her own confession.

Ros. Do you know any thing, pray, Sir, of a composition that was made upon that conviction ?

Recorder. No, Sir; you do not think, sure, that I make compositions, or know any thing of them ?

Ros. Was not the money, Sir, paid back again ?

Recorder. Not a penny that I know of, or any agreement for it.

Ros. Pray, Sir, will you acquaint the court, how that matter was really ?

Recorder. Mrs. Bathoe came to me, and said, she was mistaken if any such words did pass from her; for indeed there was never any such conventicle as Mrs. Smith swore she had confessed. Upon that I sent for Mrs. Smith, and bid her consider of it, whether there was really any such conventicle; and Mrs. Bathoe had brought her appeal and it is depending now, and will be heard the next quarter-sessions.

Ros. Pray, Sir, did you tell her, that she might have her money again ?

Recorder. I did tell her, Mrs. Smith was mistaken, and did not insist upon it, and she would have her money returned again.

Ros. Pray, Sir, did you send your warrant for one Cartwright under your hand ?

Recorder. You ask me a hard question; I might send a summons for several persons, I cannot remember all their names.

Ros. By whom, I pray, Sir ?

Recorder. I cannot tell who I send all my summons by.

Ros. Was it not by these two women, Mrs. Smith and Mrs. Hilton ?

Recorder. I cannot tell; it may be it might be so.

Ros. Pray, Sir, what did you say to Mr. Cartwright when he came thither ?

Recorder. I cannot remember particularly.

Ros. Sir, did you not ask him what he had to say against these witnesses that are produced against me ?

Recorder. My lord, I remember, when Mr. Cartwright came to me, I did ask him some such question; for they had told me that he had, by a person, been tampering with them to take them off from prosecuting a great many persons.

Ros. By whom were you told so, Sir ?

Recorder. By themselves. I know nothing of it: But I tell you the reason why I sent for him; because they told me, they went in danger of their lives; that they could not walk the streets in safety, but they had stones thrown at them; and they were reproached as common informers, and were beset hard with applications of money, to take them off from prosecuting. And, among the rest, they complained of one Cartwright, that he had been dealing with them; and it was upon that account that I sent for him, to know what he had to say against them.

L. C. J. These questions, Mr. Rosewell, perhaps, may be better let alone.

Recorder. I have seen a letter that does threaten them very much; but I cannot say whence it comes.

Ros. My lord, I desire to ask Mr. Recorder, whether or no he did not send for some of my witnesses ?

Recorder. I do not know your witnesses, Sir.

Ros. Did you send for one Richard Gibbs of Rotherhith ?

Recorder. Yes, he was constable at Rotherhith.

Ros. Pray, Sir, upon what account did you send for him?

Recorder. I did it, because I heard the constables of your side durst not execute their warrants, for fear of the rout of the people.

L. C. J. I tell you, these questions were better let alone.

Ros. Mr. How, that which I call you for, is whether Mrs. Smith has not offered to swear before a justice, that you were at a conventicle when you were not?

L. C. J. She says she does not know any thing of her own knowledge.

Ros. She offered it a year and a quarter ago, before sir George Treby.

L. C. J. Were you by when she offered any such thing?

How. I was by, when she was before sir George Treby; and she went into a yard, and offered to inform against one Mr. How for being at such a conventicle; but I was not the man, she said.

Ros. My lord, she had sworn it.

L. C. J. No, no, she had not sworn it, she only offered it, and for aught I perceive, she is a very careful witness, to see that she does not fix upon the wrong person.

Ros. Then if it please your lordship, I desire John Townsend may be called. [Who came in.] Pray, will you testify what you know concerning Mrs. Smith's swearing that Mr. How was at a conventicle?

Townsend. Sir, I will tell the truth as near as I can; I cannot tell the day, it was about a year and a half since, that he was out of town of the Lord's day, and that day was remarkable, for I met him coming to town, and it was about the evening, about five of the clock, and that day they had brought him some notice of a warrant for the seizing of his goods, for that he had been at meeting: Now he, understanding when they were to make affidavit of it before sir George Treby, he desired me to go with him thither, and I went with him, and he asked her if she knew the man. There he was, and I was, and one more, and there came one Stranger: And we went out to the light, and she looked upon all of us, and knew never an one of us.

L. C. J. You use to go to conventicles, all of you, I warrant you?

Just. Withins. She was not much out in her conjecture, I dare say.

L. C. J. But she seems to be very careful, that she did not swear against the wrong person. And (speaking to Mr. Townsend), If she had sworn that thou hadst been there that day, I warrant you she had sworn true.

Ros. Is sir George Treby here? [He did not appear.] Then I desire Mr. Thomas Harvey may be called.

L. C. J. There he is; what do you ask him?

Ros. My lord, to prove that this Elizabeth Smith swore that several persons were at several conventicles, which she afterwards con-

fessed in truth they were not; and made applications to compound for the forfeitures, and they should have their money again.

L. C. J. Prithee, ask him in general, what does he know of her?

Harvey. Elizabeth Smith came to a friend of mine in April or May last—

Att. Gen. Were you by?

Harvey. Yes, I was by. She came to a friend of mine, I say, and she told him, that she could swear against him, and some others, for a considerable value of forfeitures upon conventicles—

L. C. J. What friend of thine was this?

Att. Gen. Where does that friend live?

Harvey. In Southwark.

L. C. J. What is his name?

Harvey. One Games.

L. C. J. What trade is he?

Harvey. A sail-maker.

L. C. J. Whereabouts does he live in Southwark?

Harvey. By St. Mary Overy's dock. And he came to me, and desired me, that I would meet and speak with her; I met her, I think it was about the Exchange, at the Roe-buck; there was she and another fellow with her. She told me she could swear against such and such; and desired me to give her a cup of drink, which I did, and then she told me her story, and demanded either 10 or 20 pounds; and that that should take her off from swearing against them. I told her, I could say nothing to it; but I would acquaint them, which I did, particularly, Mr. Games. They thought not fit to give her any thing; which answer I returned to her. She told me she was very poor, and if she could have but something, she would declare who it was that would swear; but upon reasonable composition (though she had offered to swear) she would not. But she had taken the copy from a sister of her's; and, I think, she said her sister's name was Mary Farrar, as I remember.

L. C. J. Did she offer to swear any thing against you?—*Harvey.* No, my lord.

L. C. J. You know that Games very well, don't you?—*Harvey.* Yes, my lord.

L. C. J. Does he use to frequent the church constantly?

Harvey. I do not know that, my lord; I have known him many years.

L. C. J. Do you live near him?

Harvey. No, I do not.

Ros. Pray call Mr. John Cartwright, and Mr. George Norton. [Mr. Cartwright appeared.]

Ros. Mr. Cartwright, I desire you would please to testify what you know here concerning Mrs. Smith, who hath testified against me.

Cart. My lord, may it please your honour, the 22d of July last, Mrs. Smith and I were together from seven o'clock in the morning till half an hour after eleven; and that morning we went to a constable, one Alexander Vanner in Aldersgate-street; and from thence we went to Moorfields to look for a meeting in

Paty-France; but there was none: And from that place we went into Moorfields again, and followed an ancient man, whom we supposed was going to a meeting; and this man we followed the space of almost an hour's time, that it was almost this time of day that it now is that I am speaking. That day she convicted Mrs. Bathoe for having a meeting in her house; when she owned to me, and another man, that she never was in the house of Mrs. Bathoe; and then for the same morning there was one Rice Bowing that was convicted of a conventicle at Bermondsey, upon her oath.

L. C. J. How do you know that?

Cart. As I was told.

L. C. J. But it may be you were told a lye; you must only speak what you know yourself.

Cart. Then, my lord, several times she has asked me to convict with her, when I never had been at a meeting; and also, she has offered to convict with me, when I have been there, and she hath not been there; and she also asked my wife to convict one Dod's meeting at Shoreditch, and my wife refused it, because she was not there.

L. C. J. Were you by when she asked your wife to do it?

Cart. Yes, and please your honour.

L. C. J. Who did you tell this first to? Because I see you hunted along with her, why did not you go and complain, when she had several times proposed such a thing to you?

Cart. My lord, I did not so well understand it at that time.

L. C. J. Who did you first of all tell it to, I ask you?

Cart. I first of all told it to one Smith.

L. C. J. Was this before Mr. Rosewell was taken, or after?—Cart. It was afterwards.

L. C. J. Did you go to Smith, or did he come to you?

Cart. It was through another's means that I came to speak with Mr. Smith.

L. C. J. Who was that?

Cart. It was through a Goldsmith's means.

L. C. J. What is his name?

Cart. His name is Ferne; he lives in Newgate-street.

L. C. J. How came he to understand it, to bring you together?

Cart. Because he understood that I was with Mrs. Smith that time that she convicted Mrs. Bathoe, and was concerned with her. I did not know any thing of Mr. Rosewell at that time at all.

Ros. Did she not tell you, she would do as much for me?

Cart. She did offer me this; that if I would go and discover any meeting, she would convict these though she was not there.

L. C. J. Who didst thou tell a thing of this nature to; only to Mr. Smith, and that Goldsmith.

Cart. I told it first to that Mr. Smith.

L. C. J. When these witnesses and things drop out of the clouds, I never put any great value upon them. These come to serve a

turn, and never make any discovery till you are taken.

Ros. My lord, you may observe it was her common practice to convict upon a report, nor having any eye or ear witness.—

L. C. J. Well, I will observe what he has said; but I tell you what I think of it.

Cart. She has asked me to do it several times.

L. C. J. All that I can say to it, is, it seems she looked upon thee as so very a knave, as that thou wouldest have done such a thing; and, it may be, she was not mistaken.

Ros. Then call Mr. George Norton. [Who appeared.] I call you as a witness, to declare what you know of Mrs. Smith's importuning you or any one to swear against meetings.

Norton. Yes, she has offered to swear, but I cannot say with him; for I was not present all that time. All that I can say, is, that she owned she was never at Mrs. Bathoe's house.

L. C. J. So she says still; and it agrees with all the rest of the evidence: It was only hear-say.

Ros. Then pray, will you please to call John Hobson?

L. C. J. There he is: what say you to him?

Ros. My lord, I bring this witness to testify, that Mrs. Smith swore there was a conventicle at such a place, when there was none.

Hobson. Sir, there was none since I came into the house, to my knowledge.

L. C. J. What house?

Ros. At Mr. Hales's; she swore there was a meeting upon the 13th of July.

Hobson. There was none to the best of my knowledge.

Just. Withins. We must not convict people of perjury upon such evidence. Indict her of perjury, if you have a mind to it.

L. C. J. Where is the instrument-maker? Atkinson? Bid him send me his book. [Which was done.]

L. C. J. Were you at every meeting always that he preached at?—Hobson. No, my lord.

L. C. J. Then there might be many meetings that you do not know of?

Hobson. I live next door to this Mr. Hales.

L. C. J. You used to go frequently to hear Mr. Rosewell, did not you?—Hobson. No, Sir.

L. C. J. [Having looked upon the book.] Was there any meeting that you know of, the 13th of July?

Hobson. None there; he lives the next door to me.

L. C. J. Was there no meeting no where there-away?

Hobson. Not that I know of.

L. C. J. She swears to that day, at Mr. Hales's.

Ros. Ay, and to the very place.

L. C. J. Do you know one Hodgson?

Atkinson. Itis Hudson, my lord.

Hobson. No, my lord; I do not know him.

L. C. J. Were you ever at his house at any meeting?

Hobson. No, my lord; I never was at any meeting these two years.

Ros. He lives next door to the house.

L. C. J. There may be a meeting next door to my house twenty times over, and I not know it.

Ros. Then, pray, call John Crook. [Who came in.] Pray, Sir, do you know whether there was any meeting at Mr. Hales's the 13th of July?

Crook. No; I never heard of any such thing but what was according to his own use amongst his family. I live under his roof, and never yet did know that there was a meeting there.

Ros. Pray, call Sarah Whibby. [Who came in.] I desire she may be asked, whether Mrs. Smith did not swear there was a conventicle at Mr. Hales's the 13th of July: and whether there was any such thing?

Whibby. There was none.

L. C. J. That you know of, you mean.

Whibby. I am certain of it.

L. C. J. How came you to remember the day particularly?

Whibby. I can tell you by a very good token; because the chimney of my house was on fire that day.

L. C. J. How do you recollect it was the 13th of July?

Whibby. Because there was a neighbour of our's, that is a waterman, that was sent for to wait upon his majesty; and I went that day to call him to quench the fire; not finding him at home, I went further to call more help.

L. C. J. How can you tell that it was the 13th? It might be the 20th, for aught you know.

Whibby. No; it was the 13th.

L. C. J. How can you tell that?

Whibby. Because there was another meeting on the 20th day, for which I paid 20 shillings; and I can remember my chimney was on fire that day.

L. C. J. What day of the week was it?

Whibby. It was Sabbath-day.

L. C. J. Why, if my chimney was on fire the 14th or 15th, it may be I can remember it a little while, but how came it that you do remember it so long?

Whibby. It was the 13th of July.

L. C. J. How can you be sure of that?

Whibby. Because it was the Sunday before the meeting at Mr. Bowen's.

L. C. J. Where was the meeting that day your chimney was on fire?

Whibby. I did not know then; but I knew since, it was at Mr. Hudson's.

L. C. J. Then you have been instructed about it. But pray do not think you come here to serve a turn.

Whibby. It was at Mr. Hudson's.

L. C. J. Was there a meeting on the 13th of July?

Whibby. By relation there was; but I was not at it.

Ros. My lord, I bring her to testify there was no meeting at Mr. Hales's that day.

L. C. J. We know well enough you unvel-ling saints can lie.

Whibby. I have answered the truth, as far as I know.

Ros. I only ask her about Mr. Hales.

L. C. J. She shall answer such questions as the court shall think fit to ask her.

Ros. How far is your house from Mr. Hales?

Whibby. Next door.

L. C. J. How far is your house from Mr. Hudson's?—*Whibby*. A great way.

L. C. J. Was it half so far as you went to fetch the waterman?

Whibby. That was but three doors off; but Mr. Hudson's is half a mile, I believe, or a mile.

Ros. Then, pray, call Anne Collins. [She appeared.]

Just. Withins. Well; what do you ask her?

Ros. Mrs. Smith hath sworn, that there was a conventicle at Mr. Hales's the 13th of July; I desire to know of you, whether there was such an one, or no?

Collins. The 13th of July there was none.

Ros. Upon your certain knowledge?

Collins. Upon my knowledge there was none; I can justify it.

L. C. J. Not there you mean, at Mr. Hales's, but do you know there was any any where else?

Collins. No, not to my knowledge.

L. C. J. Do you know Mr. Hobson? Was there any there that day?

Collins. I know one Hudson.

L. C. J. I thought you had said Hobson.

Collins. No, it was Hudson.

L. C. J. Was there any conventicle there?

Collins. I cannot tell any thing as to that.

Ros. Then, pray, call Sarah Bathoe, and Susan Bathoe. [Sarah Bathoe appeared.]

L. C. J. Well, what say you to this witness?

Ros. That which I call Mrs. Bathoe for, is to prove that Mrs. Smith was mistaken, when she swore that Mrs. Bathoe permitted a conventicle at her house the 20th of July: upon which Mrs. Bathoe was convicted, and brought her appeal.

L. C. J. You do mistake, Mr. Rosewell. She says, that Bathoe confessed that there had been a conventicle at her house, as she heard.

Bathoe. She has convicted me.

L. C. J. Ay, but it was upon your confession.

Bathoe. No, I never confessed any such thing; for I had none there at that time, nor did confess any such thing.

L. C. J. Had you ever any conventicle at your house?

Bathoe. That is not it that I am to answer to now. I desire to be excused from answering that question.

L. C. J. Then I will not believe her, if she talked as long as you preach.

Ros. There was an appeal brought, my lord.

Att. Gen. She is not a witness, it is in her own case. It would be a fine thing if an old

woman's story should prevail here against positive testimony. [Then Susan Bathoe came in.]

Ros. Mrs. Smith hath sworn, that Mrs. Bathoe had a conventicle at her house the 20th of July.

L. C. J. No; she only swears that Mrs. Bathoe confessed it; but herself was not there, she says.

Ros. Did you confess it?

L. C. J. No matter what she says; it all agrees with that testimony that she has now given: this matter, it seems, is depending upon an appeal, and so she testifies for herself. And when I ask her whether she ever had any conventicle at her house, she will not tell me; which induces a suspicion, that she does not come for a fair purpose, but only to serve a turn.

Ros. Pray, Mrs. Susan Bathoe, was there any such conventicles?

Bathoe. There was none.

L. C. J. Why, I tell you, you mistake still. Mrs. Smith swears that Mrs. Bathoe confessed to her, that she had a conventicle, but she swears she was not there. And take all together, seeing she will not answer whether she ever had a conventicle; and so it may be only a mistake just of the day: or she might tell her so, for any thing appears; and for ought I know Hales has had conventicles: and what is all this to the purpose of which you are accused?

Ros. Call Mr. John Ferne. [He did appear.] My lord, I desire Mrs. Bathoe may not go away.

L. C. J. Let her stay then. What do you call this man for?

Ros. It is to prove she has compounded convictions. Pray, Sir, do you know whether Mrs. Smith hath compounded with Mrs. Bathoe, since the conviction, to set by the prosecution; and Mrs. Bathoe was prevailed with so to do?

Ferne. Mrs. Bathoe came to me about 8 or 10 days ago; says she, I must get you to go with me to the Recorder's. I am promised my money again that was paid upon the appeal I brought. I was glad to hear it, and went with her; the time appointed was five or six o'clock. I was there a little after five; and Mrs. Smith was not there, that was one of the witnesses upon her conviction, Elizabeth Smith, for I served her with a notice to attend the Recorder. We were there a second time at the Recorder's chamber about six o'clock; she was not come. We waited hard by, and went a third time; and then she was there, and desired my sister to excuse her that she was not there earlier; but she did not doubt but she should have her money; and wanted to see the Recorder. Mr. Recorder had several above with him. We waited an hour, or better. Mrs. Smith went up and my sister went up with her, or followed her: and, says the Recorder to her, are not you the woman that was with me such a time, with Mrs. Williams? Yes, Sir, (says she) I was. Says he, What made you make such haste away?

Upon that, Mr. Courthope steps forward with the book; Sir (says he) I have paid it in to the clerk of the peace. Then, says the Recorder, it is out of my hands, I can go no further; but promised afterwards to speak with sir William Smith, the chairman of the sessions, about it.

L. C. J. I can make nothing of all this. What a business is here!

Ferne. She seems to be a rash woman, ready to swear any thing.

L. C. J. Oh dear, Sir! and you seem to be a grave, prudential sort of a man.

Ros. If she did not swear that this meeting was at Mr. Hales's, why was he convicted for that meeting?

L. C. J. I know nothing of the conviction at all; it is the first time that I have heard of it.

Ros. Then if your lordship please, we desire to have the record of it read; here it is.

L. C. J. Make it appear that she swore, and that what she swore was false; and then you say something.

Ros. We desire to have these copies of records read. Here it is 'per Testimonium Elizabethæ Smith, or per sacramentum.'

L. C. J. Prove that she swore it.

Ros. My lord, we had a very gracious answer concerning the petition that my poor wife delivered to his sacred majesty in reference to her coming to me; which his majesty granted with a great deal of compassion. He remitted it to your lordship, and your lordship did second it, for the having the use of what records should be necessary for my defence. And upon what application we made to the Attorney-General, it was readily granted: but for the searching of the records, we have desired the Recorder, and cannot have it.

L. C. J. You are much misinformed in that. I will tell you how it was: Your wife and a young man came to me, a matter of a fortnight ago, and did tell me, there were several records, that were necessary for your defence, and the Recorder refused to let you have copies of them. I told her then, God forbid but that you should have all manner of helps from records, that were necessary for your trial; and thereupon I did require my brother Jenner, who is Recorder, to attend to shew cause, why he did refuse to let you have any records that you thought necessary for your defence: And he gave me this for answer, that they were records of convictions, and were returned to the sessions of peace; some to Surrey, and some into Middlesex, and some were in the clerk of the peace's hands. Whereupon I told your wife, if she would go to the clerk of the peace for copies of the records, if they did not readily give you copies at your charge, I would make them do it, if she came to complain to me; and if they would not, I would lay them by the beels. When my brother Jenner came to me, said I, I believe that which they have a mind to, is to know upon whose testimony the convictions are made. Now that is no part of the

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conviction; and that we thought ought not to be granted. Nor is there any law for it; for that is to open a way to the tampering with the king's witnesses. After this, there was Mr. Wallop, that came and moved the court of King's bench about this matter; and we gave him the same answer, that for any one to discover the king's witnesses before they come to trial was not to be allowed by law. If Mr. Attorney had come here, and said, pray, give us a list of all the witnesses that Mr. Rosewell will make use of at his trial; we should have denied his motion. God forbid but that the witnesses you bring should be heard; and that the witnesses they bring should be heard; but we must prevent tampering with the witnesses on all sides.

Ros. If the witnesses are suppressed, it is impossible to encounter their testimony.

L. C. J. What do you mean by suppressing the witnesses? They are here produced.

Ros. Their names, my lord, upon the records.

L. C. J. Their names are never exposed, nor ought to be.

Ros. My lord, it is that which must enable me to make my defence. If we could have their names, we could prove them perjured.

L. C. J. It cannot be by law. You have the same benefit that all the rest of the king's subjects have. If any one be convicted of treason by witnesses (twenty in number) we never enter them upon the record; and if any be acquitted, the testimony of the evidence upon that acquittal is never entered upon record. It may be in your matter, it was not upon the testimony or witnesses that the conviction was; but upon the notoriety of the fact, or by confession, as in the case of Mrs. Bathoe; that was by confession, and witnesses. The notoriety of the fact, or the confession of the party, are all, and each of them sufficient to make a conviction by record. You have the same liberty that every subject has.

Ros. Mr. Courthope is the Recorder's clerk, that saw the convictions in the clerk of the peace's hand.

L. C. J. We cannot tell that, without the clerk of the peace was here.

Ros. Pray where is Mr. Charles Walker? [He appeared.] I desire you, Sir, to testify what you know concerning the conviction of Elizabeth Smith upon Mr. Hales, for a conventicle at his house the 13th of July.

Walker. You had a copy of it from the clerk of the peace; I made it out.

Ros. Of Mr. Hales and Mrs. Bathoe, do you mean?

Walker. No, only of Mrs. Bathoe.

Ros. Then I suppose we may have it; and the clerk will testify it to be a true copy.

Walker. This is a true copy.

L. C. J. Then make what use you please of it. Will you have it read?

Ros. No, my lord, not yet. If your lordship please, I desire Richard Drew may be called; but however, if your lordship will let him read that passage in it, that I cannot so

well read, it is in court hand. [Clerk of the Crown reads.] 'Memorandum quod ad generalem Sessionem pacis pro Com' Midd' septimo die Octobris, tricesimo sexto, &c.'

L. C. J. What do you make from this? Here is a record of the conviction, which says, that by two credible witnesses, and the notoriety of the fact she was convicted.

Ros. Pray call Richard Drew. [Who came in.] Pray Sir, what do you know about Mrs. Smith's practice in relation to conventicles?

Drew. Upon the 11th of July last there was an acquaintance of mine, that she did pretend was at a meeting—

L. C. J. Who was that that did pretend so?

Drew. Elizabeth Smith; and she would have had some money of him. He came to me, and asked my advice. Yes, said I, I think you had better give her money, than to run the hazard of swearing against you: So he did. He took me along with him to a place where they were to meet, where she took ten shillings, and promised he should come into no further trouble about it.

L. C. J. Had he been at a conventicle or not?

Drew. That I cannot say.

L. C. J. Do you believe he was, or was not?

Drew. My lord, I cannot say that he was, or was not.

L. C. J. But that is not the question I ask you: for you would not persuade him to give her money, if he had not been at a conventicle.

Drew. My lord, I did not know whether he was, or was not.

L. C. J. I ask you again, did you believe he was or was not?

Drew. I believe he might, by his being so willing to take my advice; though he said it was a base thing to give her any money in such a matter.

Ros. Pray call James Howard.

L. C. J. There he is; what would you have with him.

Ros. My lord, I crave leave first to ask Mistress Shaftoe; Are you Mr. Hilton's wife?

Smith. Yes.

Ros. Then I desire Mr. Howard may testify what he knows concerning this mistress Smith; But first, which Hilton's wife are you?

Smith. George Hilton's.

Ros. What then do you know of her, Sir.

Howard. I was once drinking a cup of ale in Grub-street, where she did take a parcel of money in the concern of the king, my lord.

L. C. J. Prithee, speak up: In what concern?

Howard. She took a bribe in the concern of the king.

L. C. J. What dost thou mean?

Howard. Of a person that had been at a meeting.

L. C. J. Prithee, what bribe was it?

Howard. About 11 or 12 shillings.

L. C. J. Prithee, of whom was it?

Howard. The man I never saw, nor the woman before; I came in by chance.

L. C. J. How long ago is this?

Howard. About the middle of July last.

L. C. J. Who did you discover this matter was?

Howard. My lord, I was only drinking a cup of ale; and I discovered it to Mr. Drew, that was called last.

L. C. J. Was Mr. Drew one of them?

Howard. No: Mr. Drew I am acquainted with; he is my neighbour.

L. C. J. When were you at church last?

Howard. The last Lord's day.

L. C. J. When did you receive the sacrament there?

Howard. My lord, I never did. We have no parish-church at present; it is now a building.

L. C. J. Where do you live?

Howard. In Mugwell-street.

L. C. J. Have you no public preaching in the parish?

Howard. I do hear Dr. Fowler, and Mr. Smythies too, sometimes.

L. C. J. That is, when there is no conventicle (I suppose) in the way. That Mr. Smythies and Dr. Fowler are both very well known.

Ros. Is Mrs. Anne Farry here? [She did not appear.] Pray call Mrs. Anne Higgenson. [Who appeared.] Do you know Mrs. Shaftoe, or Mrs. Hilton, as she is called?

Higgenson. My lord, I have very little knowledge of her; I have known her but a very little while.

Ros. What testimony can you give of her conversation?

Higgenson. Since I have known her, I have heard some ill things of her: But I cannot speak to any thing of mine own knowledge.

L. C. J. Why, so people may say a great many ill things of you that you do not deserve, nor know any thing of.

Ros. Call Anne Carter. [She did not appear.] I desire sir John Talbot would please to be examined.

L. C. J. Here is sir John Talbot by me.

Ros. Sir, I desire you would please to testify to the court and the jury what you know concerning the conversation of mistress Shaftoe, otherwise called Mrs. Hilton.

Sir John Talbot. She was a servant, that lived in my house a great many years; but I did not use to converse with her.

Ros. No, Sir John; but what do you know of her conversation while she lived in your house?

Sir J. Talbot. All that I know of her, is, she had no very good character in the family.

L. C. J. Do you know any thing of your own knowledge?

Sir J. Talbot. As to any thing of my own knowledge, I cannot speak; it is all no other than hear-say from all the family.

L. C. J. But I ask you what you know of your own knowledge, Sir John. Tell us the particulars you yourself know.

Sir J. Talbot. It was the complaint of all the servants of the house, that she was guilty of telling lies and stories in the family.

Ros. Was she reported in the family a frequent liar?

Sir J. Talbot. She had that character in the family; all the servants complained of it. I only know of other things since she was gone out of the family; and that she has been concerned in an odd sort of practice, about attempting to steal away a young lady.

L. C. J. Do you know of it of your own knowledge?

Sir J. Talbot. I had it from herself, and upon her own affirmation.

L. C. J. What was that?

Sir J. Talbot. It was about the practice that had been set on foot of cheating people of money for procuring fortunes; particularly concerning the daughter of one sir Harry Jones. And there have a great many gentlemen been abused about town in that matter, and made believe that this woman had an interest in her, and would put this great fortune into their hands: I have not been privy myself to any of the negotiations, but I have understood there were such practices; there was one Salein and she that were engaged.

L. C. J. Look you, sir John, Do you know this of your own knowledge? For we must not hear evidence to take away people's reputation by hear-say: If she hath confessed any thing to you, you may speak that, and let us know it.

Sir J. Talbot. My lord, if it be not too long to give you the circumstances how I came to know it, I will tell you what I have been informed about it.

L. C. J. No, that is not evidence, sir John; unless you know it yourself, or had it by her confession.

Sir J. Talbot. My lord, I do not come here as a voluntary evidence, but I am here called upon. And, my lord, I think I ought to give my testimony, if a man's life be concerned.

L. C. J. And so ought we who are upon our oaths, to insist upon it, that you give legal evidence, what you know of your own knowledge; and I ask you here again, whether what you relate be of your own knowledge, or what was by hear-say?

Sir J. Talbot. My lord, I had notice sent me by a letter, That there was a gentleman come to Thistleworth with a coach and four horses, with a design to steal Mrs. Jones. I cannot remember whether there was any name to the letter, but such a letter was sent, and I was to inquire about it of this Ellinor Shaftoe, who was engaged in the design. I sent to her to come to me, and she did come; and told me that there had been such a practice of one Salein, and she would bring a gentleman to discover the whole business, and she did so; and brought this Hilton (by whose name, as her husband, she owns herself), and he came to me, and gave me a note of several gentlemen's names that were concerned in it; and, I believe, I have a book wherein their names are. I then asked, Why she did let it so long run, and the business go on so far? Mr.

Hilton did confess, that one particular gentleman had been kept in treaty, who was a country-man, and came to live in town, and was in town the greatest part of the winter upon this design; and did walk that way, expecting that this Nan Carter should bring down this heeres, so that they might have an opportunity to steal her. Mr. Hilton had no other way of application to me but by this Shaftoe; and he confessed himself, that he was a party concerned in the design.

L. C. J. Ay; but what did Hilton's wife say? For what he said is nothing to the purpose in this point.

Sir J. Talbot. She is one that I had no communication with, nor converse, while she was in my family, otherwise than as an ordinary servant; but this same Mrs. Jones was my ward.

L. C. J. Did she confess she had any design in this matter; or was to have a reward for setting the matter on foot?

Sir J. Talbot. No, my lord; she did not particularly confess she had any hand in the design, but it was that which several other persons have come and inquired since of my family about; who have told me, that there was one Shaftoe, otherwise Hilton, that was concerned in it.

L. C. J. That is no evidence, Sir John, I must tell you again.

Sir J. Talbot. My lord, I cannot make the evidence otherwise than as it is. I tell you what I know.

L. C. J. You understand yourself so well, sir John, that you know it is not evidence; and you are not to talk of what other people have told you.

Just. Withins. How long did she live in your family?

Sir J. Talbot. I cannot tell how long, my lord, but I believe she was there ten years.

Just. Withins. That is a strange thing, that you should keep an ill woman so long.

Sir J. Talbot. My lord, with your permission, she was a servant when that child came to me, and when the mother died; and my wife did not think fit to put her away; so she came and staid with the child as long as my wife could keep her; but at last she did foment differences in the family, lies, and stories, and was found to be a person not fit to live in the family; and therefore my wife was afraid to keep her any longer and put her away.

L. C. J. Well, Mr. Rosewell, have you any other witnesses?

Ros. Pray call Anne Dillingham.

L. C. J. Well what do you ask her?

Ros. My lord, I bring this witness to prove concerning Mrs. Shaftoe, alias Hilton, that she offered to swear against people, as being at conventicles, whom she had never seen.

Dillingham. She lodged in my house, and is a very ill woman; and asked me to swear of meetings that I never knew any thing of at all in my life, I never was at meetings but about thirteen years ago. I asked her why I

should swear, or what I could swear to? She told me, I should have a share of the money, if I would swear to what she said, whether it were right or wrong, I should have a share, if I would but swear.

L. C. J. How long ago is this?

Dillingham. Two years ago.

L. C. J. Who did you tell this to first?

Dillingham. My lord, I am subpoenaed here to give my testimony.

L. C. J. That is true; but who did you tell this, that you talk of first to?

Dillingham. My lord, I never told it to any body but her, except it was to my own husband.

L. C. J. But why would you keep this as a secret, and not tell it to any body?

Dillingham. Why, my lord, I do not speak it for any malice to her at all, I assure you.

L. C. J. Where do you live?

Dillingham. In Long-Acre, at the Golden-Ball.

L. C. J. If you live in Long-Acre, how came you to discover any thing of a matter that was transacted at Rotherbith?

Dillingham. My lord, I know nothing of it, of my own knowledge; but what she would have persuaded me to.

L. C. J. But how came she to talk to you about a matter at Rotherbith? Or, you to know any thing about her? That I desire to know; and how you came here?

Dillingham. One Mrs. Peirce, that is a neighbour, asked me what I knew of her; and so would subpoena me, because she lodged at my house.

L. C. J. How long did she lie at your house?

Dillingham. I cannot tell; I believe about half a year.

L. C. J. Well, what became of her? How did she behave herself?

Dillingham. My husband turned her out of the house, and would not entertain her; because she kept company with a man that was none of her husband.

L. C. J. Why, can you tell when they were married?

Dillingham. She went as the wife of Mr. George Hilton, when she was not married.

L. C. J. How! Was she not married then?

Dillingham. No, they were not married then. He was not her husband then. There are a great many of our neighbours that can say more than I. She is a naughty filthy woman; a very ill woman; if I should call her whore, I believe she might trouble me for it; but I believe it to be true.

L. C. J. Have you any more witnesses, Mr. Rosewell?

Ros. No, my lord; but I hope your lordship will give me leave to say something to the court and jury.

L. C. J. Mr. Attorney, have you any more witnesses to call for the king?

Att. Gen. My lord, we have some witnesses to support the credit of these witnesses

that we have produced : But we do not think there is any need; nor that it is any way diminished by the defence of the prisoner at the bar.

L. C. J. Do as you please, Mr. Attorney; go on your own way.

Att. Gen. No, my lord; we shall trouble your lordship no further with any evidence.

L. C. J. Then, Mr. Rosewell, let us hear what you have to say further for yourself; for all the witnesses have been heard, of one side and the other.

Mr. Rosewell. My lord, and dear countrymen, who are to be my judges in this cause this day, what I now speak, is with respect as much to their precious souls, who are concerned either in prosecution, or trying of me, as my own safety. There is not a man of you of the jury, though you are strangers to me, but I would lay down my life to-morrow to save one of your souls, if I might be an instrument therein: How much more then all of them, if the consideration be taken of the worth of an immortal soul? Your lordship knows, and I am sensible, how unfit I am now to do such a thing as this is, in the company of so many learned gentlemen of the long robe. I have betrayed already too much of my ignorance in such affairs, and I beg your pardon for it; and I humbly thank your lordship, and the court, for the indulgence that you have shewed towards me in my infirmities. You are, my lord, as in the presence, so in the place of the great God, the judge and lord of all, at this day: You are Elohim, I have said ye are Gods; whose property it is to help the weak, and compassionate the innocent; therefore I make this apology in reference to my own innocency, and my great inability to sum up the proofs that have been in this cause. If you will put my weakness in competition with their vast abilities, who are of counsel for the king against me, and my ignorance in the laws of the land against their great knowledge; I cannot but expect to be overthrown, notwithstanding my case is very innocent, and I have declared in the presence of God the truth of my heart this day. And if I were to be called to the bar of the great God, the judge of all the earth, before I sleep, I should speak the same thing, and must, and no other. I am sensible a lye is both a base, and a very wicked thing; and that the lake that burneth with fire is prepared for all liars. And I pray God convince these gentlewomen wherein they have wronged and abused me, that they may repent of their sin; which (I bless God) I have prayed for them most days ever since I was confined, and begged it of God with tears, in charity to their poor souls. And I believe I have prayed more for his majesty in one weak, than they have done in all their lives. They are not the king's friends, but his enemies in bringing such allegations against those that are his true, faithful, and innocent subjects, as I am, my God knoweth.

And here, my lord, I would first observe the

variations that are in their evidence. In the first place, Mrs. Smith swears, that the text I preached upon was the 21st chapter of Genesis. And here is Mrs. Hilton comes, and she swears afterwards, that it was the 20th: herein they vary. Then I suppose, my lord, if they vary and differ, in law they are not two witnesses, but differing so are both of them incredible: And I think the Statute Law of this land is, that a man must be convicted upon the oath of two credible witnesses.

Next, my lord, here is mistress Smith swears, that these things were delivered, which are charged in the indictment, all together in the morning-exercise, in the forenoon: Whereas your lordship has heard from several witnesses (and I do not know one man of them but fears a lye; and would have sworn to the truth of what they have spoken. They tell you) how every passage that these people would pervert, must come in, and how it was divided. I hope your lordship will pardon the infirmity of two or three, a few illiterate men, that are weak, and could not so well instruct themselves to speak in a court of justice upon such an occasion: But upon the whole matter, they give such an account, all, that it cannot be presumed, or thought, that they should agree to speak any thing that was not true. And I am confident, there is not a man of them, but would take his oath (as I said) of the truth of what he has here declared. And they have declared that there were two distinct exercises, as I have protested in the presence of the great God. That in the morning was upon the 20th of Genesis: And the other in the afternoon (there being an hour that past between) was upon one particular verse of a chapter in the Epistle to the Hebrews, quite distinct from the other discourse that was in the morning. She not only varies from the truth, but also from her fellow-witness, that it was all in one exercise. This I submit to your lordship's and the jury's consideration (these worthy gentlemen that are to judge of my life and death) whether they are two credible witnesses thus varying.

There be several other things, my lord, that because of my present infirmity, I may not so readily call to mind; but which ought to be recalled and recollected, as in reference to the person, whose house we met at. One says it was one capt. Daniel Weldy's: Another that it was one Mr. Daniel's. Therein again they vary in reference to the person; and if they are out in one thing they may be out in another.

Smith. I can say nothing about his name; I never was there in my life before.

L. C. J. Mistress! mistress! You must not interrupt him: he is upon his defence for his life.

Ros. Then, my lord, she says that my text in the afternoon was upon a Psalm; and there was no such thing, as your lordship has had it particularly made appear to you. I have ingenuously told you the text and the truth: I have spoken it from my heart in the presence of the great God; and upon what

occasion every passage that they have wrested was spoken : And your lordship may thereby perceive how most abominably they have perverted my words. Now, they having wrested my words that are innocent in themselves (so far from being treason, that I do not know there was any fault or crime in them ; being only plain scriptural proofs of doctrinal propositions in divinity, without those applications that they have pretended to), certainly your lordship and the gentlemen of the jury will consider what is most probable or likely ; what they have declared, or what you have heard from the several witnesses that have come in to testify concerning me.

My lord, I was going to speak something to your lordship of the great wickedness of their making the application of what was innocently spoken and meant, to the late king of England, and his present majesty whom I daily pray for, and always did, whatsoever these witnesses have declared concerning me. And your lordship has heard my maid testify (which I little expected) that I used to pray for the king every morning and evening in my own house ; and God knows that to him I have addressed myself for him daily : And more than that, she heard me (when I thought none but the God of heaven himself had heard me) pray for him in my closet. I would desire your lordship and the jury to consider, whether these are not the criminals (and not I), that they have made application of innocent passages, and wrested the words, that were plain and innocent in themselves, to a wrong meaning, to make me guilty of High-Treason ; applying them to his majesty, when I never intended, or thought the least of any such thing.

My lord, I doubt not but there have been several that have joined in it, that have helped to frame and forge this accusation against me. And there is that which I suggested to your lordship in the morning, in the beginning of this cause : These persons have not a perfect, or so much sworn me a knave, but a perfect fool and a madman, to speak such absurd, incoherent, inconsistent, solecistical, and nonsensical things. I believe there is no man of common sense and reason, no gentleman that is here this day, that can imagine that a person, that had the use of common sense and reason, should speak such absurd things as these are. Besides, my lord, I have brought witnesses, several of them, to testify there never was any such thing spoken by me, as they have testified against me, and misapplied. I have likewise produced several persons to give evidence of my usual and constant practice with relation to the king and government all along, my contending for monarchy, and against anarchy, which did too much reign in these late days of confusion, which I remember by very sad experience, though I was then indeed but a child. And when I came to be a man, I used always to observe the 30th of January, and the 29th of May ; preaching upon those days, and pressing people to obedience : and inveighing

against those that had acted against their principles, and were rebels either against his present majesty, or had been concerned in that barbarous act against his royal father ; which I did utterly abhor.

And, my lord, methinks it should have been very unlikely that a man, that should make it his common practice so to do, as I have testified concerning myself, should fall under such a suspicion and accusation, as I now am ; or, that such an one should fall into such a solecism, as the words that are testified against me must import ; it is very unlikely. I leave it to the great God of Heaven to vindicate my innocence in the matter ; which I do not question but he will do.

Then, my lord, here are several gentlemen of the church of England, that have testified concerning my conversation. They have had acquaintance with me many years, some of them near 20 years ; the least 8, 10, or 12. They never heard an indecent word, with respect to his majesty, or the government, fall from me ; any unworthy reflection upon either of them : But my constant practice was to pray for his majesty with all earnestness and solicitude. There are several of them gentlemen of repute in the city. There are particularly two persons, that belonged to an honourable family in which I lived so many years, who give a testimony what my conversation there was, and my constant practice of praying for the king, while I was there. This your lordship, and the gentlemen of the jury, have heard and observed, I doubt not.

But, besides that ; your lordship and the jury I hope, observe as to these people, who swear against me, what my witnesses have testified, that they would swear any thing, and forswear it : and what a character is given concerning one of them particularly, your lordship has heard from that worthy gentleman, sir John Talbot, whose face I never saw before it was in this place. And by the last witness, you have a testimony concerning her lewd conversation. And several other witnesses prove she would swear any thing for them, if they would swear for her. So that it appears she would, and does swear at a venture such and such conventicles ; only upon hear-say, and mere report : and that she has taken money, and made some compositions too. These things I must refer to your lordship, and these worthy gentlemen who are of the jury.

If then, my carriage and conversation (so well known in the world) be compared with that character that is given of these persons, I must humbly submit it to your lordship, and the jury, how far they are to be believed against me ; and might argue from the incredibility of their testimony : but your lordship cannot but remark it.

My lord, it is very strange, that these two women should exactly remember these words. They agree in every particular circumstance. I durst appeal to your lordship, and the jury, particularly to the jury, if now they would un-

make to repent upon their notes, the words that have so often been repeated here; and whether there is any of them would be able to agree in all the particular words? They have an incredible mercy, that could so exactly agree together, that these were the words. I do humbly submit this to your lordship. For, my lord, I lay the stress of my defence very much, not only upon the incredibility and improbability, but even the impossibility of the evidence that they have given. I humbly submit it, I say, to your lordship, and these gentlemen; and leave it with them, and the great God of Heaven, whom I pray to direct them. I hope they will consider the life of a man, and the worth of blood. My lord, however I am represented this day, I know myself to be a faithful subject to his majesty; and to the great God of Heaven, whose I am, and whom I desire to serve.

My lord, I will now, if you please, ingenuously confess my crime, if it were any. I have been frequently preaching in my congregation, out of the scriptures, and it is true, as your lordship sees, the chapter came then in course to be expounded: which I used to do, to let the people understand the scripture, as well as I could; for the people perish for lack of knowledge; and it is by the knowledge of Jesus Christ, that they must come to life and salvation; for him to know is life eternal. It has been my way to expound the scriptures to them.

In the presence of the great God, before whom I speak, to whom I can appeal for the truth and integrity of what I say, that God before whom we must all stand (all, whose faces I see here shall meet, and see one another, at the great tribunal), it is to this God that I appeal as to the truth of my heart in these things. And, my lord, I shall continue, as I have done, however God disposeth of me, to pray for the life and happiness of his majesty: my usual prayer, morning and evening, being, that God would crown him with grace here, and glory and honour hereafter. And this I shall do by the grace of God unto my dying-day; for my soul does abhor such things as have been testified against me this day.

Thus, my lord, I have dealt as plainly with your lordship, and the jury, as I can. My infirmities are great. I desire to leave my whole cause with the Lord, and with these worthy gentlemen my countrymen, who, I do not question, will have a just compassion and consideration of my case, under these circumstances wherein I stand, and to all the circumstances that have been made out in this case this day.

L. C. J. Mr. Attorney, will you please, or any of the king's counsel, to say any thing in this matter?

Att. Gen. No, my lord, we leave it entirely to your lordship.

L. C. J. Gentlemen of the jury, this case has held a long time; and, gentlemen, I must tell you, nobody ought to think time too long

in a case of this nature, wherein the government is so much concerned on the one side, and the life of the prisoner at the bar on the other. 'Et de vita hominis nulla est cunctatio longa.' I think no man ought to apprehend his patience too much tired in finding out the truth in the case of a person that is tried for his life. However, gentlemen, by the way, because the case has been long, it is fit that there should be some recollection made of it; and in order, as near as I can, that I might help your memories in the evidence that hath been given, both for and against the prisoner at the bar; I would endeavour, as well as I can, to repeat at least the substantial part of it to you; and in case any thing that is material be omitted, God forbid but it should be supplied by any one that is able for to give any assistance of that kind; for I cannot pretend to be so exact, as to give an account of the whole evidence myself. But, gentlemen, I must tell you it is a duty incumbent upon the court, to give you all the assistance that can be in a matter of this nature, and I will do it with as much integrity, and with all the care and caution of doing no injury, either to the prisoner or to the king, between whom we are to be indifferent, both, you, and the court, as possible can be, that there may be no wrong done on the one side, or on the other; and, according as the prisoner himself hath said, what I shall speak, I know I speak in the presence of the great God of heaven and earth, who is to be the judge of all men. We are upon our oaths, and you are upon your oaths; and we are all of us bound by our oaths that we have taken, to be guided in this weighty affair (for so I must call it) by the evidence that has been given to us at this time, both against the prisoner, and for him. For certainly there cannot be a thing of greater concern, nay, even in point of compassion, than to see any man come to be accused of so high a crime as the prisoner at the bar is now tried for. And he must have a strange obdurate heart and conscience, that cannot so far participate of the common sympathy of human nature, and his fellow-creatures, as to compassionate any one that stands in such circumstances as the prisoner does. But then, on the other hand, the denials of the prisoner at the bar, with all the imprecations that he has made, and all the affirmations that he has offered of what he has formerly done; and all these things of his appealing to the great God of Heaven about his innocency, that I must tell you, of themselves, they are not to weigh with you; for your business is to know, according to the oath that you have taken, whether you have evidence given to you (since you are sworn upon this trial) to satisfy you that he is guilty according to that evidence. So that if the affirmation of the person accused, though attended with never so many imprecations one way or other, be offered to persons that are in your case, as jurymen, it is not to weigh with you at all one way or other, if it be only the affirmation of the party accused; for if so,

then there would never be any guilty person brought before any jury whatsoever; or any criminal could come to suffer any judgment, or be convicted of any crime, if his own affirmations concerning himself, and his own commendations of himself, would be sufficient to acquit him, and set aside his accusation. So that now you are to go according to the evidence offered, and so are we, against this person that is before you.

Gentlemen, I must say that it is very untoward, and, I hope, by this cause there will be a warning given, at least, to other persons, that there have been too many notorious transgressors of the law in this matter of conventicles. I speak that, not to affect this case at all; but I speak of what the nation hath had but too woful experience of, as to these seditious meetings, that are, and have been continually kept up in opposition to the laws; and I speak nothing as to the meeting that was at this time; but I speak it, that others may be warned for future times; for always mischief attends the open and public transgression of the law. God forbid, but that people should worship God, and serve him, according to their own consciences; therefore the law has been so indulgent to them, as to give them leave to exercise their religion in other manner than as is done in the church of England; provided there be not any occasion of tumult; but that there be not above five, except those of the same family, meeting together; which you know the act of parliament hath provided for. And the truth of it is, the reason of the law is very plain: For you all know, who are gentlemen of quality, that this law, as well as another law, that has so great a relation to the case before you, does declare, that from these seminaries of sedition and faction conventicles, and the clubs and cabals of discontented, irregular people, disaffected to the laws both of church and state, was the great mischief and confusion that was brought upon us, and which at length brought us into the distractions of the late times.

Gentlemen, I must say likewise this to you, that whatsoever the prisoner at the bar thinks now, that blessed martyr king Charles the 1st, was by such means brought to that horrid, accursed, murderous death and end; I cannot call it less than so, in relation to the persons that brought him to it, under the pretence of religion. It was the cry of Popery and arbitrary power, of which he was no way guilty, though that was insinuated into the minds of silly people, those ignorant souls, that were easily captivated with a base lye; but that was the occasion. Many of you, gentlemen, that are yet in being, remember it yourselves; and many of you have, and cannot but have seen and read the history of those times, and have been so conversant with the practices of these people since, that you are able to make a judgment in the matter. All these sort of things are but pretences, and fair shews of dangerous and seditious people; that which was most dangerous to us at that time, and I am apt to

believe will be so to the world's end. For what people come to gild over their bitter pill of sedition, it is always under pretence of religion. For, a-lack-a-day! perhaps there were as many rebels against the late king raised by the beating of the cushion in the pulpit, as by the beating any drum in the street; for it is well known these are the bell-wethers of the faction, that under pretence of religion, come there to incense the people to commit all these villainies that sometimes they are incited to do, as we know; and to prepare the way to bring us into that condition that we were in the late times: And, particularly, were used as instruments to bring that blessed martyr, king Charles the First, to the block. These pulpiters took occasional texts of binding their kings in chains, and their nobles in fetters of iron; and raised up such doctrines from texts of scripture, that were certainly intended for quite far other purposes, to countenance their practices, to make people kill and slay God's anointed, under pretence of saving and protecting the anointed of God. But who did they mean by it? Pray, how did these people come to take upon them to preach against Popery, when indeed they were preaching down all manner of religion, under the pretence of that? So that you grew to have as many religions, as there were sects or dissenters in the nation; and never any could be tolerated that were not grown into the party, but they came all into office, and the more extravagant the more preferred; so that without the blessing and immediate providence of God, by a second resurrection, reducing us into some sort of order, in restoring his sacred majesty (whom I pray God grant long to reign over us; and so ought all loyal subjects to pray), what a miserable condition had we been in! And I may call it a second resurrection, it being the resurrection of our religion; we were turned all into confusion; we had no other religion, at least apparently predominant, but that that had the strongest army to support it, and that had force enough to contribute to what the luxurious, debauched professors of it would make to be religion; for they were the professors at that time of all things.

Gentlemen, I speak this because even the laws, that have been made since the restoration of the king, have taken notice, that the beginning of all the mischief hath been this; and that the great incendiaries of all sorts of rebellion were these, who took upon them in their pulpits, under colour of religion, to countenance rebellion and treason, confusion and anarchy. Now how far these things have been known to you all, that I must leave to you; and must betake myself a little nearer to the case, having premised these things; to which I would add this as a warning to all people, that they would not abet or assist in any meeting against law, or that is known to be against law, whatsoever they think; for there will mischief come upon it one time or another, let them pretend what they will. As that gen-

learn says, he undertook to expound, and teach his people the knowledge of the Lord: the knowledge of the Lord is a very good lesson to be learnt, and to be taught all people; but blessed be God, we thank him for it, we have churchmen of as great learning (without any reflection upon the gentleman at the bar) as he can pretend unto, and men as pious and virtuous; and perhaps we may say at this time, with a little more confidence than ordinary, that we have as learned a clergy as ever was since religion was known within this kingdom. And, God be thanked, these men are not only learned for themselves, but they exert themselves for the good of others, for the satisfaction of that duty in which they are employed, by their due and constant attendance upon the worship of God, in their places of worship, the churches, which are by law appointed for it: and we need not run into holes, and corners, and conventicles, and clans, to understand the word of God, and the practice of our duty towards him, or towards men; because we have churches to apply ourselves to, where we may learn to know God, to obey him, and them that are put in authority under him; which I am sure is a duty incumbent upon every preacher of the word of God to insist upon, and press, and urge. And I am sure, whosoever preaches at a conventicle, cannot with a safe conscience preach obedience to the civil magistrate; because, while they are in that very preaching, they are acting disobedience against his laws, in regard what they do, is against the authority of those laws, under which they live; and no man can preach well against that which he knows in his own conscience, at the same time, he is practising himself.

So that, Gentlemen, I must tell you this is a wonderful dangerous thing; and therefore I give it as a caution to all people to beware how they break the laws, by going to such meetings and conventicles as these are; for it will have at the long-run, one time or other, a very dangerous issue. And there is another thing which is wonderful dangerous too, to see what shoals and cronds of people come to these sorts of meetings; people of all sorts of mean trades and professions. And how easy is it, if a man has a mind to insinuate into some silly, ignorant people, common, illiterate fellows, that can neither write nor read some of them, yet thereby to feel their pulse, to see whether they will swallow down such a thing, or such a pretence at first? For they did not in the late times begin with open rebellion, and preaching the doctrine of deposing of princes, or bringing them to the block; but they tried with several previous ways, and as the bait sunk, and was sucked in, they attempted to try further. They applied themselves perpetually to pursue the temper of their auditory; and therefore we must have a great deal of care to prevent all such mischiefs as these are for the future, that they may give no countenance to such, who pretend to be expositors, but are

very ill ones of the scripture; and thereby instil into the minds of men such dangerous and pernicious doctrines; that the scripture may not be perverted, to give an authority to such desperate things as these are; for we have known over and over how easily people are drawn into mischief in this age, even by the very same train that they were in the time of the late rebellion.

Now, gentlemen, these things being premised, I would take notice to you, that the thing now before you, is a question of a different nature from what I have now spoken of. It is not the question that you are to try, whether he preached at a conventicle or not? or whether the doing of that which he did in so preaching, is against the law or not; but whether he did at any meeting (especially as to the time that is particularly specified) speak words of the same substance, to the same effect and intent that are comprised in the indictment? For though he did preach at a conventicle, and thereby did transgress the law: yet in case he did not preach to the substance of what is contained in this indictment that hath been read unto you, and that he is accused of, he must be acquitted. That I must declare to you for law, as no doubt it must be acknowledged by me to be; therefore you are to take care, upon your consciences, to try, and consider whether or no you believe these three witnesses, that have been produced against him, swear true, or are guilty of wilful perjury. For, in downright plain English, they are guilty of perjury, if he be not guilty of the words laid in the indictment. One of the two is certainly true; either they are guilty of perjury, or the prisoner at the bar is guilty of the treason laid to his charge; I pray God direct you in your enquiry; for it is a question, I must needs say, of very great difficulty.

Gentlemen, for the intention of a man's heart I must tell you this for law, as to the compassing and imagiuing of the death of the king, it is not to be discovered but by some action; some word, or overt-act, there might be to interpret the secret imagination of the heart. It is impossible to discover or disclose the imagination of any man's heart, except we be directed to that discovery by words or actions.

Now, gentlemen, words that in themselves may bear a good construction, and are good words, yet coupled with actions that are evil, or other words that are evil, these very words may be a discovery of the evil imagination that is in a man's heart. As to express myself in a very familiar example for the purpose, that I may make things as plain as I can, for that is my design, and ought to be every one's that is concerned in such a matter as this. Because we have had some discourse concerning the late blessed martyr king Charles the First, he was here brought to a shambles of justice; for I cannot call it a court of justice, however they called it a high court; and there was a kind of mockery or pageantry of a trial. He was arraigned and tried for treason, and a new na-

tional treason, never yet invented nor known of before amongst us, treason against his people; I say, now and never thought of till these butcherly fellows that sprung out of the shambles, came to put it in practice; erecting what they called a high court of justice, but which was truly to be called a high court of injustice; and there they were to have come and cry Justice, justice, justice upon the king. Gentlemen, justice is a good word; but if that word be used and spoken as it was in that case, in order to bring the king to his death, that which was a good word, and if otherwise used, had been a proper word even at that time; that is, if applied to good purpose, to set the king and the nation free; yet being applied to the bringing that sacred martyr to so horrid and barbarous a death, that was plain downright treason; and I make no difficulty in the world (nor can any man that understands any thing) that it was so by law; and it was an Overt-act sufficiently indicating the intention of all persons that were therein concerned to put and bring the king to utter death and destruction; and all these fellows that made use of that good word, Justice, justice, justice, were all undoubted traitors; making use of it for that ill purpose.

Gentlemen, again; suppose if Mr. Cook was a man of law, that was solicitor of what they called the commonwealth at that time, solicitor to the state (I only speak this to explain my mind,) if he comes (when the king had just ground to dispute the authority of that court of injustice, that he was dragged to, and refused to plead) and does pray judgment against the king, as he did, and it was proved at his trial, judgment alone might be there meant as tending to excuse the king, as well as to sentence him to death; yet he being there praying judgment against the king, and which was afterwards at his prayer so pronounced; that shewed what his opinion of the word he used was at that time; and that made him a traitor, and was an overt-act to discover his guilt.

Why, so, gentlemen, I am to tell you, though these are words that may be used in a scriptural way very well, and to very good purpose; yet if they be applied to an ill purpose, they may be a sufficient indication of a man's compassing and imagining the death and destruction of the king. Therefore, gentlemen, you are the judges, whether if in this case, he speaking these words, of destroying our enemies, and standing to our principles, they have not an allusion to the former words; and whether they are not expositors of the mind of this person, the prisoner at the bar, of compassing and imagining the death and destruction of the king; and I do this on purpose to remind you of what is necessary to let you into the question.

Now for the testimony against the prisoner at the bar you have three witnesses. First, you have Mrs. Smith, she does directly swear that she did frequently, several times, go between

the 13th of July and the 14th of September, to hear the prisoner at the bar preach at several conventicles or places of meeting. She tells you the particular days: She tells you as to one, that she heard him the 30th of July: She heard him another time the 10th of August, according to the best of her remembrance. She heard him again the 17th of August, the 14th of August, the 31st of August; and she heard him the 14th of September; that is according to the best of her remembrance. She both tells you the time and the place, and she heard him preach at these conventicles. All that she says as to this, is introductory to what she speaks of the 14th of September, which is the day to which the indictment does refer; and this she does say positively, that upon the 17th of August, he prayed that he might be forgiven for not praying for the king; and by that she would have you to understand, as she would insinuate, that he did not use to pray for the king.

Roswell [Turning to the Jury.] I made use of the words of Samuel, God forbid that I should cease to pray for him.

L. C. J. Sir, you must not talk to the jury now; I am directing of them.

Roswell. My lord, I beg your pardon; it was to set the matter right. It was mis-apprehended.

L. C. J. All this is antecedent to the matter for which he is accused; and you see his answer to it, from a text of scripture that he offers to you, which he did not repeat with dislike to pray for the king; but that he thought it his duty always so to do.

Then she tells you particularly at another time, which, I think, was at the house of one Paul Shed, I cannot particularly tell directly the name, there was a talk of the Recorder, and of the lord mayor of the city of London; but that was before this time. And afterwards, the first and the second witness, two of them more, give you an account though they were never there but then: That he began to talk about the fire, and that he should say there was a great man at the corner of Grace-church-street, I need not name his name, for you all know him very well; that he met with a poor man, though indeed he was not a poor man, he was a labouring man, a carpenter; and they began to talk much concerning the fire, and he did say, that in case it had not been for that great man, there had been no such thing as the fire in London; nor if it had not been for the lord mayors and sheriffs afterwards, there had been no such thing as the fire in Southwark and Wapping. And I take notice too, that at the same place, which was Shed's house, that they spoke of, there is Mrs. Farrar, against whom there is not the least objection that I can hear of; She agrees both in the circumstance of place and time, and of the words, and to the dialogue about Grace-church-street, and the carpenter, and to the previous words, that he was not a poor man, and the like, and about the discourse relating to the fires of London,

Southwark, and Wapping, and likewise relating to the lord mayors, and aldermen, and sheriffs; these discourses were at that time.

Gentlemen, the next testimony you have, is of these witnesses that speak of the time that is in the record; which all the three witnesses that you have heard, speak to; though the most of what I mentioned before, was another time; And this is at the house of one captain Daniel; one says, captain Daniel Welby. But that it was a captain that was then at sea, is plain; for this gentleman himself, Mr. Rosewell, does not deny that this was at capt. Daniel's house; and that he did pray for him, as being then at sea, and for all his family; and all the witnesses speak to the same time. Though indeed the first witness did say, that she did not know but it might be capt. Daniel Welby; but she likewise said, she did not directly know his name. But she directly swears to the very words that are mentioned in the indictment. She does directly swear that Mr. Rosewell preached upon the 21st of Genesis. Says she, as I remember; though Mr. Rosewell did think, there was a difference between the evidence of the one and the other woman about the 20th or 21st, yet it was only upon her remembrance, as well as she could, and she did not positively swear it was in that place, but according to the best of her remembrance. And the second witness, Mrs. Hilton, when she came to swear, she said it was either the 20th or 21st; but in so many words she did directly swear, that he should preach, that the people made a flocking to the king on purpose for the curing of the king's evil; but the king could not do it; but we are they that the people should flock to for the curing of all their evils. Which are the very same words in substance that are in the indictment.

The very same words in substance, says that other, the second witness; the same day, in the same place, did I hear Mr. Rosewell then speak these words; and they go further and the same witnesses both swear, Hilton and Smith, that Mr. Rosewell should say, we have had two wicked kings together who have suffered Popery to come under their noses, who can be compared to no other persons but wicked Jeroboam. Mrs. Smith swears these words directly, and Mrs. Hilton says, she thinks there was the name of Rehoboam mentioned; but she is sure there was mention of two wicked kings in the same words as Mrs. Smith speaks. They go yet further, and say, both the one and the other of them, that he said, if the people would stand to their principles, he did not doubt but they should overcome their enemies as in ancient times with rams-horns, broken platters, and a stone in a sling. The two witnesses, both Mrs. Smith and Mrs. Hilton, swear to the very words, and at least to the substance of them; and if there should be some little variance in some few of the words, that will signify nothing, if the substance be the same.

But now, gentlemen, besides these two wit-

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nesses, there is a third witness, Mrs. Farrar, against whom (that I can see) there is not the least exception in the world, if you remember any, you would do well to consider of it; you may be better able to recollect what has been spoken or offered, than I can in so long a time; and you ought to endeavour (being men of understanding, and good quality) to refresh one another's memories, and make what observations you can; which I perceive you have taken notes about, some of you at least.

She does directly swear as to the business of the king's evil, the same words that the other two have sworn, about flocking to the king to cure the king's evil, which he could not do: but they were the priests and prophets that could cure the maladies of the people. And as to the second words, she swears that he said, there had been two wicked kings that had suffered popery to come in under their noses. And she swears in the third place, that there was likewise an exhortation to stand to their principles, and that they should overcome their enemies. She does not indeed particularly tell you about rams-horns, and the platters, and the stone in the sling, but only of standing to their principles, and overcoming their enemies: Which I would have you particularly to take notice of, it being the material part of the indictment to make these words treason.

Now, gentlemen, give me leave to tell you, there is a great regard, and very great, to be had to the circumstances in this case, to see how far these things are to be tacked together. First, you remember the witnesses were examined apart; and it does not appear that they have talked together; and there was all the care taken that possibly could be, they should be out of the court and out of one another's hearing; so that there was as much endeavour to detect the falshood of their testimony (if it could be) as possible in any case, even in the very most minute circumstance. Mrs. Smith swears, that Mrs. Hilton came to her house on Saturday night; that they went together to the house of this capt. Daniel upon the 14th, about seven of the clock; that they were there before Mr. Rosewell came in; that there was a lower room in the house; and a little higher there was a little room; and then there was a room up two pair of stairs, where there was a bed; that Mr. Rosewell stood upon the stairs, but they both sat upon the bed, together with one of Mr. Rosewell's own witnesses, which was the mathematical instrument-maker, and that he was in a mourning-cloke; and that there was particular notice taken of a pair of shoes given by Mrs. Smith from under the bed to the child of that mathematical instrument-maker; and that there was prayer made for capt. Daniel, the master of the house, who was then at sea, and for his child and family. There were these circumstances, every one particularly asked of the witnesses, and sworn to by them in the very same words, the same manner of posture, the same things done

both as to the room, the bed, who sat upon the bed, the morning cloke, the plucking off and delivering of the shoes; that I may appeal to your memories, if they did not agree to a tittle exactly.

Then they began to enquire further concerning other expressions of Mr. Rosewell at other times: Something about people in scarlet, and something about canting: And Mrs. Smith tells you that he did speak something about canting; that he was talking concerning that word; says he, I will tell you what that canting means, I went not long ago through a cathedral, where the organs are, and there the people were gathered together; and they were singing the Lord's prayer, and I do not know what I heard them sing, and I could not but laugh out; and he broke out in his sermon into a He! he! he! that is canting. This, they say, was his expression at that time.

When Mrs. Hilton came in, she tells you the very same words, even to a very particular phrase, which I had forgot before, that he saw the men in white gowns that were singing, and which he counted canting. It is very true, there is no such thing mentioned in this indictment; but only it is offered by the king's counsel to shew the temper of the man, and how he usually used to preach.

As concerning the story of Sampson and Dalilah, that is sworn by both witnesses, that there was such a discourse; for he began to talk of our king's keeping of women, and he hoped they would bring the same destruction upon him that they brought upon Sampson; he hoped it would so fall out with our king. How far it is true (they both having sworn it) you are the judges; they have directly sworn it, and to all the circumstances both of time and place.

Gentlemen, There is yet another thing that is material too, though a small minute circumstance, and that is about this same Paul Shed, that they have spoken of. When the first witness came in, he chid her for coming in her pattins, and bid her pull off her pattins, for they would leave such an impression there, that people would be apt to discover that there was, or would be a meeting; and therefore she promised, when she came any more, that she would be sure to leave off her pattins. And it is proved, that Mrs. Hilton and Mrs. Smith were in the room above, and Mrs. Farrer was in the room below, and it does not appear that she was acquainted with the rest. She had heard him several times, and though she did not see him that day, he being up two pair of stairs higher, yet she swears directly to the same words, the substantial part of them that the other two witnesses spoke of. So that I must say, if in case they have contrived this story to take away the life of the prisoner at the bar, they have contrived it with all the devilish subtily that ever any could do, or that could enter into the minds of any people. You are the judges of the fact, I pray God to direct you, that you may detect the truth; far be it

from the Court, or any body, to desire that any thing but truth should prevail; for it were far better a thousand times that a hundred guilty men should escape, than one innocent man should suffer. But on the other side, far be it from any man, that is upon his oath to do his duty between the king and the subject, to be moved by compassion, or any thing of that nature, to do against the evidence that is given in open court; unless he be satisfied that the evidence is false. For in this case I say again, either you must find the prisoner guilty of what he stands charged with in the indictment; or else you must find these three witnesses guilty of wilful perjury: and I pray God again to direct you what you are to do in it.

Gentlemen, as to the testimony that has been offered on the behalf of the prisoner (I would follow the same method that has been taken, both in the evidence given by the king and the prisoner, as near as we can): first, you have had brought by him half a dozen (for I would not injure him as near as I could one tittle) that have given you an account of what he said at that time. There was Hudson, Hall, Atkinson, Smith, Hales, and Wharton; I took their names, as near as I could; and all these people do directly say, they were present at that time, and they heard nothing spoken of the late blessed martyr king Charles the first, or of reflection upon the government; but all that was said of the king's majesty, that now is, was in his prayer, wherein he did pray for him; that they heard nothing come from Mr. Rosewell concerning the king's evil in the manner that the witnesses speak of; but what was spoken, was spoken of another king, in relation to Abimelech king of Egypt, and not relating any way to the disease they call commonly amongst us the king's evil. It is true, one of them does say, (which is a word that has obtained very much amongst some sort of people), that when he prayed for the king, he prayed for his deliverance from evil counsellors: and under these words, evil counsellors, and deliverance from them, we know what became of that so often mentioned prince now, king Charles the first. Under that pretence they would remove all his friends from him; and when he was left alone, they could easily do what they pleased with him. Many, with pretence of great pity and zeal for the king, cry out, that all that they complain of, is not of what the king does; him they think to be a wonderful good man; it is not he, but his evil counsellors, that they reflect upon; and so we must fight against these evil counsellors; and when we have laid them aside, and he stands alone, then it will be easy to serve him as they did his father. Whatsoever the pretensions of such words are, we know what the designs of the people, that made the same pretence heretofore, came to; and I pray God, that there are not the same designs on foot still; nay, that that was not the design of this prayer of the prisoner at the bar.

Gentlemen, they give you a particular account how he preached upon the 20th of Genesis; and they speak as to the 2d and 7th verses of that chapter, and what discourse he had upon them. But truly, it is pretty strange (as Mr. Rosewell himself objected even to you of the jury very well), can any one of you remember so exactly the words that were spoken in these witnesses have sworn? And truly he puts a very material question: but then the question turns the other way; how come all your witnesses to give such an exact account; all except the second man, who indeed did commit a blunder or two, your six witnesses, even to the texts of Scripture, to the very phrases that were used, particularly to the word tremendous? They are all as exact as can be: It is strange that five people should agree in all the circumstances; but why should it not be as much believable that three should have as exact a memory as the other five? Nay, and I will tell you, what is pretty strange too, that these people must hear, and remember just what was said upon the 14th of September; but that which was said upon the text the time before or after, that they cannot so well remember. It is plain, they have been dialoguing with one another; and it is plain, that some people can neither write or read, nor remember, but how they shall be sure to serve the present purpose. That seems to carry an objection in it on the other side, as the king's counsel say; and it seems the more reasonable on our side, why they should remember so exactly, as they have sworn; because (say they) that day, when we come home, we called for pen, ink, and paper, and set down these words, the substance of which we have now here sworn: so that that does shew you we had reason to remember, what we have testified against this person. But what is yet greater than all this, it cannot be imagined (say the king's counsel) that the prisoner's witnesses are so much to be believed, since they give no account of what was spoken at any time before, nor any time since.

Then, gentlemen, there is another reason, says Mrs. Smith, I came on purpose to see who was at the conventicle; though I had been at several conventicles before, yet I never heard such words spoken. Says Mrs. Hilton, I was glad to be gone; and tells you of her unwillingness to stay there, having never heard such words spoken against the government before; and therefore she set them down immediately as soon as they came home; and they went together to the Bull and Mouth, the Quakers meeting near Aldersgate afterwards; and that that day, or the day following, they went to Mr. Recorder, and gave him an account of what had past in their knowledge. This is the answer that is given by them to what the prisoner's witnesses say: but you are to weigh this testimony of both sides. For I must tell you, gentlemen, though these witnesses, that are for the prisoner, are not upon their oaths, yet they are as much under the obligation of

giving true testimony, as they can be by law; and you ought to have regard to their testimony, how far it is consistent with reason and with truth. Some things they differed in; some things they heard in another manner; whether you may believe such things may slip out of their memories, or how that is, you are to consider of it. This, gentlemen, is the first part of the evidence that the prisoner hath given for himself.

Next, gentlemen, there is another part of the evidence, and that is from the fifteen witnesses, one Mr. Jolliff, captain Cotton, Mr. Fipps, Mr. Veering, Mr. Hitchcock, Mr. Hinman, Mr. Wanly, Mr. Strong, Mr. Cutloe, Mr. Mel-sam, Mr. Medham, Mr. Winnacott, Anne Broadhurst, Anne Manning, Isabella Dickenson; all these were called to his reputation as to his behaviour and conversation towards the government. They tell you they have known him a long time. It seems they frequented the hearing of him sometimes, when there was an indulgence and a dispensation for such meetings, then they went to hear him, and then he used to pray for the king; and it has been observed, that, it may be, meeting with favour and kindness from the king and government, he might be very well pleased with the king at that time; though that turned to the prejudice of the government (as we all know). But whether his complexion altered towards the government, when it was thought fit to restrain that indulgence, that you have to consider. They say, they know nothing of harm by him, and that may be true; no more do I; and I presume you do not; if you do, you will tell us. You and I, pray God we had never heard of any thing of harm come from him, with relation to the king and government; but you have heard what has been testified by these witnesses.

Then there came two witnesses, that lived at sir Edward Hungerford's when the prisoner at the bar lived there; one of them lived ten years there, the other four. And they give you an account, how he was used to pray (not according to the Common Prayer) but he used to go to church, and he did pray for the king very earnestly, and heartily, as they say; he came there in the year 1664, and he continued there seven years, and they always looked upon him to be well-inclined to the government.

Then you have an account of three servants that lived in the house; one lived four years with him, and that she frequently heard him pray for the king (for I would not willingly forget a word that should make for the prisoner's advantage), she said he prayed as earnestly for the king as for his own soul, with as much zeal and earnestness as he could do; this is what she says. And the second lived with him three years, and she does remark particularly, that one time being in private in his own closet, at prayer by himself, she heard him very earnest in praying for the king: so that he would urge it as improbable, and unreasonable, to believe, that if he, in his private

family, and by himself, should so earnestly pray for the king (which was never intended to be heard by any body, and came to be thus heard by accident), he should in public, before a great congregation, utter such words against the king and government as are pretended against him. This is the use he makes of that.

Then, gentlemen, you have likewise afterwards, the testimony of those two witnesses that have been examined before, that is, Mr. Atkinson and Mr. Smith; that whereas you seem to say, says he, I made a great reflection upon the late king, and his present majesty; it was so far from that, that I used to teach upon the 30th of January, and then to preach obedience to the king, and to pray for the king, and make sharp invectives and reflections upon those that had been concerned in that horrid, barbarous murder of the late king, of blessed memory; so that I cannot be thought to encourage such things as these, when I used to preach to my auditory such doctrine, as I now tell you of. This is the substance of that part of the evidence, as near as I can remember, and recollect; you have taken notes, gentlemen, yourselves; you will be able for to make observations, according to what notes you have taken.

Then, gentlemen, here are 18 witnesses, that he has called, to endeavour to persuade you to a disbelief, and gain a discredit as to the witnesses that are produced against him. Now as to that, which was offered by the first witness, How; that was but by a hearsay, he knows nothing of his own knowledge; for my brother, sir Thomas Jenner, he gives you an account of all the questions that he was asked about; that she never did say that she was present at the conventicle, but that Mrs. Bathoe had confessed it to her; and upon that confession she was convicted. Now gentlemen, it is a very untoward thing in this matter, that Mrs. Bathoe, it is plain, used to have conventicles, and she is the widow of a non-conformist preacher, and this woman was so far from saying, that she was there, that she only insisted upon it, that Mrs. Bathoe had confessed it to her. So likewise you have been told concerning that business of Mr. Hales, the conventicle at his house, on the 13th of July; it was so far from her swearing that Mr. How was there, that though he was mentioned, yet she refused before sir George Treby to swear that there was any such conventicle, or that he was the man; she did not know the man, and could not say any thing to him. And my brother Jenner being convinced that there might be a mistake, that there might be no such conventicle at Mrs. Bathoe's, went as far as he could to retrieve it; but it seems it was past from him into the clerk of the peace's hands; I cannot say any thing to it: but if you are satisfied that there was no such conventicle at all, all that can be said, is, that the old woman belied herself, and my brother Jenner, as to an accommodation between them, did resolve to do what he could, and promised to speak to the clerk of the peace:

not but that, for any thing yet appears, this woman, that is here brought as a witness against Mr. Rosewell, did swear true, that that other woman did confess to her, that there was such a conventicle; they indeed have endeavoured to evince there was no such conventicle. I must leave it to you; for nothing appears clear of the one side, or the other.

Then, gentlemen, as concerning her talking with, and about one Games; wherein you had an account given you by one Harvey, and he advised to give money, rather than to be troubled; but they would not give money. Now, for that the whole answer (that it may be given together) is, that you know the prosecutor, in these cases, has a share out of the penalties that are incurred by conventicles; and though it may be that it was not so well done by such informations to compound penalties, yet it is no evil thing: for if I will choose to inform, or not inform, there is a right in me to a part of the penalty arising from the offence: and though it be not a commendable thing, yet it is not a criminal thing for me to compound it; for I do not observe that they are proved to be a people that do use to go to conventicles.

Then, Gentlemen, there is something to be observed concerning the evidence of Cartwright: He comes and tells you, that he was by, and one of the persons that went along with Mrs. Smith to several places, in order to make convictions of persons for conventicles; and she would have him swear such and such conventicles, that she would dictate to him; and she promised, and offered to swear for the conviction of conventicles, when she was not there: And this was a great while ago; but nobody heard a word of it till now, and that when Mrs. Smith was engaged in this prosecution against Mr. Rosewell. Now when we meet with this sort of people, we ought to consider of the nature of their evidence. It is certainly a very improbable thing, that any person should come and tell him, I will be guilty of perjury, I will be forsworn for you, if you will be forsworn for me. It can hardly be believed that any body should say so to a fellow, that you see is likely enough to detect any such thing if it should be for his advantage: And it had been his duty (if he had been an honest man) to have discovered this to a magistrate immediately, and detected it, so as that the villainy should have been punished; not to come and serve a turn upon such a trial, just as this is. And therefore, gentlemen, I do not like such accidental witnesses, that seem to drop (as it were) out of the clouds, and we can have no account of them before. You have no satisfactory reason how he comes in now to make this discovery. Here you have several other witnesses, that were before, that give some account of her behaviour in these matters.

As to the conviction that they talked of, upon the 13th of July, several witnesses give you an account of the matter. First of all, it is very apparent by that book that is produced, that

there was a conventicle the 13th of July, and it was at Mr. Hudson's; but indeed it was not at Mr. Hales's; and it is not alleged here by her that it was so. And for that other, my brother Jenner gives you an account, that upon the confession of Mrs. Bathoe there was a conviction; but there was no such conviction of Hales in the case, but only of Bathoe; as appears by the record which hath been produced.

Then, gentlemen, the next question is concerning the clerk of the peace, and the writing that they talk of; which makes nothing one way nor the other. Then there are two witnesses, Drew, and the other man, that met with this woman, Mrs. Smith, in Grub-street, in order to make a composition for penalties for going to conventicles; and they find out a fellow that used to go to conventicles, and they frighten him into a composition, and so much as they say, were paid perhaps, and he ought to have paid more: But it is plain, he used to go to conventicles; and it is pretty odd that he should be picked up on a sudden there, on this side the water, to discover these practices, at the instigation of the prisoner at the bar, who lives at such a distance on the other side of the water.

Then, gentlemen, as for Mrs. Higgenson, I can only say this, she says nothing to the purpose, that is either material for, or against the prisoner; for she said, she knew nothing of her own knowledge; and all that she did say, was but hearsays and reports, not by way of downright accusation against the person she was produced against. And, gentlemen, you are to consider, that hearsay and report is no evidence at all; but it must be what the witnesses know, and say of their own knowledge.

The next is a worthy gentleman, sir John Talbot, and as to whatsoever he said, or any of his family told him, except he knows it of his own knowledge, that is no manner of evidence at all to take off the credit of Mrs. Hilton. But what she herself did say (if it can be testified) is evidence against her. If she confess that she had any design, or was engaged in any practice to betray the young lady sir John Talbot talks of, that indeed is a very evil thing. But whatsoever were the apprehensions of others concerning her share in that matter, or any of the little things that they talked of concerning mistress Hilton, before she intermarried, it can signify but very little in this matter. And when we ask sir John Talbot the question, he cannot give any satisfactory account of it; for he says plainly, he had no conversation with her. It seems it was not a contrivance while she lived there for ten years together; and it is pretty hard to imagine in such a case, if she had been such an evil person, as they would represent her, in that time, that it had not appeared, so far at least, as that she had been discharged the service long before: For sir John Talbot is a person that cannot be thought to permit any thing of ill in his family. But yet withal, he cannot know all that passed, any more than any of you, of

irregularity in the family. If indeed they had questioned any of the servants, that were more conversant with her, and taxed her of any thing that was evil, then it had been a much more probable exception; but to have people's reputations blasted barely by tittle-tattle, and stories, after persons are gone out of a family, where they have lived for many years, is a matter of very dangerous consequence; and any man in the world may be injured in his credit, if such a thing be permitted. What sir John Talbot speaks of his own knowledge, that is evidence, and we would hear it, and give all due regard to it: But what was spoken of concerning Hilton, before she was married; what the rest of the servants said concerning her; or the general reputation that she had in the family; that is no evidence at all.

Gentlemen, in the last place there is a witness produced, one Dillingham; and she pretends that she is a woman of a very ill reputation; and that she would have hired her (as she would have it believed) to have sworn against several people. Now as to that, she would have done exceeding well to have made a discovery of this before this question; and it had been her duty so to do; and not now to come, and drop in, just when this question comes to be debated before you: That, gentlemen, draws a suspicion along with it, and a very great one: But I must leave the whole matter to you, which I do not question but you will examine, and look into, as well as you can. Thus I have offered the evidence that has been given on the one side, and on the other, in point of fact.

Now, gentlemen, there are some remarks made by the prisoner at the bar (as God forbid, but he should have the advantage of whatsoever can be observed upon the evidence given against him), that is, he makes a difference between the testimony of the one and the other of these witnesses, about the 20th or 21st of Genesis: that the one said the 21st, the other the 20th: Now, it is to be observed, as has been said, that she that said the 20th, which was the second witness, said it was either the 20th or the 21st; and Mrs. Smith said it was so to the best of her remembrance; but it appears to be, and so I perceive, by all the witnesses, upon the 20th; so that as to her it cannot be very material, because she does not swear positively either the one or the other.

Then gentlemen, there is another thing, that is, that she should talk of one Weldy, captain Weldy, or captain Daniel Weldy, when it seems his name was not Weldy, but his name was captain Daniel; which I think can go no great way in the case. She is not acquainted with the man himself; she tells you one part of his name right; describes the house in all the parts of it; and speaks of the circumstance of his being at sea, and being prayed for by Mr. Rosewell; therein they do both agree: So that, though she apprehended that his name might be Daniel Weldy, yet it is so far right enough that it was one captain Daniel:

and that there is a very small minute difference, that it will make little one way or other.

Then, gentlemen, he insists upon the difference between their evidence about that circumstance, whether it was all upon one entire subject; or part one part of the day, and part the other. One of them says it was not an entire discourse; for that about the rams-horns, and the broken platters, and the stone in a sling, was after two o'clock, after the interval that had been, and the space of time between the discourse of the king's evil, and those other things; and therefore, says Mr. Rosewell, whereas she pretends that it was all spoken at the same time, just as it is laid in the indictment, that cannot be: and so it appears upon his own evidence. Now, says that woman, I cannot so well tell, whether it was forenoon or afternoon, and truly they might call it forenoon, because they had neither eat nor drank; and says the woman, we reckon that its forenoon till after we have dined; and she cannot tell whether it was in the Psalms, or whether it was upon the chapter; but it was in that discourse that he held that day. She does generally apply it to the whole; and that in the day's discourse (all which time she staid, till all was over) such words did pass. You have heard the difference that is between the two witnesses, and you did well to consider of it, if you think there is any thing material in it.

Gentlemen, I must confess it carries a notable sort of testimony in it, of which you are judges and will weigh it according as it ought to be weighed. First, That these people should luckily hit together concerning the king's evil, and that there was such a discourse as is laid in the Indictment about it, and of the prophet's praying for the people for the cure of the king's evil and then they should be immediately healed. And on the other side it is pretty strange (as he urges for himself) that that should be perverted, which he spoke concerning the prophet's praying for the king, and thereupon his hand being healed, whereby the prophets have the honour (as he says) sometimes by prayer, of curing the king's evil: so that something or other, there is in the matter, that gives a mighty countenance to what the witnesses speak. There is a certain sort of occasion given (as one would say) for such expressions as they have testified, in his discourses.

Then, when they come to talk concerning the rams-horns and the platters, the witnesses say, we heard nothing concerning platters, much less of pewter platters; no, it was broken pitchers, and that was occasioned by, and had relation to a text (says Mr. Rosewell) about Gideon, how easily he discomfited the Philistines' army, and there was no such thing as any discourse concerning the king, or the government or any relation thereunto; it was only a phrase used by me in the pulpit, to shew how great a matter might be done by little means. And so likewise concerning the stone in the sling, that being an occasional instance too what great miracles have been brought

about by little means and circumstances: I have instanced in that (says he) how David killed Goliath with a stone out of a sling, and that our Saviour Jesus Christ cured the blind man by a little spittle mingled with clay. So that he would insinuate, that those words that were spoken were not with any such intention as the king's counsel would make it, and as the indictment insinuates; but only in a common, ordinary preaching, as inferences from such and such scriptures. And whether this that he talks of, was the discourse he held at that time; or what the witnesses speak, must be left to you; they having sworn it. And this, as I take it, is the substance of the evidence given by the one and the other side.

Then, gentlemen, Mr. Rosewell put the question in the morning, and he seemed to insist very much upon it in point of law, that the discourses of a madman cannot be treason. It is true, that such discourses cannot be treason, if you take madmen in the true sense, that the law commonly takes it. All traitors, all knaves, and villains, are some way, and in some sense, madmen; for no person can act with any reason in any such affairs. Treason is not to be committed upon the foundation of reason. Therefore upon his asking of the question of the witnesses, what reason there was for him to use such expressions; I told him, you did it, according as the indictment says, which is drawn according to the precepts of the law, by the instigation of the devil; you did it, not only without reason, but against reason. But if the bare saying that it was against reason, and that therefore a man was a madman, would serve the turn, there would be no traitor according to that rule; because every traitor would be a madman. Every traitor is a madman; but every madman is not a traitor. A madman in our common acceptation, is one that is captivated in his senses, not one that is corrupt in his will and affections, which must be the definition of a traitor: so that the argument, I must tell you, is fallacious. Every man, that is depraved in his mind and affections, is a madman, so as to be an enemy to the government, or to mankind; but he is not such a madman, as is commonly meant by that word; one whose words may be mistaken, because of some disorder in his understanding, so as to be excused from the accusation of treason. Therefore whatsoever consequence there may be of the thing, I must tell you, all men that talk after this rate, that this person is accused to talk in his pulpit, they are every one traitors, and so madmen; for every traitor is a madman: and if in case Mr. Rosewell be guilty, he is in that sense a madman. It is true, in other things you find him a man of very notable understanding, a man of a very great insinuation, one that has a great deal of knowledge in the tongues, looked upon to be a very learned and ingenious man; who was thought fit to be a tutor to Sir Edward Hungerford's children; and has had very many learned discourses, and shewn himself to be

man of very great parts. Though, if he be a traitor upon this evidence that is given, he is, 'eo nomine,' a traitor, and consequently a madman, for preaching and publishing such doctrine as this, that will not serve to excuse him from his treason: but the rather, because he is a man of so much learning, it aggravates the treason, as it must needs do to any body in the world that considers it. For he under that pretence offering to preach his doctrine as gospel-truth to ignorant people, it seems, 300 or more, of all trades and persuasions, whose duty it was, according to law, to have been then at church; men of strength and ability of body, as they appear to be, for the service of the government; for these people to be debauched into such doctrines as these, of standing to their principles against the government, the more learned the man is, the greater and blacker is the crime of that man that is guilty of it. God knows whether that be Mr. Roswell's case, and you that are of the jury are to try it: to do it under pretence of preaching the gospel is the worst way of doing it that could be taken; to quote scripture for rebellion adds to the crime, as it did to that of those black villains that were concerned in the murder of our late dread sovereign, who has been so often mentioned; they were generally the preachers of the late times that contributed to that horrid villainy.

Gentlemen, it is notoriously known to you in this accursed late hellish conspiracy against his sacred and most merciful majesty, our sovereign that now is (whom I pray God long to reign over us) those that had an hand in the intention to destroy him, and his royal brother, were a great many of them black-coat dissenters to the church of England; and I cannot say I know any one member of the church of England that had any hand in it at all. How many of them stand now convicted by outlawry for that bloody treason, I won't say all persons, but generally all of them dissenters; and we know these are those base, profligate villains, always made use of in these base sinks of rebellion. And they are the common sewers of faction, these conventicles are, and of treason and conspiracy against the government in church and state. God be praised, we have a religion that teaches us much better, a religion established by the laws of the land, and with that decency of worship, and care of the souls of men, that may bring us all to heaven, by the grace of God, if we please to hearken to the dictates of it, and to mind what is enjoined us, our duty by the law; but when people are once deluded by the insinuation of such false teachers and run into faction and discontent, then they will soon run into rebellion too. And I speak this, the rather to deter and give warning to other people, to have a care how they come near such places, and such practices, how to affect you.

Gentlemen, here you have had three witnesses examined against the prisoner, who stands accused for a crime of high-treason. I

must confess, I have taken up a great deal of the time; and a great deal of the time was taken up before; but there is no time too long, wherein a question of so mighty moment as this is, is to be decided: the government, the preservation of our king, the preservation of our religion, the preservation of our laws, are all concerned: for by the destruction of our king, and of our government, our religion, and all that is near and dear to us in the world, will run a great hazard, if not come to a total destruction; and I am sure it did come near to it in a former time, by this very sort of way. Therefore I injoin you, in the presence of the Almighty God, let neither displeasure, nor any sort of personal animosity, in any thing, that has been contracted by hearsay from abroad, nor any imaginations that have been suggested here without proof, any way direct you in the consideration of this cause against the prisoner at the bar. But go according to the evidence that has been here before you, on the one side and on the other side. For as on the one side you are not to be corrupted by common talk, or any prejudice against a party or a faction; so are you not to be misled by any affirmation, or reflection, or comment that the prisoner has made or said for himself, other than what is supported by the testimony of these witnesses that he has produced, and whose evidence is left to you to consider: for you must not be led by any circumstances, or by discourses, but what is sworn on the one side for the king, or testified on the other for the prisoner. And therefore I can with all freedom and zeal for the government, and all due compassion to the prisoner at the bar (whom with all my soul I am sorry to see accused, or indeed any man, of such a crime) leave this matter entirely upon the evidence that has been given. And though, I say, I am sorry to see him accused; yet such transgressions are aggravated now, when we live in an age, wherein we have all peace and plenty, while the rest of our neighbours are wallowing in their blood round about us; some we have heard of, are brought to the necessity of eating the most filthy and basest animals, that never was designed for the food of man; I say when all our neighbours are groaning under the miseries of war (blessed be God), we live and sleep quietly under our own vines; we enjoy the benefit of being subjects to a gracious king; we enjoy the full extent of our laws, which are sufficient to secure our liberties and properties; and no man can be brought (no, not one of the meanest subjects the king has) to such an untimely end, but by the true methods of justice.

He is to be tried by you, gentlemen, who are gentlemen of quality of the county where the fact is alledged to be committed; against whom he might have made his challenges and exceptions, if he had any reason, as he did against the others, according to the liberty the law allows him, without any reason. So that you stand indifferent between the king and the

prisoner at the bar, to try this cause, whether he be guilty, or not guilty of the treason of which he stands accused. In case the late intended rebellions and insurrections had taken the designed effect, according to the doctrine preached in these sermons, of standing to principles, and overcoming enemies; and what several of his brethren, who stand now accused of, and are upon prosecution (and for ought I know every one of them might be actually engaged), I say, in case such a thing had been, there had been nothing but cutting of throats; there had been no justice for any subject to have expected; no methods, or proceedings of law; but destruction would have come upon us like an armed man.

Therefore, gentlemen, as the evidence has been long, so I hope you will give me your pardon, that I have been the longer in insisting upon it; and, according to my best understanding and memory, I have given you the best account I can, both of the evidence for and against the prisoner. You are judges of the fact; and I pray God direct you, and guide you and your consciences, that the truth may be discovered by your verdict.

Rosewell. May a loyal subject speak, my lord?

L. C. J. No, Mr. Rosewell; after the Jury are charged by the court you are not to say any thing. Swear an officer to keep the Jury. [Which was done.]

Then the Jury withdrew into the usual room for such purposes, to consider of their Verdict; and afterwards they returned into court.

Clerk of the Crown. Crier, take the appearance of the jury.

Crier. Sir George Sheers.

Sir George Sheers. Here.

Crier. Vous avez Sir George Sheers, &c. — [And so of the rest.]

Cl. of Cr. Gentlemen, are you agreed in your Verdict?

Jury. Yes.

Cl. of Cr. Who shall say for you?

Jury. Our Foreman.

Cl. of Cr. Thomas Rosewell, hold up thine hand. [Which he did.] You of the jury, look upon the prisoner. How say you? Is he Guilty of the high-treason whereof he stands indicted, or Not Guilty?

Foreman. Guilty.

Cl. of Cr. What goods or chattels, lands or tenements, had he at the time of the high-treason committed, or at any time since, to your knowledge?

Foreman. None, that we know of.

Ros. Then the Lord have mercy upon the jury! My lord, I humbly request this favour, that they may be asked *separatim*, whether they be all of the same opinion.

L. C. J. That is never done, Mr. Rosewell, unless there be any difference suggested from amongst themselves.

Ros. I ask it in regard to them themselves; or I have heard many times the jury go by

the major part; and I would know whether they be all of that opinion. Therefore I beg they may be asked that question.

L. C. J. You must be contented, Mr. Rosewell; in case there were any difference, we should hear of it from amongst themselves.

Cl. of Cr. Then hearken to your Verdict, as the court has recorded it. You say that Thomas Rosewell is guilty of the high-treason whereof he stands indicted; but that he had no goods, chattels, lands or tenements, at the time of the high-treason committed, or any time since, to your knowledge, and so you say all?

Ommes. Yes.

Cl. of Cr. Gentlemen, the court dismisseth you.

L. C. J. Marshal, you must take him into your custody, being now convicted.

Ros. My lord, I would heartily beg, for the jury's sake themselves, that that question may be asked of them.

L. C. J. We must not indulge any innovations. It is not usual. You may ask them, if you please; see whether they will answer you. We must go according to the forms of law.

Ros. Then, my lord, if all these gentlemen's estates were joined in one, I would not change conditions with that man of them, who should possess the whole.

L. C. J. Mr. Rosewell, we must have no reflections upon the jury.

Then the prisoner was taken away, and the court broke up.

Die Lunæ 24 Nov. 1684. B. Regis.

DOMINUS REX ꝰ. ROSEWELL.

This day Mr. Rosewell being brought up to the court, to receive sentence, the court proceeded as follows:

L. C. J. Brother Jenner, have you any thing to move?

Serj. Jenner. My lord, we wait upon the prisoner at the bar, to desire judgment upon the conviction that was here the other day for high-treason.

L. C. J. Against the prisoner at the bar do you mean?

Serj. Jenner. Yes, Sir.

L. C. J. Then call him to his judgment.

Cl. of Cr. Thomas Rosewell, hold up thy hand. [Which he did.] Thou hast been indicted for high-treason, in compassing and imagining the death of the king, and the subversion of the government: Upon that indictment thou hast been arraigned: Upon that arraignment thou hast pleaded Not Guilty: And for thy trial thou hast put thyself upon God and thy country; which country has found thee Guilty. What hast thou to say for thyself, wherefore judgment should not be given against thee, to die according to the law? [Then he was made to kneel and rise again.]

Rosewell. My lord, I humbly hope that your lordship will not give sentence against me upon this indictment, considering the circumstances of it, I have, my lord, pro-

tested to this honourable court, in the presence of the great God, the searcher of hearts, my innocency in this case; but I have been found guilty by the jury, on whom the Lord have mercy. I do still protest my detestation and abhorrence of the fact, even in my very soul; and I do humbly beg your lordship and the court to compassionate my present condition; and, with humble submission to your lordship, I would enter into my discourse upon that hypothesis; for I would be still taken thus, even in this conviction to deny the thesis, that I ever was guilty of speaking such words as are laid in the indictment. But upon the hypothesis, supposing that I were guilty, I do humbly conceive that these words, as they are laid, are not Treason. They are very foolish and ugly words; and may be a very great misdemeanour in law (if true, which still I must over and over again insist upon), but they are not treason. And I beg your lordship will do me the favour to let the Indictment be read once more.

L. C. J. Ay, with all my heart.

Ros. I humbly thank your lordship; I desire it may be read in Latin.

L. C. J. Read it to him in Latin.

Surrey ss. Juratores pro Domino Rege super Sacramentum suum presentant, &c.

[The whole Indictment was read.]

Ros. I humbly thank your lordship. There are some things that I shall offer to your lordship in arrest of judgment out of this indictment; and I request your lordship to hear me with patience, being here for my life. I pray judgment may be arrested for these causes: That there is not any crime sufficiently set forth for your lordship to give judgment upon. My lord, I humbly take it for granted, that in all indictments of treason there must be some particular matter of treason assigned; and that it is not a sufficient indictment in general, that a man did intend to depose the king, or to raise rebellion, without some Overt-act positively asserted to be done by that person; the general intention being only an inducement to the charge. The special matters that set forth the particular acts of treason, are those that make the real charge, upon which the court and the jury are to proceed. Now, my lord, if that special matter, that is alledged, be insufficient, with an humble submission, though there be never so many such sorts of facts proved, and found by the jury, the party cannot be convicted of high-treason: For, in this case the party has the same advantage to except against the particulars alledged, to prove the general suggested treason, as against the general treason itself. Now, with humble submission, my lord, again I say, that the matter here suggested is insufficient, as will evidently appear by what I am going to offer to your lordship.

The first and principal objection that I have, is against the innuendos, which are so many, and so strange, in these words that are alledged

against me. These innuendos, my lord, I say, are nought and void; and I presume that it will be allowed to me, upon reading of the words by themselves, as bad and as foolish as they are. Without these innuendos there could nothing be made out of such words as these are, neither treason, nor any thing else.

Then, my lord, in the second place, laying aside the innuendos, I must insist upon the repugnancy and insensibility of the words laid in the indictment, being in Latin, and such Latin, as I believe your lordship never saw; and upon these two points, I desire that judgment may be arrested, and I humbly pray counsel may be assigned me to make them out in better form.

L. C. J. What say you to it, brother Jenner, and the king's counsel?

Serj. Jenner. I cannot see that he has alledged any objection, which here requires an answer from any of us, that are of counsel for the king.

L. C. J. Yes, brother; methinks he does.

Att. Gen. If he does pretend to object against any of the overt-acts alledged in the indictment; your lordship observes, this indictment is upon the statute of the 13th of this king, wherein words are made treason, if they intend any hurt or imprisonment to the king's person. For his objection as to the Innuendos, he does not assign wherein they are repugnant, or insufficient. He does assign in particular, indeed, that it is insufficient, being a general crime; which yet he does not say is not sufficiently laid; for it is said, that he did compass and imagine the death and destruction of the king: And, to effect that compassing and imagination, he did speak such and such words, which by the statute are made treason if they tend to attempt, by preaching or writing, any imprisonment or harm to the king's person. Then for him to come to talk of, 'standing to their principles,' after he had spoken of 'two wicked kings together,' meaning the late king, and the present, and that, 'then we should overcome our enemies,' what is that but preaching in order to raise a rebellion and insurrection, tending to the destruction of the king, and his government? All this is laid in the indictment; the jury find it spoken maliciously, and with such an intention as we have laid; and therefore we think that it is sufficient.

L. C. J. But, if I take the gentleman right (for I tell you beforehand justice must be done to all people impartially, the crime is a very great crime that he stands accused of; and the jury have found him guilty of the crime laid in the indictment: But, if I take him aright) he does not say that words are not sufficient to create a treason, but the words here, as they are laid in this indictment, are not sufficient: And as I take it, there is no great difficulty in the matter; but the words would have been sufficient to have supported the accusation, if they be well laid. But the question is, whether the words that you have

laid here, be so positively affirmed to have been spoken by the prisoner and to relate to the government, as they ought to be in an indictment of high treason?

Att. Gen. That the indictment must make out; and the jury have found him guilty, according to the indictment.

L. C. J. But that is his objection, they are not so in the indictment.

Att. Gen. My lord; they are laid as the witnesses swore them: as your lordship cannot but remember.

L. C. J. That they are not positively affirmed, but only alledged under an *innuendo*; that is, he spoke such and such words, whereby he compared the king to Jeroboam, and the like; and we had two wicked kings together, but if we would stand to our principles, we should overcome our enemies, *innuendo* the king. The alledging of the words spoken in the indictment is positive, if there be sufficient matter in the words to make them applicable to the government, so as to make it treason. But if you only say, he spoke them *innuendo* so and so, that is not positive enough to make the indictment good. I take it the objection runs that way.

Ros. My lord, I humbly thank your lordship for explaining my meaning: it is so.

L. C. J. In an action on the case, if you say the defendant spake such and such words, if you do not lay it that he spoke them of the plaintiff; *innuendo*. The plaintiff, in repeating the words won't do. So here, if you had brought it in the indictment, that having discourse of the late king and this king, he had spoken these words, 'We have now had two wicked kings, &c.' you then had brought it home to him: but you do not lay it that it was spoken of them at all, but only in the *innuendo*; whereas you ought to say, first, That he spoke of the late king, and this king; and then said, We have had two wicked kings together, *innuendo*, the late king, and this king.

Att. Gen. My lord, I do not know how we could have done it better than we have done.

L. C. J. Look ye, we give no opinion; but the objection has weight in it, upon my word. As I told you before, in common cases, an action of the case for words, or the like, you must lay a communication concerning the plaintiff, or an *innuendo* will not be a sufficient averment of its being spoken of him. In an action of the case for words, till within these seven or eight years, they were obliged to lay a *Colloquium* of the plaintiff, and of his trade; and that to defame him, were spoken of him as such a time such words, as that he was a cheating knave; where the word knave would bear an action, a bare *innuendo* would not do, that was not enough. But, now I confess, since declarations are made a little more concise, you need only say 'dixit de querente,' such and such words without a *Colloquium*, but you must aver it to be spoken of the plaintiff. I never thought it good in such a case, to say of a merchant, he is a bankrupt knave

(*innuendo* the plaintiff), unless he say he spoke of his trade and merchandise. So that the objection does seem to carry very much weight in it.

Solicitor General (Mr. Finch). My lord, if your lordship would give me leave, I would endeavour to answer the case as your lordship has put it; for, my lord, no doubt in all common actions of the case for words, it must be averred that the words were spoken *de persona* of the plaintiff; but the first part of the indictment, in this case, shews that the words must be spoken of the person of the king, and of the late king; for it says, he did conspire the death and destruction of the king, and to depose him from his government, and to manifest that traitorous, wicked intention of his; *Et intentione* he did speak these words of the government, 'We have had two wicked kings together,' meaning this king and the late king.

L. C. J. If you had said so, that he spoke these words of the king, you had answered my objection; but the conspiracy of the death of the king being only a general form for treason, will not make good an indictment of high treason; but you must shew some acts or words to evince and prove that that was his intention; that he did either speak such and such words, or did such and such actions. It is not a good indictment to prove that he did conspire, for he spoke such and such words, but that to carry on his conspiracy he did speak such and such words of the government, that must be positively alledged.

Sol. Gen. We do so, my lord; for we say, 'et ad eandem nefandas proditiones,' &c. 'perimplendas,' he spoke such and such words, We have had two wicked kings together, *innuendo* this king and the late.

L. C. J. You have *innuendo'd* it too much, I do doubt; for all the facts are laid under an *innuendo*, without a positive averment.

Att. Gen. My lord, I think it is as fully laid, as it possibly could be.

L. C. J. Come, Mr. Attorney, if in cases of common actions for words there be such strictness required, ten times more ought there to be in an indictment of treason, where a man's life, and all, is so much concerned. I am not satisfied, I assure you, that this indictment is well laid, though I give no opinion; but in all justice we ought to assign him counsel to make out his objection.

Att. Gen. All this, my lord, is only in delay.

L. C. J. Mr. Attorney, 'De vita hominis nulla est cunctatio longa.' I think we ought to assign him counsel, and the rest of my brothers are of that opinion too.

Att. Gen. Let them read colonel Sidney's Trial,* and the indictment there, and they'll find it the same thing.

L. C. J. I cannot tell whether there are any such *innuendos* there, I believe not; but I know not if there were, if in case it had been

* See vol. 9, p. 317, of this Collection.

moved in arrest of judgment, what the court would have done then. But I think we ought to assign him counsel to make out his objection.

Att. Gen. The very fact that makes this treason, is his stirring up sedition and rebellion within the kingdom; and we say, to effect it, he had these expressions in his pulpit, we have now had two wicked kings together, meaning this king and the late, who have suffered Popery to come under their noses; but, if you will stand to your principles, meaning the people, we shall overcome our enemies, meaning the king and government.

L. C. J. Ay, but you do not say that he spoke these words of the king: this you should have said at first, because the speaking of these words is the very overt-act; and if he did not speak them of the king, which you ought to affirm, but only by way of *innuendo*, that cannot, we think, be so good, nor sufficient.

Just. Williams. I take it that these are the main words that are to maintain this indictment of treason; and the question is, whether they ought not to have been averred that they were spoken of the two kings?

L. C. J. We do not give any opinion, Mr. Attorney, but because there seems to be some reasonable doubt and weight in the objection, we desire to have it argued, and therefore will assign him counsel.

Ros. I humbly thank your lordship.

L. C. J. We do think it fit to look into it, because we proceed any farther in a case where a man's life is concerned.

Ros. I pray God to bless your lordship.

L. C. J. Nay, you have no need to thank me; for I desire to do justice to all men.

Ros. But I desire to return my hearty thanks to your lordship, for explaining and making out what my unskilfulness in the law would not permit me to do. God be your rewarder for it.

L. C. J. Well, who would you have to be your counsel?

Ros. If your lordship pleases, Mr. Wallop, Mr. Pollexfen, and Mr. Thomas Bampfield.

L. C. J. Let them be assigned of counsel for him. But, Mr. Rosewell, I think it is not improper for me, upon this occasion, to take notice of this that is in my mind, relating to your affair, because I observe it is a matter of great expectation, and so was at your trial, and here is a great crowd of people now; that as this fact is found, if the indictment falls out to be a good indictment, which is the question that now depends before the court, so that you come to have judgment of high-treason passed upon you, and to suffer according to that judgment, what will become of these 400 people that were your auditors at the time that these words, that are thus found and adjudged to be treason, were spoken? And I speak it for the sake of all conventicles, and frequenters of such meetings, as these are. If you, that are the preachers, and teachers, the mouths of such congregations, do utter treason, and so they

conceal that treason, what a condition are they in? What are they guilty of? Therefore, if people will consider, they would do well to think, that when they go to such places, they go at a great peril; being to answer for themselves, their lives and estates, upon the prudence of the expressions, to say no more, that come from the teachers. I only put you in mind of this, because I would have all standers-by, and the auditory, which I see is very great, in mind, what danger and risk they run in thus offending the law.

Ros. My lord, I do believe, that no one in the world, besides these witnesses, that here were produced against me, can ever testify the least disrespectful word spoken by me of the late king, or of his present majesty.

L. C. J. Well; when will you be ready, gentlemen?

Mr. Pollexfen. My lord, we desire to have as much time to prepare ourselves as we can.

L. C. J. Two or three days time will serve.

Att. Gen. It is fit we should know what points they intend to insist upon, that we may prepare to answer them.

L. C. J. Yes, yes, that must be, but I perceive his main objection is, what I tell; let him be brought by rule hither, upon Thursday, because the court may have time to consider of what shall be said on both sides.

Ros. My lord, these gentlemen are strangers to me; but I dare rely upon them, from the character I have heard of them, that they will do me all the justice that they can.

L. C. J. Well, they are assigned of counsel for you. But I could not forbear giving that hint that I did, that this might be a warning to people, how they transgress the law in going to such meetings.

Die Mercurii, 26 Novembris, 1684.

REX ver. ROSEWELL.

L. C. J. Mr. Pollexfen, have you any thing to move?

Mr. Pollexfen. My lord, I have one word to move for myself, and the others that are appointed to be of counsel for Mr. Rosewell. We think it our duty to apply ourselves to your lordship for this favour; that, to enable us the better to do our duty for the person for whom we are assigned, your lordship and the court would please to order that we may have a copy of the indictment. We do acknowledge, that it is not an usual thing to have copies granted (though there be no express law that we know against it) in capital matters, but where any doubt does arise upon the penning the indictment, and counsel is assigned to enable them to do what is fitting for them to do for their client, copies of the indictment have been granted; as particularly in the case of Fitzharris, in order to the plea that he was to put in; and I myself was one of the counsel at that time.

L. C. J. Mr. Pollexfen, I make no doubt in the world, it is in the power of the court to order a copy of the indictment, if they see

cause; but, if you remember (for you were of counsel in that cause too), it is not to be granted, because it is asked. For my lord Russell had no copy of the indictment, though he insisted very much upon it: And it was in the case of Fitzharris granted, that he might particularly apply his plea (if he had a mind to it) to the indictment itself.

Mr. Pollexfen. My lord, I do not desire a copy of all the whole indictment; but of so much thereof, as may be enough for us to know the foundation upon which we are to go. I do remember we were called in, in my lord Russell's case, upon the point of challenge, for want of freeholders; but that was not in the point of the indictment, and there I cannot see what we had to do with the indictment; but here we must understand how it is laid really in the indictment, that we may apply our arguments to the case; and that I believe was never denied.

L. C. J. Look ye, if you speak to me, privately, as to my own particular opinion, it is hard for me to say, that there is any express resolution of the law in the matter; but the practice has been always to deny a copy of the indictment. And, therefore, if you ask me as a judge, to have a copy of the indictment delivered to you in a case of high-treason, I must answer you, Shew me any precedents where it was done: For, there are abundance of cases in the law, which seem hard in themselves; but the law is so, because the practice has been so, and we cannot alter the practice of the law without an act of parliament. I think it is a hard case, that a man should have counsel to defend himself for a two-penny-trespass, and his witnesses examined upon oath; but if he steal, commit murder or felony, nay, high-treason, where life, estate, honour, and all are concerned, he shall neither have counsel, nor his witnesses examined upon oath: But yet you know as well as I, that the practice of the law is so; and the practice is the law.

Mr. Pollexfen. My lord, we heard the other day the indictment read, and so may have some little account of the indictment; but we desire such a copy as may enable us to argue as we ought to do, and as the court will expect from us, being assigned by the court.

Mr. Wallop. My lord, if we should offer any thing that is not in the indictment, it is all one as if we held our tongues; and if we have only a loose account of the indictment, that may be as bad as if we had a false one: and therefore we desire, to the end that we argue *ad idem*, that your lordship with please to favour us, that we may have a copy of so much of the indictment, as upon which our objections may be grounded.

L. C. J. Mr. Pollexfen, you may remember a particular case, I have forgot the name, but I believe you may remember it; where a prisoner at this bar desired to have the indictment delivered to him to read, but it was denied him. It is hard, I confess, and so are many other things in the law; but I am wonderfully

tender of making precedents: and therefore, if it has not been practised, I do not see how we can do it.

Just. Withins. That is the usual practice, my lord; but it is in the power of the court sure to grant a copy; or, at least, of so much as is necessary for them to apply themselves to. There have been many cases of murders, where they have had copies of the indictment in order to move in arrest of judgment, as this case is.

Just. Walcot. But have there been any in high-treason?

Just. Withins. I do not take it that there is any difference between the one case and the other, they being both capital crimes; and counsel being assigned, they must know what they are to speak to.

L. C. J. I would know when ever a copy was granted to enable the party to move in arrest of judgment.

Just. Withins. My lord, when there is a motion in arrest of judgment, and counsel assigned, that is a thing they ought to know, how to demean themselves in their arguments.

Mr. Pollexfen. My lord, we submit it to you. We desire the favour that we may acquit ourselves as we ought to do, and as the court (we know) expects from us.

L. C. J. As far forth as I could do, being in the case of life, I would indulge you; but I tell you, I am loth to be the author of precedents in cases of this nature, one way or other, especially in this case, where I know you cannot but understand, by what was spoken here the other day, what the objection is, and where the stress of it lies: every man at the bar must needs understand it.

Mr. Pollexfen. My lord, we know people have various understandings; and the case is many times variously stated, not only in our minds, but in our books.

L. C. J. Well, we know you understand yourselves well enough: and what we could grant, we would.

Just. Withins. It may be Mr. Pollexfen does it only to make way for an excuse, when he comes to argue, that he is not so well prepared as he should have been; but we know him well enough.

Mr. Pollexfen. But, my lord, if we miss the words of the indictment, we hope your lordship will not think us impertinent, in having made this motion, which is for ourselves, not for our client: and therefore, we hope you will pardon us, if in case we mistake; which we could have had no colour to have desired, if what we had to say, were guided by a true copy of the record.

No copy was granted, nor rule made.*

* By stat. 7 Ann. c. 21, s. 11, it was enacted, That after the decease of the person who pretended to be Prince of Wales during the life of the late king James, and since pretends to be king of Great Britain, and at the end of the term of three years after the immediate suc-

Die Jovis, 27 Novembris, 1684. B. R.

DOMINUS REX *ver.* ROSEWELL.

This day Mr. Rosewell was brought to the bar, and the court asked the counsel assigned for him, what they had to say?

Mr. *Wallop*. May it please your lordship, I am of counsel for Mr. Rosewell, by your lordship's appointment, he being here a prisoner

cession to the crown upon the demise of her present majesty shall take effect, as the same is and stands limited, &c. when any person is indicted for high treason or misprision of treason, a list of the witnesses that shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, profession and place of abode of the said witnesses and jurors, be also given at the same time that the copy of the indictment is delivered to the party indicted, and that copies of all the indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted ten days before the trial, and in presence of two or more credible witnesses, any law or statute to the contrary notwithstanding." This section of the stat. 7 Ann. c. 21, extended certain privileges which had been granted by stat. 7 W. 3, c. 3, and was first acted upon in lord George Gordon's Case, A. D. 1781, in this Collection.

"At common-law no prisoner in capital cases was intitled to a copy of the indictment or panel, or of any of the proceedings against him. Many persons, it is true, have upon their arraignment insisted on a copy of the whole indictment, but it hath been constantly denied. It was denied in the case of lord Preston and the two other gentlemen indicted with him, by the unanimous opinion of the judges present, who declared that it never had been granted, though frequently demanded. And lord Preston having said that it was granted to lord Russell, Holt told him that he and some others of the judges present who were of counsel for that lord, did not advise him to demand it; Foss, saith he, we knew he could not have it 'by law.' Lord Preston, not satisfied with this answer, prayed that counsel might be assigned him to argue that point; which the court unanimously refused, it being, they said, 'a point that would not bear a debate.'

"The statute of 46 E. 3, which had been formerly insisted upon by prisoners in the like case, was much pressed in this. It is not in print among the Statutes, but an attested copy from the roll was read at the prisoner's request, and is printed in the trial. It plainly relateth to such records in which the subject may be interested, as 'matters of evidence upon questions of privateright;' and it enacteth, 'That all persons shall for the future have free access to them, and may have exemplifications of them whether they make for or against the king.' This was the opinion of the whole court.

now at the bar. My lord, I am informed (for I have not seen the proceedings, nor heard the indictment read), that it is an indictment for treasonable words; and many treasonable words; and likewise, as I take it by information, these words are applied by divers *innuendos*; so that, for aught I can apprehend by what I am informed (which I must still keep to) it is so uncertain, insensible, involved, and intricate, that no safe judgment, as I humbly conceive, can be given upon it.

My lord, to consider these words; first, if you please, I shall state them as discharged of the *innuendos*, and put them to your lordship, barely and nakedly, as they are in the indictment, and as they were sworn, and are to be supposed by the conviction to have been spoken. The words are these, as they stand discharged of their *innuendos*: that 'the people make a flocking to the king, under the pretence of healing the king's evil, which he could not do; but we are they to whom they ought to flock, because we are priests and prophets, that by our prayers can heal the dolours and griefs of the people. We have had now two wicked kings together, who have suffered Popery to enter under their noses; who can be likened to no other person but the most wicked Jeroboam: and if they would stand to their principles, he did not fear but they should overcome their enemies, as in former times, with rams-horns, broken platters, and a stone in a sling.'

These, my lord, are the words nakedly in themselves; and these are said to be spoken in a public assembly, where they were likely to do hurt to the government. Thus, I say, they stand without any of the *innuendos*. Now, though your lordship will have, and justly ought to have, a good account given you of

"In the case of Charnock, King, and Keys, whose trials came on after the passing this act and about a fortnight before it took place, they were denied a copy of their indictment; though they argued with a great deal of plausibility, that they were within the reason and equity of the act at that time, as much as they would have been if their trials had been brought on a fortnight later.

"In these cases, and in the case of the assassines, whose trials came on before the commencement of the act, the prisoners, as soon as they had pleaded, had copies of the panels delivered to them; and their trials were postponed, that they might be better enabled to conduct themselves with regard to their challenges. But this the court declared to be matter of favour, and not of right: and counsel and solicitors were permitted to attend them in prison previous to their trials. This likewise was an indulgence, which they could not claim of strict right, and which in bad times hath been generally denied." Fost. Cr. Law, 228, 229.

See, too, pp. 1, 2, 230 of the same book, and East's Pl. Cr. ch. 2, s. 48—51.

such words as these, how they came to be spoken, even taking them as they stand discharged of the *innuendos*; yet humbly conceive, with submission, they do not contain any intention of deposing or destroying the king, and so can have no treasonable intention in them: and then your lordship, I suppose, will likewise expect to have a good account of these words, in another respect, how words, which in the hearing of them barely and nakedly spoken, could not carry a treasonable intention; I say, how it comes to pass that in the writing of them down in an indictment, they become high-treason.

My lord, these words, as they stand discharged of the *innuendos*, are loose, extravagant, insensible words, sounding rather towards phrenzy, than treason. So that as they stand without further explanation by an *innuendo*, they are perfectly insensible, and one cannot tell what they refer to, or whom; and if the words, *Ex vi termini*, without further averment, contain no treasonable intention and meaning, and so consequently have no treason; it may seem very difficult and hard to maintain, how; out of the assembly in which they were spoken, being put into Latin in an indictment, they should become treason: they not being treason at Rotherhith, where they were spoken; how they should be made treason at Kingston, or here, where they are dressed up in another form. Indeed, I know no way that it can be done, but by adding some other words, by some other hand. And, my lord, I suppose it was so done by those who framed this indictment that is before your lordship, by inserting and adding this multitude of *innuendos*.

But I suppose, then, they that would insert these *innuendos* must have a good warrant to insert them: for if they are inserted without warrant in law, then it must be acknowledged to me that the indictment is not good; and I humbly conceive it to be a rule in law, that no *innuendo* can warrantably be inserted in an indictment, information, or declaration, upon an action of the case for words, unless the defendant first himself be averred, and that directly, to have mentioned a person in certain, to whom those words may be referred; and it must not slide in by supposition, but it must appear in the body of the discourse of the defendant. And the reason is evident in all cases of slander, and particularly in these of treasonable words; for how could the hearer understand whom the preacher meant, or he that discoursed so and so, and so be influenced to rebellion, unless he had named the person of whom he spoke, as here, unless the defendant had named the king, to whom the words he spoke should be referred?

My lord, the treason of the words is in stirring up sedition and rebellion; and if then the words cannot terminate upon the king, and the hearers could not collect that to be the intention of the speaker, these words could not influence a people to rebellion and sedition. And according to this rule, I conceive that most

of the *innuendos* in this indictment are not warrantable.

For, my lord, as to the first words to take them in order, though I take it, that that is the most remote matter from the crime charged; yet let us strike off these *innuendos* as we go along, if we can. There it is, *Quod Populus, &c.* The people (meaning the subjects of our lord the king) keep a flocking to the king to cure the king's evil, which he cannot do, &c. Here the first *innuendo* is the people (meaning the subjects of our lord the king). Now he had never before named the people of England; but the *innuendo* fastens that meaning upon the word (people). Which, with submission, my lord, is always a sign of a naughty *innuendo*; and it is without warrant of law; an endeavouring to give an original certainty to uncertain words; which is more than the office of an *innuendo* will allow or warrant. I say, my lord, it always bears a bad face, where words first appear with an *innuendo*; and have no certainty even in the beginning of them, but by the *innuendo*; that with submission is to be rejected, the *innuendo* not doing its proper office for which it ought to be used in law: for *Populus* may intend any people, it may intend the French people flocking to the French king (and he does heal the king's evil in the same manner: nay, pretends to it, as a sole gift to him, his predecessors, and successors: but I only put that for an instance); and all the *innuendos*, if you observe them, are of this nature. The words first appear without any light but what these suppositions give them, and therefore, I say, they are to be rejected.

But now, my lord, I come to that which is more particular, '*Nos habuimus nunc duos iniquos Reges insimul*;' 'We (meaning the subjects of the king) have had two wicked kings' (meaning king Charles the First, and this king,) together. Now that we say is altogether void, for there was no mention of any kings, wicked kings or good kings, pious or bad, before in the discourse, to which, according to the office of an *innuendo*, these words are to be applied. My lord Coke in his 4 Rep. fol. 17. B. has this case.

John Jeames brings his action against Alexander Rutlech, for speaking the following words concerning him to one John Bonner. "Hang him (*prædictum Johannem Jeames innuendo*) he is full of the pocks (*innuendo* the French pocks) I marvel that you, (*prædictum Johannem Bonner innuendo*) will eat or drink with him (*prædictum Johannem Jeames innuendo*) I will prove that he is full of the pocks (*innuendo* the French pocks.) Upon a motion in arrest of judgment, it was resolved by the court, that in every action of the case for slander, two things are requisite. First, that the person who is scandalized be certain. Secondly, That the words spoken be apparent slander. The office of an *innuendo* is to design the same person that has been named before: And is in effect, instead of a *prædict*. But it cannot make the person certain, that

was uncertain before. In the present case, it was evident that the plaintiff did speak the words of the defendant. But as to the second thing, it did not appear that the words spoken did mean the French pocks; and words are to be taken in *mitiori sensu*.¹⁹

* Mich. 41. & 42 Regine Eliz. en bank le Roy, entre John James pl. & Alex. Rut-
lech def.

Le plaintiffe count que le defendant, et un John Bonner ayant conference de le plaintiffe; Le defendant dit plaintiffe al dit John Bonner ceux parols; 'hang him' (prædictum Johannem James innuendo) 'he is full of the pocks' (innuendo the French pocks) 'I marvaile that 'you' (prædictum Johannem Bonner innuendo) 'will eat' [B] 'or driak with him' (prædictum Johannem James innuendo), I will prove that he is full of the pocks (innuendo the French pocks). Le defendant plead non culpable, et fuit trové pur le plaintiffe, et damages assese: Et fuit move en arrest de judgment que les dits parols ne fueront actionable. Et fuit resolve que en chescun action sur le case per slanderous parols, deux choses sont requise. 1. Que le person qui est scandalize soit certain. 2. Que le scandal soit apparent per les parols mesmes. Et pur ceo si un dit sans ascua precedent communication, que l'un des servants de J. S. (il ayant divers) est un notorious Felon ou Traitor, &c. icy pur le incertaintie del person nul action gist; et un (innuendo) ne poit faire ceo certain: Issint si un dit generalment: 'I know one near about 'I. S. that is a notorious thief,' ou tiels semblables. Mes quant le person est un soit nosme en certaine, come si deux parlant ensemble de J. S. l'un dit. 'He is a notorious thief.' La J. S. en son count poit monstre que la fuit parlance de luy entre les deux, et que l'un dit de luy: 'He' (innuendo prædictum I. S.) 'is a 'notorious thief.' Car le office de un innuendo, est a container et designer mesme le person que fuit nosme en certain devant: et en effect estoit en lieu de un (prædict) mes un (innuendo) ne poit faire person certain que fuit incertain devant: Car serrá inconvenient que actions serra maintaine per imagination d'un entent que n'appiert per les parols sur que l'action est foudue, mes est tout incertain et subject al deceivable conjecture: Mes si un dit a J. S. 'Thou art a Traitor,' &c. la 'constat de Person,' et action gist: Issint icy en le case al barre, quant le defendant et Bonner ad parlance del pl' donques quant le defendant dit 'hang him.' La (innuendo) voyle denote mesme le person nosme devant: Mes si le defendant sauns ascua parlance del plaintiffe ad dit, 'hang him,' &c. la nul innuendo voyle aver fait le person certain. Quant al 2. si come (innuendo) ne poit faire le person certain que fuit incertain devant, issint un (innuendo) ne poit alter le matter on senoe des parols mesmes: Et pur ceo quant le defendant en le case al barre dit al plaintiffe; 'That he was full of 'the pocks,' (innuendo the French pocks)

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And I humbly conceive this book is a most pregnant authority, that states the matter truly, with a judgment of law, and the reason of it; and all the books that come after this, borrow their light from what is laid down as the rule of law is in this case; as there are an infinite number of them, which I shall not trouble your lordship with particularizing; only just to name some of them. 5 Co. 90 Hob. 45. and 2 Cro. 126. wherein they say, that although the plaintiff be particularly named by a special name; yet if the declaration comes to name him in an action of the case for words, at the first appearance with an *innuendo*, then that *innuendo* is void; though his name be expressly alledged in the very words, yet they will reject that *innuendo*, as not doing the proper office of an *innuendo*; and that judgment shall be arrested, though the jury found that the party spoke such words; And this is upon the rule in 4 Co. before-mentioned.

Now, my lord, to apply this rule in the 4th report, to the case before your lordship, we say there was no mention at all before of any two kings; nay, not of any king, in his discourse, to which the *innuendo* should refer; and the *innuendo* being joined to the words first spoken, without any discourse laid concerning such a person, or averment to be spoken of such an one before, the *innuendo* cannot give any certainty to that, which had no such original certainty; that being against the office of an *innuendo*, and so is to be rejected. And the meaning of the books, and of that great rule, which I first cited, is this, that the defendant must himself, in his discourse, first set up such a light about the words of the person concerning whom they are spoken, that the intention of the speaker may with ease be collected; then comes the *innuendo* with a beck or a nod, as it were; and that collection is to be the *nutus*, to shew who was meant; but it is not sufficient to give an original certainty, where such a certainty is not fixed before the *innuendo* comes. The defendant himself must set up such a light as will carry the intention to the end of the discourse.

Then it is said, *Duos iniquos Reges*, in the plural number; meaning the late king Charles and his present majesty; now king Charles the first was never pretended to be mentioned before; why then, according to that rule, as to him the *innuendo* signifies nothing at all; and then it must be taken in common understanding, 'We have now had two wicked kings together,' *innuendo*, our sovereign lord the king that now is, against whom the treason must be said to be committed: but this is very harsh, and insensible, and impossible; it is harsh, in

cest 'innuendo,' ne fait son propre office, car ceo contende a extender a les general parols, 'the pocks,' ale 'French pocks,' per imagination d'un entent que ne'st apparent per ascua precedent parols, a que le 'innuendo' re ferrer; Et les parols mesmes serra prise 'in 'mitiori sensu.'

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all respects, both of grammar, and reason, and law; it is insensible, because it is impossible; and it is impossible because you must else make two kings to be one, or one king to be two, and the *innuendo* must serve both ways; which, I believe, your lordship will hardly undertake to do.

And besides, my lord, there is another inconsistency in these words, '*habuimus nunc*,' that's contradictory; *habuimus* refers to the time past, and draws one way; *nunc* to the time present, and draws another way: and when there are such inconsistencies and incoherences, how can any man make a judgment in this case, where the life of a man especially is concerned?

But, my lord, if *habuimus* be that which being first shall take place, then these words refer to any two kings that we have had, under whom Popery hath been let in; and so we must run back from Harry the 8th, up to the conquest, nay, beyond the conquest, to the Saxons and other former kings, to the first that established the Christian religion, which was then subject to the Papacy. And it will be hard to construe them wicked kings for so doing at that time; as any man's reading, that knows any thing of the history of England, will easily tell him. So that it is unintelligible and insensible, even that way; and, to be sure, if it be so, that we have had two wicked kings together, referring so far back, it cannot at all concern the present king.

My lord, I shall be short: I only state these things before you, and recommend them to your lordship's consideration. Then come these words, which it seems are most relied upon. 'If they would stand to their principles, he did not question, but they should be able *'Inimicos suos vincere,*' *innuendo* the king and the government. This is the most insensible, as I apprehend, of all; and it is in the fatallest part, it being there that the treason must lie, if there be any. Now, my lord, we first say, there is no mention at all of any enemies throughout all the words precedent; there is no averment that the king was enemy to any body, or any body to him; and therefore the *innuendo*, for this reason, is to be rejected; and the rather, in that it makes the king and his subjects to be enemies one to another; which is an imputation that ought not to be admitted; and I dare say, will not be by your lordship. Therefore, in this case, to put such a sense in such a weighty matter, being a matter of fact, upon such uncertainties, without any further averment of the intention and meaning of the speaker to be so and so, and without any thing but such *innuendos*, is very hard: for now perhaps the jury only from this *innuendo* were persuaded that all these things pointed upon the king and the government; and did take it that the law was so; that the words intended as much: then do they give their verdict of a matter that was never averred, and for want of an averment could never be put in issue, so that the party could have a trial, whether he were guilty as the indictment says.

My lord, I shall cite no books more than I have done. I humbly conceive, that putting that great rule in the book I first mentioned, and the reason of the thing together, and the subsequent authorities that I have cited; and they stand so fair and clear to avoid this indictment, that to trouble your lordship further were to embroil the case; therefore I shall say no more out of the books. But the rule is a firm, reasonable, undeniable rule, which must rule all cases that come under the reason of it. And I never heard that book was ever contradicted; but all subsequent judgments were agreeable thereunto.

Just. *Withins*. What folio is it, Mr. Wallop, in the 4th Rep.?

Mr. *Wallop*. Folio 17. B.

Just. *Holloway*. It is —'s Case, is it not?

Mr. *Wallop*. Yes, Sir. My lord, I have stripped the words of the *innuendos*. You will not, I am sure, put, nor can an *innuendo* put such a violence or force upon words as to make them treason, when in themselves they have no such meaning. *Innuendos* are to follow the meaning of the words as they lie in the record, and not to draw the meaning of the words after the *innuendo*; for you will never (especially in case of life) press words, or strain them to speak more than willingly they mean or intend. It is not the practice of the law so to do, to make any such stretches. '*Qui nimis emungit, elicit sanguinem,*' he that wrings the nose too hard, will draw forth blood, that is the rule of that great lawyer, my lord Coke, who applies that saying to the forced straining of words beyond what in themselves they naturally and easily will bear. And it is plain that God is not well pleased with such emunctions: nor does the law of the land at all allow it, but absolutely forbids it, for the law of England speaks thus, '*In dubiis et generalibus, benignior sensus est preferendus,*' in all dubious, uncertain, and general cases, the most benign and capdud interpretation is to be taken: so that if there should be a doubt about these words, what sense they be taken in, the law of England does injoin your lordship to take the way that lies on the right hand, and make the most favourable construction, that can be of them. We say then the words, as I conceive, standing quite otherwise, and without the *innuendos*, are insensible, at least uncertain, to what they should be applied, or to whom; and then if there should be a doubt, though indeed in one respect I think there is none, yet if there should remain a doubt, I say your lordship and the court are to take that which is the most mild and gentle way of construing these words.

My lord, I shall not trouble your lordship further in the matter, for I think it is seen by its own light, and these few touches, that I have given of that general rule, as applied to the particular case before your lordship: and I do not question, but they will be applied by your lordship and the court in their consideration of the case: therefore I lay it at your

lordship's feet, and humbly pray, that the judgment may be arrested.

Mr. Pollexfen. My lord, I am assigned by the court to be of counsel for Mr. Rosewell, the prisoner at the bar, and therefore humbly desire your lordship would please to spare me a word of the same side with Mr. Wallop. The case, that is, this part of the indictment, hath been put, according to what our information is, right by Mr. Wallop; but because there may be many words in the indictment, and there are so, some of a higher nature than others, therefore I beg leave to put the words distinctly as they lie, and I shall endeavour, with submission to your lordship, to shew what words are in themselves treason, and what are not treason, though they may be a great misdemeanour, and highly punishable by the law and by the court.

My lord, though the statute of the 25 Edw. 3. does provide that for the convicting of any for treason, there shall be an overt-act, yet I do not hold, nor do I think, but that there may be words that are an overt-act, and consequently treason, within that statute; but then what sort of words these are, is that which I would humbly offer to your lordship to discourse of: for, my lord, it plainly appears that words in themselves, that are very evil and wicked, yet are not treason, nor are to be punished by virtue of that statute of the 25 Edw. 3. As in case Cr. 117. and 125. Hugh Pine's case.* The words there spoken by Pine are most evil and wicked words, yet by all the judges of England they are agreed not to be treason.

But, my lord, for a further determination of this point, what words are treason, and what not, give me leave to mention the statute of 13 Car. 2. which I understand to be the statute upon which the prisoner is indicted, and the two branches of that statute: for the first tells what is treason, and the second what is not treason, but only misdemeanour: and that second branch of the statute says, that if any person shall maliciously and advisedly publish or affirm the king to be an heretic or a papist; or that he endeavours to introduce Popery, or maliciously and advisedly by writing, printing, preaching, or expressly speaking, publish utter, or declare any words, sentences, or other things, to stir up the people to hatred or dislike of the king's person, or the established government; then he is disabled to have or exercise any place or office, civil or military, and be liable to such further punishment, as by the common laws or statutes may be inflicted in such cases; by which, I take it, the meaning to be fine and imprisonment, or bodily punishment; but not the punishment that is appointed to the judgment of high-treason or loss of life or member.

Att. Gen. My lord, I humbly crave your lordship's judgment whether this shall be permitted, that the counsel should enter into such a discourse as this. The question, I take it,

that your lordship appointed to be spoke to, is, whether this indictment as to form be sufficient for your lordship to give judgment upon? But Mr. Pollexfen is going into that which is a far greater point; whether these words abstracted from all their *innuendos* are treason, or no? My lord, the prisoner did not move that in arrest of judgment; and whether your lordship expects any such thing should be spoken unto, that was not moved or stirred by him, I must submit it to you. The jury found that these words were spoken with an intent to depose the king. Whether that your lordship will permit it to be argued, whether such words are treason in their own nature, is of quite another consideration.

Mr. Pollexfen. Good Mr. Attorney, Pray spare us. We come to shew that if in their nature they import not matter of treason, then the *innuendos* cannot help them, so as to make treason of them.

Att. Gen. Truly, my lord, I did not understand that it was your lordship's pleasure the counsel should have liberty to argue any such thing, as whether the words be treason, being found to be spoken with such an intention; but whether these *innuendos* have sufficiently been laid to maintain the indictment in point of form.

Mr. Pollexfen. If you leave out the words *innuendo'd*, then sure we may speak to the words themselves.

L. C. J. Look you, Mr. Attorney, either you mistake Mr. Pollexfen, or I do: For I take it, that he is entering into the consideration of these words as they are laid in the indictment; that are uncertainly laid, so as that they will not support an indictment of treason.

Att. Gen. My lord, he is arguing, that if they were spoken of the king, yet they would not be treason.

L. C. J. Will he say so? I dare say, he will not.

Att. Gen. He is arguing upon the statute, what words are treason, though spoken of the king, and what not; which I take it, is not the question now.

Sol. Gen. My lord, we humbly offer it to your lordship, whether it be according to your lordship's rule and intention, that he was to argue whether the words were treason; or only whether the form of the indictment, as to the *innuendos*, was good and sufficient.

L. C. J. Taking the words to be sufficiently set forth in the indictment, and found by the jury to be spoken of the king, especially the last words: Do you think we would suffer that question to be debated, whether they were treason or not? God forbid. I will not sit here to hear that question at all so much as made or put, I'll assure you. I took him not to argue at all any thing that way.

Mr. Pollexfen. Pray, my lord, hear me; I am going only to this; for I would not offer any thing beyond what is fit for me to offer, and for the court to hear: But this we say, that the words, the effective words, are not

* See vol. 3, p. 359, of this Collection.

so sufficiently laid in this indictment, as to make them amount to treason, I am only going to that.

L. C. J. Ay; that is the stinging part of the question, and so I understood him before.

Mr. Pollexfen. My lord, I only mentioned that of the statute, that there were two sorts of words there taken notice of; to shew that I thought these words were not within that branch that is said to be treason.

L. C. J. Well, go on.

Mr. Pollexfen. I will keep myself to the first clause of the statute; for what I mean, is this, That if these words come not within that first branch, which makes the treason, then your lordship cannot give judgment upon this indictment. For though, my lord, it may be these words are extraordinary ill, and being spoken or preached, may have an ill sense or meaning with them; yet I would observe to your lordship, there are other penalties and punishments provided for some sort of words, than there are for others.

But then, my lord, let us consider the words of the first branch of this statute. If so be any person does compass the death, or bodily restraint, or other harm to the king's person, or to deprive the king, or levy war against the king, &c. and this compassing and imagination does express by printing, writing, preaching, or malicious and advised speaking, they shall suffer judgment of high-treason. Now then, all that I would come to, is this, that this same treasonable printing, writing, preaching, or speaking, must be of such words as shall intend the death, bodily hurt, restraint, or imprisonment of the king's person, or levying of war.

My lord, having said this, the next thing is to come to the words themselves, and to take them as they are in themselves, without the *innuendo*, and see what the natural sense of them will be: And we will take them in the natural order as they are laid in the very indictment, and found by the jury.

The first passage of them is, 'quod Populus,' &c. (meaning the people of England, the subjects of our lord the king) 'made a flocking to the king (meaning our said lord the king that now is) to cure the king's evil, which he could not do; but we are they to whom they should come, being Priests and Prophets, that by our prayers can heal the griefs of the people.' Now, my lord, with humble submission, it is plain that as to these words, they have not in themselves any tendency to treason at all, whatsoever reflection they may make upon the king; they are the words of a Priest magnifying his own office, and his power with God Almighty; but they do not come up (I think) to this crime, for which the prisoner at the bar stands accused.

Then the next words that follow, are these, 'Nos habuimus nunc duos iniquos Reges insimul, qui permisissent Romanam superstitionem intrare in eorum conspectu, &c. and who can be likened to none but wicked Je-

'roboam.' My lord, these, I do acknowledge, are very wicked and bad words, especially if they must be applied, as the indictment has set them forth, to the late king, and his present majesty: Yet these very words (under favour) will not amount to the charge of high treason. They deserve very severe punishment; but they seem not to come up to any thing of an intention, or compassing, or designing the death, bodily hurt, or imprisonment of the king; or the levying war against him. This I speak, my lord, with submission, and I believe your lordship may be of the same mind.

But then, my lord, the next words that follow, are the words (I suppose) that are relied upon, to make out this accusation; 'Quod si ipsi starent ad fundamentalia, ipse non timebat, &c. That they should overcome their enemies, as in former times, with rams-horns, broken platters, and a stone in a sling.' These, my lord, seem to be the words in which the crime consists. Now, my lord, if these words in themselves are so uncertain, or such as do not tend or relate to the present king, or the present government, to stir up sedition or rebellion against them, then they will not be treason, because they do not so relate.

Now, my lord, these words, if you take them alone without the former clause, 'Nos habuimus nunc duos iniquos Reges insimul,' &c. closed with the *innuendo*, that he meant the late king, and this, I see not possibly how they can be said to relate to the present king and government, to make them treason within this act. Which way can it be? 'If they would stand to their principles, they should overcome their enemies.' How can they be intended to be meant of the king, and his loyal subjects? Then let us consider the words that go afore, whether they will help any thing or no; 'habuimus nunc duos iniquos Reges insimul'. These words of themselves, stripped of the *innuendo*, do not express what two kings are meant by them. If you take the words strictly, that 'We have had two kings now together, insimul,' as the word signifies, it must be two kings at one and the same time: But take it in the English phrase (as perhaps they would have it turned into English), 'We have had now two wicked kings together,' (meaning the late blessed martyr, and his now majesty), then it must be, we have had now two kings successively; but it is a strange thing to render such Latin into such English, which seems to be, in the nature of the words themselves, such as will bear no such sense or construction as that. And then, the 'qui permisissent Romanam superstitionem intrare in eorum conspectu;' if the first words do not in themselves express what kings were meant, these words that follow can give no manner of certainty to them at all: For here is not so much as any *innuendo*; nor can the words that follow them ('qui assimilari possunt,' &c. which can be likened to none but wicked Jeroboam) in any sort, shew any certainty to whom

the words are to be applied, or illustrate whom the speaker meant.

But now that which is the next clause, is the next clause of all; 'Sed si ipsi starent ad fundamentalia, &c.' 'Ipsi' in all ordinary construction of speech in all language, being coupled to the former words (and so I think the rule in the grammar is and will be read by my reasonable person that reads) must refer to the next antecedent. And then, who are they that are last spoken of? It must be the two wicked kings, let them be who they will, that were meant by those wicked kings; for there is no other person that does intervene, as spoken of, to whom they should be referred. The former words are spoken in the first person, and plural number: We have had, speaking in the name of himself, and they that were his auditors, and then to come with *ipsi*, after he had mentioned two kings, who had suffered Popery to come in, and were to be likened to Jeroboam, changes the form of the whole speech. It should seem, according as it is hid in the indictment, to run thus, and then I desire your lordship to consider the sense and grammar of them; 'We had now two wicked kings together, who have suffered Popery to come under their noses, we cannot compare them to any but wicked Jeroboam: And if they would stand to their principles, then he did not doubt but they should overcome their enemies, as in former times, &c.' Why then, if *ipsi*, according to grammar, and ordinary reading, being a relative, must refer to that which went last before, there is nothing in all the sentence before, but, We, that is, he and the people that heard him, and the two kings that he spoke of; and the two kings being last spoke of, it must in all grammar, I say, and sense, be understood of the kings. Then let us see, what sense we can make of it; 'We have had two wicked kings, that have permitted popery under their noses, that they can be compared to none but wicked Jeroboam: and if they stand to their principles, he did not fear but they (the kings) should overcome their enemies.' In all ordinary and fair reckoning, I cannot see how they can mean it, but the *ipsi* must refer to the *reges*; and the 'Eorum fundamentalia, ipsorum regum,' if you take these words, as they do lie; and if they have any sense or meaning at all in them, this is the proper and natural sense and meaning of them.

For it is pretty hard to apply the 'Nos habemus nunc duos iniquos Reges,' to the 'ipsi qui starent ad fundamentalia.' In all probability he spoke it thus, if it continued on in a discourse, which I can say nothing to, being only to speak to the words as they are hid in the indictment, 'And if we do but stand to our principles, I do not doubt but we shall overcome our enemies as formerly,' &c. But *ipsi* is a variation of the person, and, according to all grammatical construction, we know how it must be expounded. The other seems to be the natural reading of the words; but the in-

dictment has not pursued them, but has made them instead of that, to be quite nonsense, supposing them to have been spoken as the jury have found them.

But, my lord, if they do not well bear that sense, which I think they should properly and naturally bear, if they had been right laid, the question then, whether we can make these words, as they are laid, to bear any such sense, as the king's counsel, by their *innuendos*, have placed upon them? that is, if they, meaning his auditors; 'should stand to their principles, then they should overcome their enemies,' meaning the king and his loyal subjects. Truly, my lord, I cannot see how that can be, how *ipsi* should be me; I and mine auditors should stand to their principles.

But setting that aside, come we then to the main words. 'He did not fear but they should overcome their enemies.' The great force of these words lies in the word enemies. What is meant by enemies? For all the rest without that, would not signify any great matter, with submission to your lordship, as I think: And therefore here comes the great burden, and that which is the sharp sting of all this indictment. And to make enemies to signify the king and his subjects, my lord, is a very wonderful *innuendo*, as I believe ever was attempted to be made. So it seems to me, with submission to your lordship; the word enemies itself is a word of so large comprehension, that it reaches to a great part of the world. God knows, mankind is so very unhappy, as that every one hath very many, and too many enemies. Who is not an enemy? A man scarce knows; it is well if he does. And this is a thing that's mighty hard, that so general a word should have so heinous a particular application.

There then rests the burden of the case, whether *inimicos* should signify the king and his loyal subjects. If in the natural grammar the former words of 'Ipsi starent ad fundamentalia,' be, as I have shewn, to be referred to the *duos Reges* as the last antecedent, then it must mean, that the *duos Reges* would overcome their enemies, and then there is no hurt in all these words, but whatsoever was spoken is very commendable, and very allowable: But if you would take it otherwise, I see not how it can be done without the greatest strain in the world of so general a word, to make *inimicos* mean the king and his subjects.

Now, my lord, let us see how they intend to help it out, and that is, by these *innuendos*. The nature of an *innuendo* hath been already opened to your lordship by Mr. Wallop. I shall not repeat any thing of that which was said before, for that I cannot take to be any service to the prisoner at the bar, to take up your lordship's time in repetitions. The books have been cited, and reason itself will direct to that; for must not a man be convicted by his own words, as well as punished for them? It is not, sure, the skill of the clerk to put in an *innuendo*, or of any one else, that shall be construed to make my words to have any other

sense, than I thatspake them intended them in. If the words are not clear, why then they cannot affect the auditory, so as to have any evil influence upon them, to incite them to sedition or rebellion; for sensible words must influence sensible men: But words that are insensible, can have no influence at all upon rational creatures. Then shall an *innuendo* make that an offence, without which it was not an offence; especially so great an offence, as that of high-treason? Surely not.

Besides, my lord, all our books are against making any such construction. Roll's Abr. 1. part 84. There is a whole bead-roll of them to prove, that *innuendos* will not help, where the words in themselves have any uncertainty in them. The bare setting down the words with *innuendos* are not an averment sufficient to maintain an action, or an indictment. The cases there are indeed upon actions of the case for words, which in reason are under the same rule.

For, my lord, there are two ways to apply words that are uncertain, to bring out the true intent and meaning of them, to whom they are to be applied; the one is by a *colloquium* precedent, and where there is a *colloquium* precedent of such matter as will lead in the sense of the words, which without it were not to be understood, there the laying that *colloquium* makes the words come to be sensible, and there is this reason for it, whenever that is done, the *colloquium* must come in evidence, and must be proved: But I never yet knew an *innuendo* offered to be proved. Another way is this, where words are laid in a declaration with an averment precedent to be spoken of such a person, then the words, with an *innuendo* after that averment, shew sufficiently what is meant by them. If so be scandalous words are spoken, as to say, 'Thy landlord, your brother, your master, your servant, your son, is' a 'thief,' or the like: In these cases the words in themselves do not express the man of whom the scandal is raised, but they give such a denomination of the man, that may by the hearers be sufficiently known. Why then, in that case, if in the declaration it is averred that the plaintiff was his landlord, was his brother, was his master, was his servant, was his son, and that these words were spoken of him, and thereby it comes to be made apparent to the court what is meant, and who is meant, that is well, and all that must be proved to the court upon evidence, or the action cannot be maintained. By such means as this it is made plain and demonstrable, that there can no doubt remain, either with the court or the jury, to whom the injury is done, and of whom the scandal is uttered. And these are the only two ways that ever I could observe were allowed to be sufficient to maintain any such action: And there the *innuendo* comes very properly in to assist the averment, or the *colloquium*.

But now, my lord, here in this case, here is nothing of that kind, but only a bare *innuendo* that such and such were meant, without either

a *colloquium* that there was a discourse concerning such and such persons, or an averment that the words were spoken of the persons.

My lord, I cannot tell what precedents they will offer to your lordship of former or latter times. We have had but very little time to look into it, and have not that recourse to the precedents on the crown's side that the king's counsel have. But, my lord, for precedents that may have past *sub silentio*; without having the question stirred, I suppose, will not be allowed by your lordship, and the court as precedents against us. But I think there will be no instance given, wherever any such thing came in question, that ever judgment was given against the defendant.

My lord, this seems to be the sense and nature of the words as they are laid in this indictment, stript of the *innuendos*, and your lordship knows what a case we have now before you. We are in the case of the life of a man, which is much favoured in law, and if there be any doubt or uncertainty, your lordship will lean rather towards the favourable side; and if, according to the rules of law, words to make men criminal shall not be strained, or forced beyond their plain, natural meaning, sure they shall not to make a man capitally so: For the greater the crime is, the greater consideration the court will have to see that there be no strained, forced constructions to bring the life of a man in danger: And therefore I humbly pray that judgment may be arrested.

Att. Gen. May it please your lordship, I am of counsel in this case for the king: and notwithstanding any thing that has been said, I do conceive, that there is high-treason well alleged in this indictment, of which the prisoner is found guilty against whom I must demand your judgment. My lord, there is a great difference in this matter; that is, whether the words are treason, as they were spoken by him, and whether or no this treason, admitting it to be treason, be well disclosed by this indictment: For, my lord, I think to preach in a public assembly, that 'we have had two wicked kings together, who have permitted Popery to come under their noses,' and then to go on with it to 'Stand to their principles' (for so the words are laid in this indictment) and they should overcome their enemies as 'in former times, with rams-horns, broken platters, and a stone in a sling,' is a very high aggravation of such words. And, my lord, if you remember the evidence, as I doubt not you do, it was all spoken in a public assembly, before 4 or 500 people, and they were spoken without any words intervening whatsoever. These were the only words that were spoken relating to this matter: So that these must carry their own pregnant sense with them of exciting the people to stand to their arms against the wicked kings, or else they are of no signification. And thus they are laid in the indictment, and found by the jury to be spoken positively to stir up the people against the king.

to depose him, and to raise rebellion within the kingdom. This, I say, is positively affirmed, and laid down in the indictment. But, now, whether or no these words are in point of form said, that the court must understand them with relation to the king and government, and as an argument to stir up the people, is the question: For if they be so, then they are well laid to support this conviction of treason.

Now for that, my lord, I would only first say, they must either import treason in themselves, or they do not. If they do import treason in themselves, no addition of the person concerning whom they were spoken, as that they were spoken of the king, will mend the case, or make it better. Though it be laid never so much to be spoken of the king, and that be never so much averred, yet if it be not spoken to disturb the government, or to raise rebellion and insurrection, the adding a thousand times that it was spoken 'de Domino Rege,' would not avail. They confess they have no precedents to produce, and I believe truly they have not: And so they only go by way of argument, taken from actions upon the case for words: Whereas there is a great disparity in the case between actions of the case for words, and informations or indictments for words that are criminal or capital; and I know if they will look into the precedents that are in print, in the entries, and in the reports of informations or indictments, they will find it is never, or very seldom, or rarely done, it being looked upon as to no purpose, or as perfect surplage, to lay that such or such a thing was spoken, 'De Domino Rege de Gubernatione.' But in criminal cases, and not capital, it is commonly thus, of which there are multitudes of instances: That such a one being of an ill mind, to raise commotion in the kingdom, and stir up sedition, spoke these and these words. This was the constant form in your lordship's time, as your lordship can remember in the informations that were, or the indictments of persons that had spoken words relating to the duke of York. I can remember when your lordship used to say, 'Never consult me, but follow the ancient precedents,' which I dare undertake to say are all thus, and so I shall shew by and by, it has been in indictments of treason: And though, perhaps, one or two might at any time be otherwise drawn (of which yet we can find none), yet, this hath been the constant form for any thing that I can find, and it is of very great consequence to say at this time of day, that what has for hundreds of years together been the constant practice, and way of indictments and informations, is not good, it were to turn all things topsy turvy, and to make great confusion in prosecutions, and the practice of the law, in criminal matters. I shall therefore shew your lordship that here is such a certainty as the law does require and as is usually practised, and that the words in themselves are such, that they must have relation to what we have laid down in the indictment, and to nothing else.

But then they do lay down this for a ground, which I think I may grant them very easily, and yet it will signify nothing to what they mean; I would wipe off all these innuendos, leave them out of the case, for I never expect any help from them at all; and then I do agree that an innuendo, without a strong, urgent averment that the people which hear the words spoke, and the court that are to pass judgment upon them, shall say forcibly appears from the words themselves, who was meant, and what was meant, will not support the indictment, nor has the verdict fortified it at all.

But they tell you in actions of the case, if John-a-Stiles be called a bankrupt, if he will bring an action against the party that spoke these words, he must aver and affirm, that they were spoken 'de Querente,' of that particular person that doth bring the action; and so it is, the law is so, and the reason's plain, because there are many John-a-Stiles's perhaps, and the plaintiff that brings the action is but one; and therefore, if he does not shew that the discourse was of that John-a-Stiles, who brings the action, it is uncertain who was meant, and cannot be supported by a bare innuendo. But I take it in these cases, wherever the precedent averment is necessary, there must be a distinct proof of that averment, as if John-a-Stiles be called bankrupt (in the case I mentioned) and he brings his action, and avers the discourse to be *de Querente*; and he calls witnesses, who prove the words to be spoken, that the defendant did say John-a-Stiles was a bankrupt; and the court demands this question of the witnesses, but do you know what John-a-Stiles the defendant meant? and he shall answer, no, we only heard the party say John-a-Stiles is a bankrupt: It is apparent that evidence will not support the action, for that averment must be proved, that he that brings the action was intended, and that there was a discourse concerning him. There must be, I say, the proof of the averment to make up that certainty of the application of the words, which the law requires. And therefore in what case soever it be, if the words be the only proof, or if the words carry sufficient in themselves to shew of whom they were spoken, it is ridiculous to say there must be an averment that they were of such a one; because words cannot prove themselves.

For, my lord, wherever words by strong and pregnant intendment do carry slander, and of such a particular person, there the books are express that there needs no averment, that they were spoken of such a one; as in the case of Fleetwood and Curle, Hob. 267, which is a rule for all cases upon actions of the case for words. Sir Miles Fleetwood being receiver of the Court of Wards, brought an action of the case against Curle, for that he (having speech with one Whorewood) did speak of the plaintiff these words, Mr. Deceiver (*Innuendo* the plaintiff) had deceived and cozened the king, &c. He did there alledge the words to be

spoken of the plaintiff. In that case, upon Not Guilty pleaded, it was found for the plaintiff, and it was moved in arrest of judgment, that it did not appear by the words spoken, that they were spoken of the plaintiff: for, Mr. Deceiver had no propriety to that purpose; and the *Innuendo* would not make it certain, when it appeared to the court, that the words would bear no certainty, though he did alledge the words to be spoken of the plaintiff in that case; because there may be many deceivers, or receivers, and he must prove it particularly spoken of himself. But then the book is express, that after a verdict, though he did not aver it was spoken of him in his office, yet judgment should be given for the plaintiff, because there is a pregnant, violent, certain sense, that may lead the court and hearers to take it so to be meant, and cannot be otherwise imagined; and therefore the court will not imagine it. As if a man spoke of an attorney, that he is a knave, and spoke not of his practice; why then the action won't lie: but if he be named an attorney in the declaration, and the hearers knew him to be an attorney; in that case, it was ruled not necessary to have any such averment; for the words themselves did import it in the original case, that it was spoken of him in his office, by the word deceiver; that having an allusion and ironical resemblance to the name of his office; and in the other case, because the hearers knew him to be an attorney.

So, my lord, upon these grounds, judgments have gone in those cases, which they themselves do so much rely upon; actions for the case for words; wherever the words import pregnantly such a sense, there does not need such an averment. But I shall shew that in informations and indictments this cannot be necessary, and the reason seems plain: for here, as we have laid it, and as the truth is, we all know it, there is but one king and one government; and when words are laid to be spoken to excite commotions, or rebellions, or insurrections, they are but external declarations of the mind; the treason that he is charged with, that is inward, it is the thoughts that are treason. But it is true, the laying that alone, that he did so compass and imagine, without some outward declaration would not be good in an indictment, any more than the outward declaration without the inward intention. But the treason is, that he did imagine to raise rebellion and war within the kingdom, to stir up the people against the king, and to depose the king, and bring him to death, and deprive him of his crown and dignity; and then goes the indictment on, and says, to the end that he might effect this treason, he spoke such and such words, which by that new law (that Mr. Pollexfen mentioned) will amount to treason in speaking, as well as writing. I say, it is positively charged in the indictment, that he did thus and thus speak to stir up the people to rebellion and war against the king; and then come the words. If indeed any collateral

words be spoken, which in their own nature import not a tendency to incite and stir up the people against the king, it would be naught with *innuendos*; and so it would be, if there were twenty averments. But I think that this is as strong an averment as can be (what we all know to be true), that there is but one king, and one government. And then he spoke the words in a public assembly, 'We have had so and so, and if they would do so and so;' which carries forcibly and pregnantly this sense, that it cannot be intended to be spoken against any one else, but against the king and the government; especially now after the verdict, when the jury find that he did all this to raise up the people against the king. All the discourse is in itself pregnantly and forcibly tending that way.

My lord, we are now upon the form of the indictment. Put the case there are many idle expressions in it, as I may grant there are; yet, if the greatest part import treason, sedition and rebellion, and are laid to be done to incite the people to rebellion, and so found by the jury; then the indictment is well laid, and judgment must be given for the king. The first words are highly derogatory to the king, and must be understood to be spoke of him. If the prisoner had thought these words would not have been treason, if he had demurred in the case, by that, as the jury find it now here, he would have confessed it to have been spoken of the king; for it is said, he spoke it to the people, and he spoke it of the people of England; and to say that *Populus* may mean the king of France's people, as Mr. Wallop would have it, certainly no man can think that: For when he speaks in English, to an English auditory in a public assembly, That the people make a flocking to the king, how can that king mean the king of France? and how can the word people, by any intendment, but a very foreign and strange one, be interpreted to mean that the French people should come over hither, for to be cured of the king's evil, when (as he himself says) the French king claims such a power? No, That does fix it particularly upon our own king.

Pray, let us consider then, what possibly can the intendment of these words be, that follow, 'We have had now two wicked kings together?' As for that objection of the word *insimul*, that it means together at one time, that sure can have very little in it, it being to be taken according to common understanding in our dialect; and in English, to say we have had now two wicked kings together, every one will understand it, we had them one after another, because we have but one king at a time.

And then, my lord, if the latter words were left out, with submission, I conceive upon the authorities that are in our books, these words would have been treason upon the statute of 25 Edw. 3. For, my lord, in a public assembly of people, which is an unlawful assembly as this was, to speak such words of the king

would be treason. For put the case; he had collected a number of armed men at Hounslow Heath, and there exhorted them to stand together; that the king was a wicked prince, and had misgoverned himself in the administration of the government; I think that would be treason within the law. By the new statute, to say the king is a Papist, plainly is a *Præsumptio*; but to say the king is a wicked king, and has misgoverned himself in introducing Popery; that is a step further than what the act makes a *Præsumptio*; for these are words to stir up the people against the king, especially preached in a public assembly.

Then, my lord, you will take all these words together; first, after he had drawn away that great authority, and great power that the God of Heaven hath given to the king, in curing the king's evil, and declared him to be a wicked prince, by suffering Popery to come under his nose, and that he was to be compared to none but wicked Jeroboam; and then, to exhort the people to stand to their principles, and he did not doubt, but they should overcome their enemies, what can be plainer treason? For it is plain, that he did speak to the people, to the congregation; and that can never be understood otherwise by the court, nor by the hearers. For that interpretation, that the king should overcome his enemies, it is foreign and ridiculous, and not to be imagined by any body, that has either sense or reason about them.

But, my lord, I shall leave all this (the jury having now found it) to show what precedents we could prepare for your lordship; how things of this nature have been used to be drawn: For we have made, for the little time we had, as good a search as we can; and I have found several: And indeed, I cannot find one otherwise, than as this is. And for late informations and indictments, if you examine the clerks that now are, they will tell you, that there is not one otherwise: But that if it be said to be done with an intent to raise rebellion or war against the king, or sedition, or the like; and then say, he spoke such and such words, that is sufficient. But I will shew your lordships some antienter precedents, some few which will shew how the practice was heretofore.

The first is 3 H. 8. Rot. 17. in the Indictment against my lord Grey of high-treason; after the general charge of machinating the destruction and death of the king, and subversion of the government; it is said there, that *proditorie* he did speak these words, 'That the king's grace should be driven out of the realm, and the prince's grace should never succeed.' And it is not averred that these words were spoken of the king, and of the prince, nor was there any need it should be averred; for the words plainly import they were spoken of them; and the laying it, that it was to raise sedition within the realm, was sufficient to make them high-treason.

Then the next is my lord Cobham's Case,

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2 Jac. Sessioe 1ma; for it is one of the great records that lie in the chest, amongst the Arcaana. But by the book in the office, we have a copy of it; but there is the record in the chest, and there it is, 'Posteaque 12 die Junii, ultimo præterit, ac diversis aliis diebus et vicibus, tam postea quam antea, dixerunt, &c.' (for there are other defendants), *proditorie* 'there will be no good till the king' (meaning our sovereign lord the king) 'and all his cubbes,' (meaning the children of our said lord the king) 'were quite taken away, &c.' I leave out the general charge of the machination and contriving of the death of the king; but to the intent to effect that treason, such words were spoken without any averment, that they were spoken 'de rege.' There was no mention of the progeny of the king before; or that the cubbs that were spoken of were the king's children; neither would the words 'regalis progenies' answer the English word 'cubbs;' which was a word abusively mentioned by him. But in that case it was held to be a good indictment; and sir Walter Raleigh was condemned upon it.*

Another is Williams's Case;† and that's very like our case in the first part; that is, the first words insisted upon are laid positively to be spoken of king James, by an *innuendo*. Pasch. 17 Jac. Rot. 40, there, after the 'Machinans et intendens, &c.' it is laid, that he, such a day of September, 'proditorie devisavit' a treasonable book called Balaam's Ass; wherein there are such and such passages applied to the king by the *innuendo*. There is nothing said of that, to be spoken of the king, 'de rege;' but the words of the book carrying their own plain sense and meaning in them, that they must be intended of the king, and the government, that was sufficient to maintain the indictment; and he was executed. The *innuendos* are not material. If it can have no other sense, that is enough to maintain the indictment.

My lord, in Fitzharris's Case,§ which your lordship and all the court remember; part of the libel related to the duke of York, by the letters D. of Y. and sometimes only called by the letter Y, and the king himself by the letters Ch. And the *innuendo* is, meaning our sovereign lord the king; and there is nothing averred in that case; and indeed there can be nothing averred; for by the import of the thing it must have that sense.

Colonel Sidney's Case,|| my lord, you'll

* See vol. 2, p. 1, of this Collection.

† See vol. 2, p. 1085. In Shower's Report of this Case of Rosewell, the Chief Justice is represented to have said to the king's counsel, in Williams's Case, "the book was dedicated to the king; and, I will tell you, that if you had laid it that he spoke those words of the king, and you had proved only the words, I would have left it to the jury whether they believed that he spoke the words of the king."

§ See vol. 8, p. 338. || See vol. 9, p. 817.

find to be the same: there's no averment; but the words of the libel are brought in with an *innuendo*.

And you have another indictment at Salop, 31 Car 2. One Pitt was indicted of high-treason, and convicted for these words, 'If the king should hang or banish any of the papists, his throat shall be cut.' This is laid in the same form in the indictment, as we have it here in our case. If you please it may be read that he did 'advise, proditorie,' speak such and such words, 'if the king,' meaning our sovereign lord the king, without any previous *discourse* of the king, or saying it was spoken *de rege*, 'should hang or banish any of the papists' (*quasdam personas mala dispositas, &c.*) *innuendo* 'his throat shall be cut.' He was convicted, I say, and I think was executed, though I cannot directly tell that: but this is the record of his conviction.

So I take it, it is, with submission, that the precedents go all along, both in criminals that are not capitals, in indictments and informations; and also in indictments for high treason. The charging the words to be spoken to stir up sedition and rebellion within the kingdom, without the help of any averment whatsoever, is sufficient; that is a strong implication that they are spoken of the king and government.

And, my lord, as to these words they could not be laid otherwise, than they are in this indictment; for this is all that the persons that are the witnesses swore was spoken. Your lordship remembers it, it was so, when they were here, they could swear no more. So that to have averred that he spoke to them 'de rege et gubernatione,' would have put a proof upon us, that our witnesses would not have come up to. We must have proved a discourse of the king and government, and a swearing of the words would not have been a proof of that. The jury has found that this was done to stir up sedition, and to levy war; therefore, I conceive, according to the constant course of the precedents, there is no need of any averment; but the words are well laid, and well proved, and he well convicted.

To say, that enemies is a very general word, and that we have enemies of all sorts, and that therefore a bare *innuendo* cannot make it mean one more than another, is odd in this case: for I would fain have any man assign me what sort of enemies he could be thought to mean. In such a discourse he could not mean spiritual enemies; because the instruments hat they were to be destroyed with, were carnal weapons, broken pitchers, and a stone in a sling. These are not fit for overcoming spiritual enemies; but they must be such enemies as can be destroyed by such instruments, carnal enemies that are to be vanquished, by outward force. And then what enemies can such a public, unlawful assembly have, but the government? All that are of their own side and party are none of their enemies. And it cannot be taken distributively, that every particular man has his enemy, that is a foreign understanding; but

when he speaks to the congregation in a conventicle: that they should overcome their enemies, being so unlawfully assembled, that must be the government. And had he not told you before, who were the enemies that he plainly meant? He had said, that the king was a wicked man; and according as he represented him, an enemy to God and man by introducing Popery into the kingdom. And you are to consider the time when, and the place where these words were spoken. We know that in these conventicles it has been the constant cry, that we should be all over-run with Popery, and the like: and therefore, that is considerable in the case.

My lord, I make a great difference between words spoken in private, and words spoken in a great and large assembly. It is the same thing as if it had been spoken at the head of an army; especially when people meet contrary to the laws of the land in defiance of the government, and gather together in such great multitudes; and have such discourses and opinions broached amongst them. I cannot see truly, how it is possible to have been better laid, being sworn directly as it is laid; and especially being found to be all spoken to disturb the government, and to raise sedition and rebellion. Therefore I must submit it to your lordship; and pray your judgment against the prisoner for the king.

Sol. Gen. My lord, I beg leave to add one word on the same side. That which I shall apply myself to, is to shew that this is a very good indictment, in the form of the indictment, and that upon this matter which the prisoner is proceeded against; for it could not be better.

My lord, the fact charged upon the prisoner is as Mr. Attorney has opened. These words were spoken in a conventicle, 'The people make a flocking to the king to cure the king's evil, which he cannot do,' &c. These are the words upon which the prisoner was committed: these are the words upon which he is proceeded against; and these are the words which have been found against him. And, my lord, more words than these are not alleged to be spoken by the prisoner, nor proved to be spoken by him at his trial upon this indictment. Therefore, if these words are high-treason, this is a good indictment in substance, if it proves so too in form. And whether these words are not themselves treason, I shall not now speak, but shall only go to shew, as I said, that it is a good indictment in point of form. For these words are his crime, as spoken in that conventicle; and the only crime of which he was accused, and of which he is found guilty.

Now, my lord, let us see how the indictment is. He is charged with compassing, hatching, and intending to raise rebellion, and levy war in the kingdom, and to depose the king; and to bring the king to destruction: that is the charge of high treason, in the kind of it. Now, as that is the charge, it is of absolute necessity to allege an overt-act,

which must be proved too ; and if there be not an overt-act, the indictment is naught. Well, then, the treason is compassing the death of the king, and intending to raise sedition, and levy war. What is the overt-act charged upon him? Why, to bring such his wicked purposes to pass, he did traiterously speak, publish, and utter [the words of the act of parliament, in 13 Car. 2.] in an unlawful assembly, in the presence of divers of the king's subjects, these words that I repeated before to your lordship.

Now, my lord, I ask ; are these words treason in themselves, or are they not? If they are treason of themselves, then the indictment is certainly good in form, without saying, that he spoke the words of the king, or of the people of England, subjects of the king. For either they do import that of themselves, or they do not. If they do import it of themselves, the saying that he did speak them of the king, and of the people, would have been impertinent and idle, because it is a thing manifestly plain of itself. If they do not import this of themselves ; then had it been charged, that they were spoken of the king and of the people, this must have been proved.

To go on then, my lord : if it must have been proved, it must have been proved either by the words themselves, or by something else. If it were to be proved by the words themselves ; why then it returns to the old question, and we need not alledge it. If it were to be proved by something else, then the fault is not in the indictment, but it must be want of other matter than what our witnesses would prove ; which, I am sure, would have been a very great fault in us to have drawn upon ourselves. But if the words import of themselves the meaning to be of the king, and of the people of England ; then it is plain they make the treason of themselves, and there requires no averment.

As now, for instance, my lord, to change the words a little, to illustrate the case ; as suppose it had been charged in the indictment, that to bring his wicked purposes forth to effect he did speak these words in such an assembly, Precouse to yourselves arms, and make yourselves ready by such a day, and go to Whitehall, and kill the king ; would any man have said here, that it was necessary that we should say in the indictment that he 'dixit de populo, vel de Rege,' so and so? No, certainly, it is not necessary, because the words plainly import their own meaning.

So here in this case ; if the words themselves necessarily import to be spoken of the king, it is as impertinent here to say, 'dixit de Rege, dixit de populo,' as in that case : because it is no more than what they necessarily and naturally import of themselves : which shows that this averment, that they would have, is absolutely immaterial ; and, if it had been charged, would have required some other proof than the words themselves. And so the fault cannot be, as they would alledge, in the form of the indictment ; but in the substance of the

words, that they do not import in themselves such a meaning. And therefore, I think, with submission, I have maintained the form of this indictment beyond all contradiction ; and notwithstanding all their objections, it is a very good form without the words 'dixit de rege, vel de populo.'

As Mr. Attorney said, it is necessary, my lord, in actions on the case for slander, to aver 'dixit de querente,' because he must ascertain the person of whom the words are spoken, to be the very plaintiff ; for there may be divers of the same name : and you must always, upon a record, ascertain the person, to entitle the plaintiff to the action : but where words are pregnant, and full of themselves, there needs no averment in such a case ; which without such pregnancy would be necessary, and if not done, the action would fail. As in that case that was cited by Mr. Attorney of sir Miles Fleetwood ; if it had been that the words were sir Miles Fleetwood has deceived the king, it would not have borne an action, unless it had been averred to have been spoken of him as of cozening the king in his office : because generally to say a man has cozened the king, will not bear an action, it is so loose. But when he says, Mr. Deceiver ; the ironicalness of that shall not excuse him, but rather demonstrate both who, and what he meant ; that it shall be applied to him, as doing it in his office. And, being so, it must necessarily be understood to be a very great slander ; and then it needs no averment. So says the book.

So that where words are plain and full, even in an action on the case, there requires no averment : but in indictments, they being for offences against the government, the very ancient forms used will govern the case, as well as the reason and nature of the thing ; that no one can be meant, by such sort of words, but the king and the government : and for that I rely upon the precedents that have been cited, that the forms were always thus. The precedents, with humble submission, where the overt act laid in the indictment, is by words spoken, that it is said, 'dixit de Domino Rege,' &c. There is not one that does ever carry it so, but the forms are constantly in the same manner with this that is now before your lordship, without such averment, as carrying plain surplisage to aver that which the words necessarily import.

To say, my lord, in this case, as we hear it objected on the other side, That these forms passed 'sub silentio,' and no such objection was ever made, I say, that is no objection to our indictment : for the argument sure turns the other way ; because the forms have been constantly in this manner that ours is, therefore it is assigned, that what they offer, is no objection at all ; for, doubtless, in so long a tract of time, when so many learned men sat on the bench, and so many learned of the king's counsel attended the king's courts, and so many persons have been indicted, tried, and suffered upon such indictments, who would have saved

their lives, no doubt if they could, by making such advantage of such an exception; that is a strong argument, that it was never thought an exception. So that, besides the reason of the thing, the precedents are all with us, which hath always been accounted a good argument.

My lord, a great many of us remember the indictments of latter times: particularly that of colonel Sidney: though there is another overt-act laid in that indictment too, yet that is nothing to this case. If there be but one overt-act laid in the indictment, it must be proved by two witnesses; but if there be several overt-acts laid in the indictment, and one is proved by one witness, and the other by another witness, that is sufficient to maintain the indictment. In Mr. Sidney's case there was to one fact but one witness; and therefore it was necessary to lay another overt-act, which was proved by other witnesses. And one overt-act comes to this point that is now in question before your lordship. It is in this form directly without any averment that the words were spoke or written 'de Rege or de Regimine,' but that the book contained so and so: and the thing itself speaks itself of whom it was meant. If therefore the words in that case, being proved, were necessarily to be applied to the government of England, there need no averment: No more does there here.

My lord, not to trouble your lordship further in so plain a case, the precedents being thus, and it being known to be the constant practice in point of form, I would fain know what they would have had us done. The witnesses swear these are the words, and there are no more; how then can we frame a better indictment, than upon the words that they swear were spoken? My lord, we pray your judgment for the king.

L. C. J. Well, have you done on both sides?

Mr. Attorney. Yes, my lord.

L. C. J. Truly for my part, I think this is a case of great consequence on the one side, and on the other. I hear it is said there are abundance of precedents in the case, some have been mentioned, and it is necessary we should look upon these precedents, before we deliver any absolute opinion. But, truly I must say, Mr. Attorney's precedents have with me very little weight. And I must differ from Mr. Attorney in another thing: for if in case the last words were out of the case, of 'standing to their principles, and overcoming their enemies,' do you think, that because it is said in the fore part of the indictment that he intended the death of the king, and to raise rebellion, and therefore said, there were two wicked kings who suffered Popery under their noses, and were to be likened to Jeroboam; that that would be a good indictment for high treason? Then it were plain the act of parliament, 13 Car. 2. was made to no purpose. For though I doubt not in the least, words may be an overt-act of high-treason, in compassing the death of the king, upon the stat. of 25 Edw. 3. I make no difficulty in the world of that: so was my

lord Cobham's case, and so were the cases in Harry the eighth's time, 'We will drive the king out of England,' or any thing of that nature: I say, that would be an overt-act sufficient to bring a man within the compass of the statute of 25 Edw. 3, because these are express words tending to the death and destruction of the king, the deposing him and depriving him; and they call him the king. But if a man comes and says, That such a one, with a purpose and intent to destroy the king, said these words, That the king could not cure the king's evil; that's not such an overt-act as to make good an indictment of high-treason. And to say, that the king introduces Popery under his nose into the kingdom; why it is a very high crime, but it is prescribed by the act of parliament to be prosecuted only as a misdemeanour, and punished by *Præmunire*. If you look into that statute, you will find which way the words shall have a tendency, that are to convict a man of treason; that is, that tend to the imprisonment, bodily harm, death or destruction of the king, or raising insurrection, and rebellion: or levying war within the kingdom, that is high-treason. But words that do not necessarily tend to any such thing; as to say the king is a Papist, introduces Popery, is popishly affected, phrases that some people delight in: that has a peculiar punishment appointed to it by this act. And this is all taken care of, to shew the judges how they should proceed, being careful of leaving it loose, in so great a case as high-treason. And the parliament seems to be the more careful in it, because they make the treasonable words such an offence, during the king's life only. Now, as Mr. Solicitor puts the case, by way of illustration, in other words; I make no difficulty, but to bid men prepare arms, and go to Whitehall, and kill the king, would be rank downright treason. Would any man in the world doubt to aver, that that were an overt-act? No man living would. But if I will say, that to compass and imagine the king's death, he bid them rise up and go to Whitehall, and they should overcome their enemies, does that import the king? There is no necessity of that. The king cannot be said to be an enemy, unless it be plainly declared by the party himself who he meant. And then to say, how could it be made better, no doubt of it, it might easily be made better if it had been considered of. For if you had come and averred, that these words were spoken concerning the king and the people of England, certainly it would have made it more certain. I do not bind myself now in my opinion, by what I now tell you; but I am only breaking the matter. If you had said, that he said, if we will stand to our principles, we shall destroy them, I think it had made the case stronger ten times; but you have not so done. Indeed, I am not so fond in my imagination, as the counsel for the prisoner seem to be; that we have had two wicked kings together, who have suffered Popery to come under their noses; that therefore we must run it up

king Ethelbert, and I do not know who; or that plainly in common English speaking, mean two kings successively; and it must be made a strange, forced construction, if we should interpret it, that he did not speak these words of the late blessed Martyr, and his present majesty. And because enemies is in the plural number, therefore to make it nonsense, because one is destroyed, if the words had been well laid, as they might, therefore it could have no relation to him that was left, I say, would make a strange forced construction. That might be well enough, if the words had been properly laid. But when you come to speak of enemies, *innuendo*, the king and his subjects? how can that possibly be? For you had talked of nobody before that they are said to have a displeasure to; and therefore, without saying that the king is an enemy, to say, 'Stand to your principles, and you shall destroy your enemies,' *innuendo*, the king, is, I doubt, to stretch it a little too far. But whereas I have put the words, how I think they should have been laid; says Mr. Solicitor, The truth is, they were not so spoken as you would have them laid, but they are laid as they were spoken, and as they were sworn; and that is a point of fact to be left to the jury, whether they aimed at the king and government, or not. Do you think that an answer? For it would be the same argument in an action of the case for words: Where it is plain it must be 'dixit de querente,' you do so and so. My declaration must aver it, and I must prove it too. If I do not say it, though I prove it, that will not maintain the action: if I do say it, and not prove it, it will not maintain the declaration; all is naught: and what is there more in this case? if you had said it, that would have directed the jury plainly, upon finding the words as laid in the indictment, to have found what was the intention of the party by these words. These are things (I must confess) that wonderfully weigh with me. It is in a case of capital offence, where the life of a man is concerned. If the precedents have all gone so, there is some weight in that: but if the precedents be only such as you have spoken of, words directly telling who is meant, they have no manner of likeness to the words in this indictment, because there they could never import any thing else.

In the next place, I am stumbled at another thing, Mr. Attorney, and that is, the difference of the persons in one part of the words, and the other. You have begun in the first person plural, 'We have had two wicked kings together,' and as the Latin words are, 'Nos habuimus nunc duos iniquos Reges insimul,' but afterwards you say, and if they, *ipsi*, 'will stand to their principles, he did not doubt but they should overcome their enemies.' It had been best to have laid them, as (certainly in common understanding) they must be believed to be spoken, 'If you or we will stand to our principles;' and then the very *innuendo* would have been more sensible and applicable.

Sol. Gen. But, my lord, it was sworn as by the witnesses, that he said, If they.

L. C. J. The words say he preached, 'We have had,' that is, he and the congregation assembled, and then it is afterwards turned to 'they.' I make no difficulty in the world, but that 'we have had two wicked kings together,' was intended of the late king and this; and if it had been alledged, that afterwards he had said 'we shall overcome them,' and a jury had found that these words were spoken with such an intention, as is laid in the indictment, it would have been treason. But both in grammar and reason, when you come to say, and *si ipsi &c.* pray, to whom should that relate? What is the English of *ipsi*? Is it we, or they? If it be they, in the third person, there are no third persons spoken of, but the two kings, and they are the last antecedent. For my part, it does stumble me, it is a thing of great consideration. I speak not, as I said, to bind myself in opinion; but I think, if ye had put the word *nos* instead of *ipsi*, it had come nearer to the understanding of men, both in grammar and sense. For I exclude myself and them I speak to, if I put it in the third person, and your *innuendo* (I said) can no way help it.

Att. Gen. Truly, my lord, I did not think that that did rest upon your lordship at all, as any objection.

L. C. J. It does rest, I assure you, Mr. Attorney.

Sol. Gen. If we had done otherwise, we should not have laid it as the truth is, and the Latin does not alter the case, for the word spoken was 'They.'

L. C. J. Ay, but certainly he said, no doubt, 'you' or 'we,' if you will stand to your principles, it's nonsense else.

Sol. Gen. My lord, I take that to be well enough, for here are three sentences. The first is, 'That the people make a flocking to the king, &c. quod populus, &c.' The next is, 'quod nos habuimus, &c.' And then the third is, 'quod si ipsi.' Now 'quod' governs the particular sentence, and it being a particular sentence by itself, with humble submission, it is good in grammar, and in sense too.

L. C. J. Suppose you were to speak it in English. Mr. Solicitor; suppose you were to speak it, 'Now we have had two wicked kings together, who have suffered Popery to come under their noses' (meaning the late king and this), there perhaps the *innuendo* is sensible, and, no doubt of it, then he must mean them: but to say, If they 'will stand to their principles, they shall overcome their enemies,' pray to whom does that 'they' relate?

Sol. Gen. My Lord, with humble submission, you put the case of an entire speech, made in the person of the preacher, and the congregation, and as the words were spoken all at one time. I would make it an entire speech too; but it seems to be several sentences, and therefore that differs the case. For

taking it that these are three distinct sentences, they might be spoken in a several manner by varying the person, and so they were sworn. And suppose he had only spoke the last words, an indictment for this in the third person had been a good indictment: and if it had been charged in that case, 'Quod dixit et asseruit, quod si ipsi, &c., and then in evidence, come and prove these words, would not that have been good?

L. C. J. Truly, I think, Mr. Solicitor, if the indictment for these last words alone had been in the third person, it is a question whether that might have been a good indictment, if you had come in evidence, and proved, that he had said of the king and government, 'If you will stand to your principles, you shall overcome your enemies.' Though I deliver no absolute opinion of that, because there ought, I think, to have been an averment, that they were spoken of the king, and the people.

Sol. Gen. In an entire speech, my lord, there the relative must be applied to the last antecedent, according to grammar.

L. C. J. And I think it must be taken to be an entire speech, and you lay it in the indictment to be so, and then the relative must go to the last antecedent, or else Dr. Busby (that so long ruled in West-minster-school) taught me quite wrong, and who had tried most of the grammars extant, and used to lay down that as a positive rule in grammar, that the relative must refer to the next antecedent.

Just. Withins. Mr. Solicitor, if you make it several speeches, then it is ten times worse, for then the latter part is so uncertain, without an averment of whom the words were spoken, that sure it can never be made good.

Sol. Gen. Suppose it had been 'ulterius dixit,' would that have made it a distinct sentence? If it would, our proof it may be was, that it was an entire speech, but yet consisting of several sentences, and must have the common understanding, as to their relation one to another.

Att. Gen. This objection of 'quod ipsi, &c.' was not moved by the prisoner at the bar, and therefore we did not expect to speak to it.

L. C. J. It is started here now by the counsel. And it is a question truly with me, whether this can be any way sensibly applied, as you would have it. Surely the *inuendo* can never make it good.

Att. Gen. My lord, I say fling all the *inuendos* out of doors, the words in themselves will do it.

L. C. J. Why then we must see whether it be a good indictment in point of form, or rather in point of substance, as you have laid these words, without saying they were spoken 'de rege.' It is a question of great weight and concernment both to the king and to the prisoner, and therefore we must take good time to consider of it, before we deliver a settled opinion. But Mr. Solicitor, you very well remember that *Staley's* case was otherwise. For, though the words were, the king of England

is a tyrant, &c. yet there it is said, and expressly averred, that he spoke the words 'de rege.'

Att. Gen. Could colonel Sidney have moved in arrest of judgment this that the prisoner now starts? No, he could not sure. He might have moved for a new trial.—

L. C. J. Certainly (Mr. Attorney General), that case comes not up to this. Where the words import in themselves that the king is meant, or any way circumstantially, it does necessarily imply that they be meant of no one else, and that would be good without the averment. Which was the case of colonel Sidney, where the matter declared in the libel was plainly down-right relating to the government, that 'if he did so and so he must renounce his crown,' and the like. How can that be applied to any but the king? 'The people of England have committed the kingdom to his power, &c.' Why, how can it be interpreted that any body else is meant?

Att. Gen. When will your lordship please to give judgment?

L. C. J. Mr. Attorney, we will consider of it. It is usual, in cases of less difficulty than this, to take time of consideration. I do not say, but that looking upon the precedents, perhaps I may alter my opinion, and therefore do not speak this to bind myself: but we will consider of it.

Att. Gen. I look upon it that the government is greatly concerned in this matter, more than ten such as the prisoner at the bar.

L. C. J. It is true, Mr. Attorney, the government is greatly concerned, and the prisoner is greatly concerned, for his all is at stake. I do say a good indictment might have been made, I am sure.

Sol. Gen. This is the best we could make, for we had no proof to make out any averment, because these were all the words he said.

Att. Gen. After the jury have found the words as laid in the indictment, was it ever asked of a jury, 'These words were spoken of the king, or they were not, but you have not said that they are spoken of the king, for it is not laid in the indictment?' Would that ever vitiate the verdict?

L. C. J. Mr. Solicitor, pray, would you have us give judgment, that the jury could not find that the words were spoken of the king?

Mr. Pollexfen. The jury have not found that they were spoken of the king, for there is no such thing averred.

Att. Gen. Nor they have not found them to be not spoken of the king; but they have found them to be spoken to stir up sedition.

Sol. Gen. We are never bound by law to aver 'that' that we cannot prove. And therefore I put all upon that dilemma; either the words import of themselves to be spoken of the king, or they do not. If they do not, if we had said, 'dixit de domino rege,' it must have been proved, and that would have been to have left it to the jury whom he did mean. And if they be not self-evident, God forbid the

jury shall be charged to find out such a meaning; but if they are self-evident, they need no averment.

Just. Hol. Truly, we think it may be good evidence to a jury, and it is every day done in cases of actions for words. It is left to the jury to consider, whether he meant the plain-iff, John-a-Stiles, or any other: and the evidence is helped by this, or that circumstance, where the words do not naturally import it.

Just. Walcot. I do think that the averment that these words were spoken of the king, is a point of fact that ought to be averred and proved. Might not the jury in this case have found that they were not spoken of the king? If they had found that, why they would have acquitted him; if they had found they were, and you had not alleged it, why then they had found more than the indictment would had them to.

L. C. J. Well, this is only by way of discourse, not that we bind ourselves by our present opinion. We must look upon it. We will not give our judgment suddenly in a case of this nature.

Mr. North. Will your lordship please to spare me one word?

L. C. J. Ay, Sir, let every man be heard, in God's name.

Mr. North. My lord, as to this objection, 'quod ipse' relates to the two wicked kings spoken of just before, that cannot be: for you take notice that these words of the two wicked kings relate to the late king, and to the present, as the indictment says. One of the kings is dead, what you cannot understand it to be of the two kings, that should overcome their enemies, and therefore it must be the people. This 'Populus' being a noun of multitude, and taken in the plural number, *Ipse* will very well relate to it.

L. C. J. Mr. North, the argument turns both ways upon that, and certainly he did not express himself after that rate. It is so loose a hang-together indictment, as truly I have scarce seen. For my part, I would know how it came to pass, that we should not have as much certainty in indictments, as we have in suits upon the case?

Att. Gen. My lord, there must be certainty in all cases, and we think there is certainty enough in this for your lordship to give judgment upon.

L. C. J. Mr. Attorney, I believe if you sat in our places you would not think so. All our books require greater certainties in indictments, than in actions on the case: nay, in cases of this nature, we are bound by our law books to be of counsel for the prisoner, which we are not in civil causes, where the prisoner may choose his own counsel. And we have not one act of parliament to help the defect of forming indictments, as we have in civil actions, but still in all the statutes made in Jeoffails, there is an exception of capital offences, to show that our strictness would not help uncertainties or insufficiencies in form, where the life of a man

was concerned. This seems to carry a great consideration with it.

Att. Gen. My lord, I was very willing and desirous your lordship should assign the prisoner this learned counsel, because we did suppose they would have produced some precedents of a better form than this: but they have cited none.

L. C. J. And you have cited never such a case as this, Mr. Attorney. And if we can find no other like case, we must be governed by the reason of the thing.

Att. Gen. My lord, we hope you will expedite it for the sake of the government.

L. C. J. Certainly, I think it is very uncertain who are meant by enemies; it may be Mr. Solicitor, Mr. Attorney, it may be the court, no body knows who it is: for every body knows, that to preachers in conventicles and to those that meet there, the judges, and all that are for the support of the laws, may be reckoned to them as enemies. But when it is so uncertain who are meant, how can we supply it by such an *ipse*: That there might have been a good indictment framed upon such words as these, as he in all probability spoke them, and he justly found guilty, is no question with me at all. And (as I said the other day, for the sake of the auditory) if he be guilty of speaking such words, and of treason in speaking them; what will they be guilty of that were present, and heard the words spoken? They may thank God, that we have a gracious king, that does not take all the advantages the law gives him against those that break his laws.

Sol. Gen. My lord, your lordship was pleased to mention Staley's case to me. As I do remember it, it is not as your lordship says: but it is, That he, to perfect his wicked treason (speaking of the king) said so and so. Now, if an averment be necessary, this is a naughty averment; for it is not positively averred that he did speak of the king.

L. C. J. Well, we will look upon it. And I would ask you, Mr. Solicitor, whether if he said (as it is most likely he did) if you will stand to your principles; and you put in *ipse*, whether that would be good?

Sol. Gen. My lord, we put it in as the witnesses swore it.

L. C. J. They did swear the words according to their apprehension; but no doubt of it, in common form he must speak them as I say.

Att. Gen. They swore the words so; and we could lay them no otherwise.

L. C. J. Well, Mr. Attorney, will you move any thing?

Att. Gen. No, my lord.

L. C. J. Then we will consider of it. And take you back the prisoner; and you shall have a rule of court to bring him, when the court is ready for judgment.

Then the prisoner was carried back to the King's-bench; and no judgment was given that term; but the next term Mr. Rowewell

pleaded the king's pardon at the bar of the court of King's bench? and was discharged.*

The following is a COPY of the said PARDON :

REX v. ROSEWELL, for High-Treason.

Mich', 36 Car' 2 Rot. 133. B. R.

SURTY, ss. Alias, scil' die Martis, scil' septimo die Octobris, anno regni Domini nostri Caroli secundi, Dei gratia, Angliæ, Scotiæ, Franciæ, et Hiberniæ Regis, fidei defens', &c. tricesimo sexto. Per quamdam inquisitionem capt' pro verenisimo Domino Rege apud Kingston super Thames, in comitatu Surr', coram Georgio Com' Berkley, Francisco Wythens Mil', un' Justic' dicti Domini Regis ad placita coram ipso Rege tenend' assign'; Thoma Jenner Mil', un' Servien' dicti Domini Regis ac legem, ac Recordator civitat' London; Adamo Brown, Bar', Francisco Vincent Bar', Edvardo Evelin Mil' et Bar', Jacobo Clarke Mil', Christophero Buckle Mil', Richardo Heath Servien' ad legem, Petro Rich, et Stephano Harvey Arm', Justic' dicti Domini Regis, per literas patentes ipsius Domini Regis eisdem Justic' prænominat', ac quibuscunque tribus vel pluribus eorum, sub magno sigillo dicti Domini Regis Angliæ confect', ad inquirend' per sacramentum proborum et legalium hominum com' prædict', ac aliis viis, modis, et mediis, quibus melius sciverint aut poterint tam infra libertat', quam extra, per quos rei veritas melius sciri poterit, de quibuscunque proditionibus, misprisionibus, insurrectionibus, rebellionibus, contrafracturis, tonsur', lotur', falsis fabricationibus, et aliis falsitat' monetæ hujus regni Angliæ, ac aliorum regnorum, sive dominiorum quorumcunque; ac de quibuscunque murdris, felonis, homicid', interfectionibus, burglar', raptibus mulierum, congregationibus ac conventiculis illicitis, verborum prolationibus,

ceadationibus, misprisionibus, confederationibus, falsis allegantiis, transgressionibus, riot', rout', retentionibus, escapiis, contempt', falsitat', negligent' conceleament', manutent', oppressionibus, cambipartiis, deceptionibus, ac aliis, malefactis, offens', et injur' quibuscunque; necnon accessar' eorumdem, infra com' prædict', tam infra libertat', quam extra, per quoscunque et qualitercunque habit' fact', perpetrat', sive commissa, et per quos, vel per quem, cui vel quibus, quando, qualiter, et quomodo; ac de aliis articulis et circumstantiis, præmissa, et eorum, aliquod vel aliqua qualitercunque concernen', plenius veritat', et ad easdem proditiones, et alia præmissa audiend' et examinand' assign', secundum legem et consuetudinem regni dicti Dom' Regis Angliæ, per sacramentum duodecim jur' proborum et legalium hominum com' prædict', qui adtunc et ibidem jurat' et onerat' existen' ad inquirend' pro dicto Domino Rege, et corpore eorum' prædict', extitit præsentat'. Surr. s. Juratores, &c. The whole Indictment as in the Trial:

Quod quidem indictamentum Dominus Rex nunc coram eo postea, certis de causis, venire fecit terminand', &c. Per quod præcept' fuit Vic' com' prædict' non omitt', &c. quin caperet eum, si, &c. ad respondend', &c. Et modo, scil', die Jovis prox' post tres septimanas sancti Michaelis, isto eodem termino, coram Domino Rege apud Westm', venit' prædict' Thomas Roswell, sub custod' custod' prison' de le Gatehouse, Westminst', in cujus custod' præantea ex causa prædict' commiss' fuit virtute brevis dicti Domini Regis de Habeas Corpus, ad subjiciend' et recipiend' ad barram hic duct' in propria person' sua, qui committitur Marr', &c. Et statim de præmissis ei superius imposit', alloquit', qualiter se velit inde acquietari, dicit, quod ipse in nullo est inde culpabilis, et inde de bono et malo ponit se super patriam. Ideo ven' inde jur' coram dicto Domino Rege apud Westm', die Martis in octab' sancti Martini, per quos, &c. Et qui, &c. ad recogn', &c. quia, &c. Idem dies dat' est præfat' Thomæ Roswell, sub custod' præfat' custodis prison' de le Gatehouse Westm' iterum commiss', salva custodiend' quousque, &c. Ad quem quidem diem Martis in octab' sancti Martini, coram Domino Rege, apud Westm', venit' prædict' Thomas Roswell sub custod' præfat' custod' prison' de le Gatehouse Westm' prædict', virtute brevis Domini Regis de Habeas Corpus, ad subjiciend', &c. ad barram hic duct' in propria persona sua, qui committitur Marr', &c. Et jur' prædict' per Vic' com' prædict' ad hoc impanellat' exact' ven', qui ad veritatem de præmissis dicend' elect', triat' et jurat', dicunt super sacramentum suum, quod prædict' Thomas Roswell est culpabilis de alta proditione prædict', in indictament' prædict' specificat', modo, et forma prout per indictament' prædict' superius versus eum supponitur. Et quod idem Tho' Roswell tempore perpetratiõis altæ proditionis prædict', seu unquam postea, nulla habuit bona seu catalla, terras,

* This case is reported also in 3 Modern 52 and 2 Shower 411. The former of those reports, after briefly noticing the arguments for and against the motion in arrest of judgment, proceeds thus " Curia; words may be an overt act, but then they must be so certain and positive as plainly to denote the intention of the speaker. If a man should tell another that he would drive the king out of England, there needs no averment that such words were spoken de rege, because they tend immediately to depose the king, but if he had said that he would go to Whitehall and destroy his enemies, that is not treason without an averment. Judgment was arrested."

In 2 Shower it is rightly stated, that the prisoner was pardoned, and at the end of the case the reporter says " Tamen quære of the law; for the strength of the prisoner's defence on his trial as to the fact charged was thought the best of his case." See the reports of these cases in Leach's editions of Shower and Mod. Rep. and the Editor's notes and references thereto.

sive testamenta; ad noticiam jur' predict'. Et quia curia dicti Domini Regis hic de judic' sub iure reddend', nondum adviserat, dies inde dat' est presertim Thomas Rosewell, in statu quo nunc, &c. usque diem Mercur' prox' post octab' Purificationis beate Mariæ Virginis contra Dominum Rege, ubicunque, &c. de judic' suo iure reddend', &c. Ante quem diem dictus Dominus Carolus secundus Rex Angliæ, &c. dicta suum clausit extremum, et Dominus Jacobus secundus super se suscepit gubernationem regni Angliæ. Et modo, scilicet die Mercur' prox' post octab' Purificationis beate Mariæ Virginis, isto eodem termino contra Dominum Rege apud Westm' venit presertim Thomas Rosewell in propria persona sua, sub custodia presertim custodia prison' de le Gatehouse Westm' predict', et alloquit' ei si quid pro se habent, vel dicere stiat, quare curia hinc ad iudic' super iudicament' predict' procedere non debeat, dicit, quod dictus Dominus Carolus secundus, Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ nuper Rex; fidei defensor, &c. per literas suas patent' sub magno sigillo suo Angliam sigillat', grem' dat' apud Westm' vicesimo tertio die Januarii, anno regni sui tricesimo sexto, de gratis sua speciali, ac ex certa scientia et mero motu suis, pardonavit, remisit, et relaxavit, ac per eandem literas patentes, pro se, hæred', et successor' suis pardonabat, remittebat, et relaxabat eidem Thomæ Rosewell, per nomen Thomæ Rosewell nuper de paroch' de Redriffe, in com' Surr' Clerico, seu quocunque alio nomine vel cognomine, seu additione nominis vel cognominis, aut loci, idem T. Rosewell sciatur, censetur, vocetur, sive nuncupetur, aut nuper sciebatur, veniebatur, vocabatur, sive nuncupabatur, omnes proditiones, quæcunque, unde presertim Thomas Rosewell in termino sancti Michaelis jam nunc elaps', in curia dicti nuper Regis, coram ipso Rege apud Westm' tent', convict' sive atinct' fuit; ac omnia et singula indictament', judic'ia, convictiones, condemnationes, executiones, imprisonment', punitioes, et omnes alias penas et penalitates quæcunque super vel versus ipsam Thomam Rosewell, de, pro, sive concernent' premissis seu coram aliquo habit', fact', reddit', sive adjudicat', aut in posterum habend', reddend', faciend', sive adjudicand', necnon omnia, et singula utlagar' versus dictum Thomam Rosewell, ratione seu occasione premissorum, seu eorum aliquor' vel alicujus promulgat', sive in posterum promulgand', ac omnimod' sect', querel', forisfactur', impetitiones et demand', quæcunque, quas dictus nuper Rex versus ipsam ratione premissorum, seu eorum alicujus, habuit, habet, seu in futuro habere poterit, aut hæred' seu successores dicti nuper Regis nullo modo habere poterit in futuro, utramque pacis ipsius nuper Regis, quæ ad ipsam nuper Regem versus presertim Thomam Rosewell pertinet, seu pertinere potest occasione premissorum, seu eorum aliquor' vel alicujus; et firmam pacem dicti nuper Regis ei inde debet et concedebat per eandem literas patent', volens quod idem Thomas Rosewell per Vice-

comites, Justic', Ballivos, aut alios ministros ipsius nuper Regis, hæred', seu successor' suorum, occasione premissorum, seu eorum alicujus, molestetur, occasionetur, perturbetur, seu in aliquo gravetur; volens quod eadem literæ suæ patent' quod omnia et singula premissa superius mentionat', bon', firm', valid', sufficient', et effectual' in lege sint et erint, licet crimina et offensa predict' minus certe specificat' existunt; quodque pardonatio illa in omnibus cur' dicti nuper Regis, et alibi, interpretetur et adjudicetur in beneficentissimo sensu, pro firmiori exoneratione presertim Thomæ Rosewell, ac etiam placitetur et allocetur in omnibus cur' dicti nuper Regis, absque aliquo brevi de allocatione in ea parte prius obtent' sive obtinend', non obstant' statut' in parlamento, anno regni dicti nuper Regis decimo tertio fact' et edit', et non obstante, aliquo defect' aut aliquibus defectibus in eisdem literis patent' content', aut aliquo alio statut', actu, ordinatione, provisione, proclamatione, sive restrictione, aut aliqua alia re, causa, vel materia quacunque in contrar' inde in aliquo non obstant'. Ita tamen quod dictus Thomæ Rosewell tal' bon' et suffic' securitat' de se bene gerend', a dat' literar' patent' predict' erga dictum nuper Regem, hæred', et successores suos, et cunctum populum suum inveniat, qual' appunctuat' et limitat' erit per Capital' Justic' de cur' præd' pro tempore existen'. Et idem Thomas Rosewell profert hic in cur' literas patentes premissa testificantes in hæc verba:

Carolus secundus, Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ Rex; fidei defensor, &c. omnibus ad quos presentes literæ nostræ pervenerint, salutem. Sciatis, quod nos de gratis nostra speciali, ac ex certa scientia, et mero motu nostris pardonavimus, remisimus, et relaxavimus, ac per presentes, pro nobis, hæredibus, et successoribus nostris pardonamus, remittimus, et relaxamus Thomæ Rosewell, nuper de paroch' de Redriffe in com' Surr' Clerico; seu quocunque alio nomine vel cognomine, seu additione nominis, aut loci, idem Thomas Rosewell sciatur, censetur, vocetur, sive nuncupetur, aut nuper sciebatur, veniebatur vocabatur, sive nuncupabatur, omnes proditiones quæcunque, unde presertim Thomæ Rosewell, in termino sancti Michaelis jam nunc elaps', in curia nostra coram nobis apud Westmonast' tent' convict' sive atinct' fuit; ac omnia et singula indictamenta judic'ia convictiones, condemnationes, executiones, imprisonmentes, punitioes, et omnes alias penas et penalitates quæcunque super vel versus ipsam Thomam Rosewell, de, pro, sive concernent' premissis, seu eorum alicujus habit', fact', reddit', sive adjudicat', aut in posterum habend', reddend', faciend', sive adjudicand', nec non omnia et singula utlagar' versus dict' Thomam Rosewell, ratione seu occasione premissorum; seu eorum aliquorum vel alicujus promulgat', sive in posterum promulgand', ac omnia et omnimod' sect', querel', forisfactur', impetitiones, et demand' quæcunque, quæ nos versus

ipsum ratione præmissorum, seu eorum alicujus habuimus, habemus, seu in futuro habere poterimus, aut hæred' seu successor' nostri ullo modo habere poterint in futuro, sæctamque pacis nostræ, quæ ad nos versus præfat' Thomam Rosewell pertinent, seu pertinere poterint ratione præmissorum seu eorum aliquorum vel alicujus; et firmam pacem nostram ei inde damus et concedimus præsentibus, nolentes quod idem Thomas Rosewell, per Vicecomites, Justiciar', Ballivos, aut alios ministros nostros, hæredum, seu successor' nostrorum, occasione præmissorum, seu eorum alicujus, molestetur, occasionetur, seu in aliquo gravetur. Volent' quod hæc literæ nostræ patentes, quoad omnia et singula præmissa superius mentionat', bonæ, firmæ, valid', sufficient', et effectual' in lege sint et erint, licet crimina et offens' prædict' minus certe specificat' existant, quodque hæc pardonatio nostra in omnibus curis nostris, et alibi, interpretetur et adjudicetur in beneficentissimo sensu, pro firmiori exoneratione præfat' Thomæ Rosewell, ac etiam placitetur et allocetur in omnibus curis nostris absque aliquo brevi de allocatione in ea parte prius obtent', sive obtinend', non obstante statut' in parlamenti' anno regni nostri decimo tertio fact' et edit', et non obstant' aliquo defect', aut aliquibus defectibus in his literis patentibus content', aut

aliquo alio statuto, actu, ordinatione, provisione, proclamatione, sive restrictione, aut aliqua alia re, causa, vel materia quacunque in contrar' inde in aliquo non obstante; ita tamen, quod dict' Thomas Rosewell tal' bon' et sufficien' securitat' de se bene gerend' ex nunc erga nos, hæred' et successores nostros, et cunctum populum nostrum inveniat, qual' appunctuat' et limitat' erit per Capital' Justic' de curia prædict' pro tempore existen'. In cujus rei testimonium has literas nostras fieri fecimus patentes, testa meipso apud Westmonast' vicesimo octavo die Januarii, anno regni nostri tricesimo sexto. (Per breve de privato sigillo.)
BARKER.

Super quo vis' et per cur' hic intellect' omnibus, et singulis præmiss', cons' est per cur' hic, quod prædict' Thomas Rosewell (sub conditione mentionat' in literis fieri' superius recitat') de altis proditionibus prædict' in indictament' prædict' superius specificat' exoneretur, et eat inde sine die.

On the Back of the Pardon is written as follows:—

Ista Charta placitatur, allocatur et irrotulatur de record' coram Domino Rege apud Westm' termino sancti Hilar', anno regni Domini Jacobi secundi nunc Regis Angl' &c. primo.

310. The Trial* of JOSEPH HAYES,† at the King's-Bench, for High Treason, in corresponding with Sir Thomas Armstrong, an Outlaw for High Treason: 36 CHARLES II. A. D. 1684.

MR. Hayes was brought by Habeas Corpus, upon the 3d of November, 1684, from the Gatehouse, and was arraigned upon an Indictment, to this effect, viz.

* See Sir Thomas Armstrong's Case, p. 105, of this volume.

† "In Armstrong's pocket, when he was taken, a letter was found writ by Hayes, a banker in London, directed to another name, which was believed a feigned one: in it credit was given him upon Hayes's correspondent in Holland for money: he was desired not to be too lavish: and he was promised, that he should be supplied as he needed it. Here was an abetting of a man outlawed for treason. Much pains was taken on Hayes, both by persuasion and threatening, to induce him to discover that whole cabal of men, that, it seemed, joined in a common purse to supply those who fled beyond sea on the account of the plot. And they hoped to know all Monmouth's friends; and either to have attainted them, or at least to have fined them severely for it. But Hayes shewed a fidelity and courage far beyond what could have been expected from such a man: so he was brought to a trial. He made a strong defence. The letter was not exactly like his hand. It was not addressed to Arm-

' That he being a false Traitor against the king, &c. the 31st of August, in the 35th year of the king, knowing sir Thomas Armstrong to have conspired the death of the

strong, but to another person, from whom he perhaps had it. No entry was made of it in his books, nor of any sum paid in upon it. But his main defence was, that a banker examined into no person's concerns; and therefore, when money or good security was brought him, he gave bills of exchange, or letters of credit, as they were desired. Jefferies pressed the jury, in his impetuous way, to find Hayes guilty of high treason; because, though there was not a witness against Hayes, but only presumptions appeared upon the proof, yet, Jefferies said, it was proved by two witnesses that the letter was found in Armstrong's pocket; and that was sufficient, the rest appearing by circumstances. The little difference between the writing in the letter and his ordinary hand, was said to be only a feint to hide it, which made him the more guilty. He required the jury to bring him in guilty: and said, that the king's life and safety depended upon this trial: so that if they did it not, they exposed the king to a new Rye-Plot; with other extravagancies, with which his fury prompted him.

king, and to have fled for the same, did traitorously relieve, comfort, and maintain him; and for his relief and maintenance, did pay the sum of 150*l.* against the duty of his allegiance, &c." To this he pleaded Not Guilty.

But a jury of merchants could not be wrought up to this pitch. So he was acquitted, which mortified the court a little: for they had reckoned, that now juries were to be only a point of form in a trial, and that they were always to find bills as they were directed." Burnet's Own Times, vol. 1, p. 599.

"Hayes was a citizen that he [Jefferies] caused to be prosecuted for high treason; and then, at the trial, apparently helped him off with the jury: which, it may be, was not without reason; for evidences, at such trials, ought to be above all exception; but since nothing new sprung at the trial, which was not seen before, it was pleasant to see a man hunted into the toils and then let go: so suddenly may enemies become friends. Upon what terms who knows?" North's Life of Lord Keeper Guilford, vol. 2, p. 107, 8vo edit. of 1808.

"Nov. 3, 1684. Joseph Hayes, merchant, came by Habeas Corpus from the Gatehouse to the King's-bench bar, and was arraigned on an indictment of high treason, for comforting, aiding, and relieving sir Thomas Armstrong, a traitor; to which he pleaded Not Guilty, and his trial was ordered Friday, 21st November.

"Nov. 21. Mr. Jos. Hayes, merchant, came to his trial by a jury of the city of London, which, after a challenge of 35, was sworn; the chief evidence against him was two or three persons, who testified as to sir Thomas Armstrong's going by the name of Henry Lawreace; and that they had seen a bill charged by one Jos. Hayes for 161*l.* 5*s.* on Mr. Israel Hayes, being the money for 150 guineas paid in London; then there was a letter mentioning the same, directed to Henry Lawreace, subscribed Joseph Hayes, which was found about sir T. Armstrong when he was taken: this was proved to be the prisoner's hand by one that was formerly his servant, as also by comparing it with other writings of his. The prisoner's defence was in making remarks on the evidence which were very pertinent; as also he called several persons who testified as to his loyalty, credit and behaviour; so that the jury, after an hour and a half's being out, came in and found the prisoner Not Guilty, so he was discharged." Narcissus Luttrell's "Brief Historical Relation," MS.

* The Latin Indictment runs thus: London *sc.* Quod Josephus Hayes nuper de London mercator, ut falsus proditor contra illustrissimum et excellentissimum Principem Dom^o Carolum secundum, Dei Gratia Angl^{ie}, Scot^{ie} Franc^{ie}, et Hiberniæ Regem, et naturalium Dominum suum, timerem Dei in corde suo non habens, nec debitum ligeanc^{ie} suæ

Upon the 21st of November, 1684, he was brought to trial, before the lord chief justice Jefferies, judge Holloway, judge Wittins, and judge Walcot; and the jury being called, he challenged the following persons: Sir Thomas Griffith, Richard Ellis, Thomas Langham, Henry Whistler, Nicholas Smith, Thomas Soper, Thomas Passenger, Henry Minchard, Peter Jones, William Crowch, Peter Veret, Henry Lodes, William Fownes, Charles Gregory, William Peele, Richard Weedon, Thomas Pory, Thomas Piercehouse, Richard Burden, John George, John Steventon, Robert Watkins, George Twine, Thomas Short, Robert Townsend, James Bush, Walter Masters, Thomas Larkham, Edward Cooke, William Fashion, John Flowerdew, John Greene, John Grice, Charles Fowler, and James Smith. In all 35.

The Jury sworn were, Samuel Sheppard, Daniel Allen, Rowland Platt, Adam Bellamy, Daniel Templeman, William Dewart, Edward Piggot, Thomas Brailsford, Edward Cheske, Edward Underwood, Robert Masters, and William Warren.

Then the Indictment being read, Mr. Dol-

'poderans; sed instigatione diabolica mot' et 'seduct', dilection' veram et debitam, et naturalium obedienc^{ie}, quas verus et fidel' subdit' dict' Dom' Reg' erga ipsum Dom' Regem generet, et de jure gerere tenetur penitus subtrahens, et totis viribus suis intendens pacem et communem tranquillitat' hujus regni Angl^{ie} inquietare, molestare, et perturbare, et guerram et rebellion' contra dict' Dom' Regem suscitare et movere, et gubernation' dict' Dom' Reg' in hoc regn' Angl^{ie} subvertere, et dict' Dom' Regem a titulo, honore, et regali nomine, coron' imperial' regni sui Angl^{ie} deponere, dejecto, et deprivare, et dict' Dom' Regem ad final' destruction' adducere et ponere, 31 die Augusti, anno reg' Dom' Caroli secundi nunc Reg' Angl^{ie}, &c. 35, apud paroch' sancti Mich' Bassishaw, in warda de Bassishaw London, satis sciens, quandam Thomam Armstrong nuper de London Milit', ut falsum proditor', proditorie conspiravisse et imaginat' fuisse mortem et final' destruction' dict' Dom' Reg', et pro eadem proditorie proditorie fugam fecisse, ipse præd' Johannes Hayes postea, scilicet dicto 31 die Augusti anno reg' dict' Dom' Regis nunc 23 suprad', et diversis al' diebus, et vicibus tam antea quam postea, apud paroch' sancti Michael' Bassishaw, in warda de Bassishaw London præd', scienter, malitiose, seditiose, et proditorie præd' T. Armstrong confortavit, sustinuit, et manutenuit, et præd' J. H. ad tunc et ibidem pro confortatione, sustentatione, et manutentione præd' T. A. summan' attingen' ad centum et quinquaginta libras legal' monet' Angl^{ie}, malitiose, seditiose, et proditorie solvit, et solvi causavit, contra ligeanc^{ie} suæ debitum, ac contra pacem dict' Dom' Regis nunc, coron', et dignitat' suæ, &c. necnon contra formam statuti, &c.

hen, as counsel for the king, opened it in the jury.

Mr. Attorney General, (Sir Robert Sawyer,) After Sir Thomas Armstrong had fled, the prisoner relieved and aided him with money, and that, after he was indicted, and sued to the Exigent; besides, a proclamation followed upon his flight, which was a sufficient notice to all the king's subjects. Sir Thomas went by the name of Henry Lawrence beyond sea; by that name the prisoner held a correspondence with him, and sent him a letter, dated the 21st of August, and tells him, he had sent him a bill of exchange for 165*l.* drawn upon his brother, Israel Hayes, who was acquainted with sir Thomas. If it were not for these receiving and nourishing of traitors, they would not lurk at Amsterdam, as they do. The letter was taken about sir Thomas, and we shall prove it is the prisoner's hand-writing, and that sir Thomas received the money. I hope you will take care, by convicting this gentleman, to stop the fountain, which issues so much supply to these traitors who lurk abroad.

Mr. Hayes then affirmed, that he never knew sir Thomas in his life.

Then the Indictment against sir Thomas was read, which was found the 12th of July, and Mr. Glover proved a copy of the king's proclamation against sir Thomas, dated the 28th of June, 1683.

Then *Ezekiel Everis* was sworn, and testified, that in August 1683, he was at Cleve in Germany, with the lord Grey, who went by the name of Thomas Holt, and sir T. A. came thither by the name of Mr. Henry Laurence, and shewed him a bill of exchange from England, upon Mr. Israel Hayes, in Amsterdam, for 160*l.* odd money; and that it was for 150 guineas, paid in England; and he told him, it was drawn by Joseph Hayes, and it was signed Joseph Hayes; and the bill was accepted, and he saw Israel Hayes's letter to sir Thomas, by the name of Laurence, which mentioned the sending the said sum to Cleve.

The Common Serjeant (Crispe) then delivered a parcel of letters into the court, and swore that he received them of the lord Godolphin, and they had been ever since in his hands.

The Lord Godolphin then testified, that he received three letters produced in court, from Mr. Constable, Mr. Chudley's secretary, who told him they were taken about sir Thomas, that one of them, without any name, mentioned 150 guineas returned to Henry Laurence.

Constable testified, that he was present, when the scout of Leyden apprehended sir T. A. and that the letters were taken out of his pocket, and he himself delivered them to Mr. Chudley, who sealed them up, and sent them by him, to the lord Godolphin.

Charles Davis testified, that taking boat from Amsterdam to Rotterdam, he met Israel Hayes and sir T. A. coming to take boat, and sir Thomas went with him in the boat, and he told them his name was Henry Laurence. Davis

afforded, that he lodged a month in one De-cow's house at Amsterdam, where there was a club every Thursday: there were Mr. Israel Hayes, Mr. Henry Insten, one Wilmore, Emerton, Dars, and some other English merchants; and he heard them several times abuse the king at table.

The Attorney General then shewed Mr. Hayes a letter, saying, It may be he will save us the labour of proving it; but Mr. Hayes disowning it, Mr. Walpole was called, and Mr. Hayes said, He was my servant, and went away after a rate that possibly would not be allowed.

Walpole testified, that he served Mr. Hayes almost four years and three quarters, and did believe the letter to be Mr. Hayes's hand.

Hayes. My lord, in matters of treason, I hope you will not admit of comparison of hands and belief, for evidence.

L. C. J. Yes, no doubt of it.

Hayes. It has not been so in other cases, that have not been capital; as particularly in the Lady Carr's case.

L. C. J. This is a mistake, you take it from Algernon Sidney; but without all doubt it is good evidence.*

Judge Withins. Comparison of hands was allowed for good evidence in Coleman's case.†

Hayes. That, with submission, vastly differs: those letters were found in his own custody; this was not found in my possession, but in another man's, and in another nation.

Sir John Trevor, counsel for the king. This gentleman was a trader with the East-India Company, and made contracts with them, which are entered in their books; we will compare them with the writing in this letter.

The Common Serjeant then called Harman and Brittle, and demanded of them where the books were; and they produced them.

Harman testified, that he knew Mr. Hayes, and that he made several contracts in 1683, and that he saw him in September 1683, subscribe his hand to a book of the company's, shewn to him.

Brittle testified, that he is porter in the street to the East-India Company, and that he saw Mr. Hayes write his hand to a book shewn to him.

Capt. Piercehouse produced a note, which he said was Mr. Hayes's, and that he supposed it to be his hand, and compared it with the hand in the book, and said, that he delivered the goods upon it: and Walpole then said, he believed it to be Mr. Hayes's hand.

Then Mr. Sturdivant was called, and they shewed him the letter, and he said, Here is Joseph Hayes writ, but I do not know it to be his hand.

The Common Serjeant said, that Mr. Sturdivant swore he did know Mr. Hayes's hand,

* See the Proceedings in Sidney's Case, vol. 9, p. 318 of this Collection.

† As to the truth of this assertion, See Coleman's case, Vol. 7, p. 1 of this Collection.

before the grand jury; but Mr. Sturdivant affirmed, the common serjeant was under a mistake.

Then sir John Trevor called for Mr. Hardwicke; but the common serjeant answered, that he was out of town before he could be served with a subpoena.

Then the Letter was read, it was subscribed Joseph Hayes, and dated the 31st of August, 1685, directed to Mr. Henry Laurence, senior, at Amsterdam, and began thus, 'Sir, at your desire I have sent you a bill,' &c.

The letter said the East-India books were then shown to the jury and to the prisoner.

Hayes denied the letter to be his writing, and said, it is very strange. I should not know my own hand; may not counsel be admitted to speak, whether comparison of hands and belief are any evidence in criminal causes? I have been informed, it hath been denied to be evidence.

E. C. J. You are under a mistake; some body has put it into your head, and puffed you up with a vain story; there is no such thing, it is a fiction, a meer whim, only said by Mr. Sidney, and no ground in the world for it.

Hayes. Was it not so in the case of my lady Carr? There is a record of that I suppose.

E. C. J. It was not so. Don't talk of it *, there was no such thing at all. Comparison of hands was allowed for good proof in Sidney's case. We must not alter the law for any body.

Att. Gen. Besides this comparison of hands, we shall give an account of the correspondence of the prisoner's brother, and that he received the money of him. Mr. Common Serjeant, Where had you this paper?

Com. Serj. I had them from my lord Godolphin. This is an account of the receipt and disbursement of the money; shew it Mr. Constable.

Constable. This is one of the papers, which was taken out of sir T. A.'s pocket.

It being shewn to the jury, one of them demanded, whether any one proved the hand that was in that note?

Att. Gen. No; but Everis swears, that sir T. A. shewed him a bill, subscribed Joseph Hayes, for so many hundred Guilders.

Com. Serj. He says, it was 100 odd pounds; now, the sum of this note is 1611. 5s. which is the change of 150 guineas.

Hayes. Here is nobody proves this letter to be my hand, positively: they only prove it by similitude, and comparison, and belief. I conceive there is but one witness, that that letter was found in sir T. A.'s hands. Everis says, he saw a bill had my name to it. Sir, you did not know me, nor ever saw my hand?

Everis. No, never in my life.

Hayer. It is only an evidence of reputation, he heard it was my bill; you saw no money paid upon it, did you?

Everis. No; but I saw a letter from Mr. Israel Hayes, that gave some account of it.

Hayes. All this is but similitude and circumstance: and I thought in case of treason there ought to be two witnesses, and hope you will let it be so here: here is no evidence but the letter, and that is not two witnesses; there is no body has proved the 'knowingly' in the indictment, that runs, that I knew sir T. A. and his treason: that ought to be proved, but I am sure it is not. Your lordship says, that the indictment and the proclamation are sufficient notice that he was a traitor: that may admit of counsel to debate it; there ought to be witnesses that could shew me to be concerned with him; which nobody in the world can prove, or that I ever saw him; and that witness, who says, he saw the bill, or this letter, does not know that I wrote it; there are them that say they heard of money paid upon this bill, but there is not one of them says, he saw any money paid: and these are several witnesses, every one to a several thing. Here is no proof but by the East-India porters, and those who say, they believe this letter to be my hand; nobody says, he saw me write this letter, or had any correspondence with sir T. A. If they pretend there was money paid beyond sea; is this indictment well laid, for it is laid to be paid in London? The payment of money beyond sea can be no evidence of fact upon this indictment: for the jury of London are to enquire of matters arising in London only. If I am to be tried for payment of money beyond the sea, the fact should have been laid there, and the trial ought to proceed upon the statute of 35 H. 8. cap. 2. The indictment should be taken by special commission from the king, and the trial be in the county that the king should choose. I desire counsel upon this point.

L. C. J. No, it is an idle whim, and I would fain know the counsel that put that foolish notion into your head.

Hayes. If you will allow me counsel, you shall hear who they are; I have been informed the law is so.

L. C. J. We are of another opinion: if any whimsical notions are put into you, by some enthusiastic counsel, the court is not to take notice of their crotchets.

Hayes. The witnesses are strangers to me; there is one that has been sworn, to whom I have paid several thousands of pounds, who says he does not believe it to be my hand.

Then he called Mr. Sturdivant, who looking upon the letter, said, I do not believe it to be his hand, I have had dealings with him, and he hath given me many receipts.

Hayes. There have been a great many forgeries; and this letter is forged: there have been forgeries so like, that the persons themselves have not known their own hands. Every body knows that a hand may be counterfeited very like: in Mr. Sidney's case, Mr. Wharton, a young gentleman, not above one or two and twenty, said, He could undertake to counterfeit any man's hand whatsoever. I am not

* It was in Trinity-Term 1689. Anno 21 Carli 2. 1684. 410.

a man of that quality, to give sir T. A. 150 guineas.

L. C. J. We all know you have been a very active man, a busy fellow about the city; as forward a spark as any I know of a great while. I don't know what you talk of your quality, but we know your qualifications; you have always been factious and turbulent against the king and government.

Hayes then affirmed, that he neither gave nor lent, nor returned any sum of money to this person; and then called Mr. Langley, who testified, that a letter was counterfeited and a bill of Exchange for 450*l.* and so exactly like, that if he had not known of it before he saw it, he must have owned it for his hand; and the party that paid the money, paid it in his own wrong; for he never drew any such bill. Mr. Common Serjeant had my books several days in his hands, where there is an account of 20,000*l.* between my brother and me; and if I would set my hand to such a letter and bill, and write my name at length, is it not as reasonable that I should put the name of Laurence in my books? and if it were there he would appear. Indeed here is an account produced of divers parcels of money disbursed in little sums; but I appeal to the merchants whether any bill of Exchange was ever paid in such parcels? No foreign bill was ever paid by 3*l.* or 5*l.* or 20*l.* at a time; it must be paid at the day, or it will be protested. Here is a computation of a sum like to the sum in the bill; but these are suppositions, and not proof.

Then Mr. Hayes called Alderman Jeffreys, to speak to his reputation and conversation; who said, That he had known him many years, and never knew any hurt of him.

L. C. J. Have you been at any of the elections at Guild-hall for mayors or sheriffs, when Mr. Bethel, and Mr. Cornish, and them people were chosen; and have you seen Mr. Hayes there, and how he behaved himself? A very forward active man, I will warrant you.

Alderman *Jeffreys*. I suppose I may have seen him there, but I cannot say any thing to his behaviour.

Then Mr. Hayes called Mr. Pellet, Mr. Lloyd, Mr. Withers sen. Mr. Withers jun. and Mr. Hugh White, who gave a fair account of his dealing and conversation. He then said, that he would trouble the court with no more witnesses.

Mr. *Attorney General* then said, that he would call one witness more against him; and ordered Atterbury the messenger to be sworn, and the letter was shewed to him.

Atterbury. I apprehended Mr. Hayes, and brought him before the king, and was present when the letter was shewed to him; and the king and Lord Keeper North pressed him to own whether it was his hand, or no; and he said, he should say nothing to it, if they could prove it upon him, well and good.

Hayes. His majesty was not there.

Atterbury. As I remember, the king was there; I imagine the king was there.

L. C. J. I was there, what he says is true; you said, I am not bound to accuse myself; it is true, you did deny that you knew Laurence or Armstrong; and it is as true, you would not absolutely deny the letter, but said, you were not bound to accuse yourself.

Hayes. My lord, I did hope, that in point of law, my counsel should have been heard to those things I mentioned, and I wish you would favour me in it; [but that being denied him, he addressed himself to the jury:] Nothing has more troubled me, since my confinement, than the imputation of high-treason, a thing I always detested; I never knew any, the least thing of the conspiracy, but by the trials, or other printed papers; not one of the conspirators, who have come in, or been taken, have charged me in the least; nor did he himself accuse me, with whom I am charged to have this correspondence. Gentlemen, I desire you to consider, that it is my life is concerned, and I beg you would consider what these witnesses have testified; they are not positive in any respect, nay there are not two to any one thing that is charged: Constable says, the letter was found among sir T. A.'s papers; he says no more; and here are not two witnesses to that: Evers tells you, he saw this bill, but did not know my hand; there is nobody tells you I wrote this letter, but it is found in another man's custody, in another nation.

Gentlemen, it is very hard, that by comparison of hands a man's life should be in danger; when, in lesser crimes, it has been denied to be good evidence; and none of you can escape the same danger if this be allowed to be evidence; for your hands may be counterfeited as well as mine.

If there had been any probability of my knowing him, it had been something; but there is not one that testifies that ever I knew him, nor indeed did I: there is a great deal of circumstance made use of, upon the account of his acquaintance with my brother in Holland; but it is strange there should not be some evidence of a further correspondence between him and me, if there were that intimacy that such a letter as this doth import.

I must, with reverence to the divine Majesty, say, and I call God, angels, and men to witness the truth of it, as I shall answer it to him, before whom, for ought I know, I am quickly to appear, that I never in my life spoke with sir T. Armstrong, nor was ever in his company, nor ever wrote to him, by the name of Laurence, or any other name; and I do solemnly say in the presence of God, that I never gave, sent, lent, paid, or ordered to be paid, any money, directly or indirectly to sir T. A. or H. Laurence, or to him by any other name, or to his use; I speak it without any counterfeiting or equivocation.

Gentlemen, there have been overtures, if I would say some things, that my life might be saved; and it is not to be believed, that I

would run the risque of my life, if by speaking the truth I could save it.

The Chief Justice did here appear enraged, and interrupted him, saying, What do you mean by this?

Hayes. I say—

L. C. J. Ay, but you must say those things that are decent and fit for us to hear; you must not insinuate, as if the government would make any such compacts as you talk of.

Hayes. I say, that Mr. Forster told me—

L. C. J. If you offer that, I can tell you a story, that perhaps you will be very unwilling to hear; on my word, it will be very unpleasant to hear it; you had better let those things alone, for you will but draw a load upon you.

Hayes. I beseech your lordship to hear me—

L. C. J. Yes, I will hear you, provided you keep within due bounds; but we must not suffer these things.

Hayes. I say nothing but this, it has been told me, that the way to save my life is to confession.

L. C. J. As you represent it, it is a reflection upon the government—you talk of overtures having been made you; do not make me say what I have no mind to say.

Hayes. I say, Mr. Forster by name told me, there was no way for me to escape, but by confession.

L. C. J. You had best call Mr. Forster, to know how he came to tell you so; if you do, I will tell you of another thing of * 4 or 5000*l.* that was offered for your escape; you had better forbear, or I shall put you in mind of a brother of somebody that is at the bar.

Hayes. My lord, I was told, that was the way: Gentlemen of the Jury, I have declared to you the whole truth, with all the solemnity that becomes an innocent man, and not an ill man. Besides, what you have heard, in all this evidence, is nothing but circumstance and hear-say; and shall a man's life be taken away, for 'I believe,' and 'I think,' or 'I have heard?'

Gentlemen, I know you are my fellow-citizens and fellow-christians, and of the same reformed religion that I am; and I hope you are sworn into this service without any prejudice against me, but with an impartial resolution to do justice: and therefore I cheerfully

* "The story of the 4 or 5000*l.* was this: An eminent Papist, very acceptable to king Charles the second, undertook to some of the friends of Mr. Hayes, that a pardon should be had for 4000 guineas to the king, and 1000 to himself; but he afterwards declared, that the king had refused him therein, and told him, that he was advised, that he had better give that Popish friend 4000*l.* out of the Exchequer, than pardon Hayes; but that he gave his royal word, that the overture should not hurt Mr. Hayes." Former Edition.

leave the matter with you; I am sure, that if God help me, and deliver me in this exigency, that it is he, and you under him, that preserve my life.—

Gentlemen, The great incertainties, improbabilities, and consequences in this case, I hope will be weighed by you, and make you the better to consider the proof, which is made by none but such as are strangers to me; since, then, they know me not, I hope you will weigh it, before you give it against me: we must all die, and I am sure it will be no grief to you to acquit a man that is innocent. I leave it with you; the Lord direct you.

Mr. Recorder, (Sir Thomas Jenner.) The treason charged on the prisoner is of that sort, that if he be guilty, he will be a just example to terrify others from doing the like; for if traitors had not persons to supply them with money abroad, it may be, they would not have so much courage to run away. We have satisfied you that sir Thomas Armstrong was indicted; that an exigent was gone against him upon that account; here was a proclamation, and sir Thomas Armstrong named in it; and so the Recorder repeated the evidence of the witnesses, and concluded: Gentlemen, We think that his defence has been so little, and our proof so strong, that you have good ground to find him guilty.

The Lord Chief Justice then summed up the matter to the Jury:

Gentlemen of the Jury, This is an indictment of high-treason against the prisoner at the bar; and you are to try it according to your evidence. The prisoner's affirmation of his innocence is not to weigh with you. Nay, I must tell you, I cannot but, upon this occasion, make a little reflection upon several of the horrid conspirators, that did not only, with as much solemnity, imprecate vengeance upon themselves if they were guilty of any treason; but thought they did God Almighty good service in that hellish conspiracy: It is not unknown, one of the persons proscribed in this proclamation did declare, they should be so far from being esteemed traitors, that they should have trophies set up for them; and all this under the pretence and enamel of religion: nay, I can cite to you an instance of another of the conspirators, [lord Russel] that after a full and evident proof, and plain conviction, of having an hand in it, when he comes upon the brink of death, and was to answer for that horrid fact, before the great God, he blessed Almighty God, that he died by the hand of the executioner, with the axe, and did not die by the fiery trial: he blessed God, at the place of execution, that he died a traitor against the king and government, rather than died a martyr for his religion. I think it necessary to make some reflection upon it; when men, under the pretence of Religion, are wound up to that height, to foment differences, to disturb and distract the government, to destroy the foundation of it, to murder his sacred Majesty, and his royal brother, and to subvert our reli-

gion, and liberty, and property; and all this carried on upon pretence of doing God good service. You are to go according to evidence; as the blood of a man is precious, so the government also is a precious thing; the life of the king is a precious thing, the preservation of our religion is a precious thing, and therefore due regard must be had to all of them. I must tell you, in this horrid conspiracy there were several persons that bore several parts; some that were to head and consult; there was a council to consider; others were designed to have a hand in the perpetrating of that horrid villainy, that was intended upon the persons of his sacred majesty and his royal brother, and with them, upon the persons of all his majesty's loyal subjects that acted with duty, as they ought to do; there were others, that were to be aiding and assisting (as in the case of the

prisoner, if you find him guilty) aiding, abetting, assisting by money, or otherwise; or harbouring any of those persons that were concerned therein. Then he recounted the Evidence given against the prisoner, and made such remarks upon the same, as he thought fit.

The Jury withdrew, and spent two hours in consideration of the matter; and then returning, gave their verdict, that the prisoner was Not Guilty.

Att. Gen. My Lord, though they have acquitted him, yet the evidence is so strong, that I hope your Lordship and the court will think fit to bind him to his good behaviour during his life.

L. C. J. Mr. Attorney, that is not a proper motion at this time.

So the prisoner was discharged, after he had been imprisoned five months.

311. The Trial between Sir WILLIAM PRITCHARD, Plaintiff, and THOMAS PAPILLON, esq. Defendant, at Nisi Prius at the Guildhall of London, in an Action upon the Case for a false Arrest: 36 CHARLES II. A. D. 1684.

November 6, 1684.

London, ss. SIR Wm. Pritchard, late lord mayor of the city of London, having in Easter Term last brought an action upon the case, for

* For several particulars of the proceedings in the City of London with which this Case is connected, see the Note to the Case of Sacheverell and others, p. 29, of this volume, and the Cases and Notes there referred to.

The following passages are from Narcissus Luttrell's MS. "Brief Historical Relation," &c. in the Library of All Souls' College, Oxford:

"April, 1683. Mr. Papillon and Mr. Dubois having given order for a writ to be taken out to arrest the Lord Mayor, sir Dudley North, one of the sheriffs, and several of the aldermen, in an action of the case for a false return to a mandamus directed to them for the swearing them two sheriffs of London; and the sheriff being concerned, the writ was directed to Mr. Brome, coroner of London, who accordingly went to them to acquaint them therewith, and desired an appearance, or that they would give bail, which, they refusing, he executed the writ, and carried them very civilly to his own house, and kept them there till ten at night; when one of the city sergeants came with a writ and arrested the coroner, and carried him away prisoner to the Countess, refusing to take bail, so that he was forced to lie there all night, during which time the lord mayor, &c. walked home. This thing had so surprised some persons, that the Tories reported the Whigs had seized the lord mayor and carried him away, and the lieutenant of the city met, and eight companies were ordered out immediately for the security

falsely, maliciously, and without probable cause procuring him to be arrested and imprisoned in his mayoralty, against Thomas Papillon, esq. the defendant pleaded, Not Guilty, and thereupon issue being joined, it came this day to be

of the city; this affair affords variety of talk, some condemning it and others approving it, according to the different tempers of persons.

"Nov. 6th, 1684. In the afternoon, a trial was at Guildhall, before the Lord Chief Justice Jeffreys, on an action brought by sir William Pritchard, late lord mayor of the city, against Mr. Papillon, for causing him to be arrested during his mayoralty: and the jury, to the amazement of all, gave 10,000*l.* damages. Since which, Mr. Papillon hath thought fit to abscond, as being much the safer for him."

At the end of "A Ninth Collection of Papers relating to the Present Juncture of Affairs in England," &c. published in the year 1689, there is inserted, 'An Advertisement,' as it is called, 'of the Learning and Rhetoric of the late Lord Chancellor Jeffreys,' as follows:

"There is lately published, the trial of Mr. Papillon, by which it is manifest that the then Lord Chief Justice Jeffreys had neither learning, law, nor good manners, but more impudence than ten carted whores (as was said of him by king Charles the Second) in abusing all those worthy citizens who voted for Mr. Papillon and Mr. Dubois, calling them a parcel of factious, pragmatical, sneaking, whining, canting, sniveling, prick-eared, crop-eared, atheistical fellows, rascals, and scoundrels, &c. as in p. 29, and other places in the said Trial may be seen. Sold by Richard Janeway, and most booksellers."

tried before the lord chief justice Jeffries; and the Jury sworn to try this cause, were these: Bartholomew Ferryman, Thomas Blackmore, Thomas Symonds, William Whattton, John Green, Thomas Amy, Joseph Bagys, Daniel Chandler, John Reynalds, John Allen, Joseph Caine, and William Withers, jun.

Mr. *Munday*. May it please your lordship and you gentlemen of this jury, sir William Pritchard knight, late lord mayor of the city of London, is plaintiff, and Thomas Papillon, esq. is the defendant: and this, gentlemen, is in a special action upon the case, wherein the plaintiff does declare, That whereas the 12th of February, in the 35th year of this king, and before and after for several months then next ensuing, he was mayor of the city of London, being duly elected and sworn into the office of mayoralty of the said city: and according to the custom of the said city, time out of mind, he ought daily to attend the said office, in the diligent government of the said city, according to the duty of his said office, which he was to execute to the honour and dignity belonging thereunto: That the defendant, Thomas Papillon, being one of the commonalty of the said city, and under the government of the plaintiff, by virtue of his office aforesaid, not being ignorant of the premises, but contriving, and falsely and maliciously envying the happy estate of the plaintiff in his said office, as also unjustly to disturb the plaintiff in the execution of his said office, the said 12th day of February, in the 35th year aforesaid, the defendant for vexation to the plaintiff, not having any lawful or probable cause of action against the plaintiff, falsely and maliciously did prosecute the king's writ of *Alias Capias* out of the court of King's bench, against the plaintiff, by the name of sir William Pritchard, knight, directed to the then coroner of the city of London; by which writ it was commanded the said coroner to take the plaintiff, if found within the said city, and safely keep him so as to have his body before that court at Westminster, upon Wednesday next after 15 days of Easter, then next following, to answer the now defendant in a plea of trespass: And that the defendant of his further malice against the plaintiff, afterwards, and before the return of the writ, to wit, upon the 24th day of April, in the 35th year aforesaid, at London, to wit, in the parish of St. Mildred the virgin, in the Poultry, in the ward of Cheap, London, delivered the said writ of *Alias Capias* to one John Brome, gent. then being coroner of the said city, to be executed; and then and there the plaintiff, then being mayor of the said city, by virtue of that writ, maliciously and unjustly did procure to be taken, and arrested, and detained in prison, under the custody of the said coroner, for the space of six hours, to the disgrace and scandal of the plaintiff and his said office, as also to the manifest damage, prejudice, and grievances of the plaintiff: whereas, in truth and in fact, the defendant, at the time of the taking, arresting, and detaining of the plaintiff in prison, as afore-

said, had not any just or probable cause of action against the plaintiff in the premises, whereby the plaintiff says he is injured, and for which he lays to his damage, 10,000*l*. * To this the

* Pasche, 36 Car' 2. B. R.

London, ss. Wilhelmus Pritchard Miles, nuper Major civit' prædict', querit' de Thomæ Papillon in custod' Mar', &c. pro eo videlicet, quod cum duodecimo die Februarii, anno nostri Domini Caroli secundi nunc Regis Angliæ, &c. tricesimo quinto, ipse idem Wilhelmus Pritchard, ac antea, et abinde per se parat' menses ex tunc prox' sequend' extitit' Major civitat' London præd', in officium Majoratus illius debito modo elect', præfect', et jurat', ac secundum consuetudinem civitat' London, prædict', a tempore cujus contrar' memoria hominum non existit, in eadem usitat' et approbat' officium suum Majoratus illius indies intendi debuit, per assiduam diligent' ipsius Wilhelmii in regimine civitat' illius, per ipsum secundum debitum officii sui præd' exequend', et performand' ad honorem et dignitat' ad officium illud spectant' et pertinen', prædictus tamen Thomas existens unus de Comit' civitat' præd' et sub regimine dicti Wilhelmii, virtute officii sui prædicti, præmissor' non ignarus, sed machinans, et false ac malitiose invidens felici statui ipsius Wilhelmii in officio suo prædict', necnon ipsum Wilhelmum in executione officii illius minus juste inquietare et disturbare, prædicto duodecimo die Februarii, anno tricesimo quinto suprascripto, idem Thomæ Papillon, pro vexatione præfat' Wilhelmo adhibend' (eodem Thoma adtunc non habente aliquam legitimam vel probabilem causam actionis versus ipsum Wilhelmum) false et malitiose prosequit' fuit extra cur' dicti Domini Reg' coram ipso Rege nunc habit', scilicet, apud Westmon' in com' Middlesex adtunc et adhuc tenent' existen', quoddam breve ipsius Dom' Reg' de alias Capias versus ipsum Wilhelmum, per nomen Wilhelmii Pritchard, Militis, adtunc Coronator' civitat' London' præd' direct', per quod quidem breve idem Dominus Rex nunc eidem tunc Coronatori præcepit quod caper' ipsum Wilhelmum Pritchard, si invent' foret in civitat' London' præd', et eum salvo custoliret, ita quod haberet corpus ejus coram Domino Rege apud West' die car' prox' post quindenam Pasche ex tunc prox' sequend', ad responden' præfat' Thomæ Papillon, per nomen Thomæ Papillon Armiger', de placito transgres', et quod idem tunc Coronator haberet ibi tunc breve illud. Et prædictus Thomæ Papillon, ex ulteriori nequitia et malitia sua præcogitat' versus ipsum Wilhelmum, postea et ante return' brevis prædicti, scilicet, vice-simo quarto die Aprilis, anno tricesimo suprascripto, apud London' præd', videlicet, in parochia sanctæ Mildredæ Virginis in Pulletria, in warda de Cheap', London, prædicta, breve de alias capias cuidem Johanni Brome, Gen', adtunc Coronator' civit' London' præd'

Y

defendant has pleaded, Not Guilty. If we that are of counsel for the plaintiff, shall prove this matter unto you, gentlemen, that we have laid in the declaration that has been opened unto you, you are to find for the plaintiff, and I hope will repair him in damages for this affront and injury.

Attorney General. (Sir Robert Sawyer.) May it please your lordship, and you gentlemen of the jury, I am of counsel in this case for the plaintiff; and this action is brought, gentlemen, to vindicate the honour of the chair from such affronts as these, which in no age, till of late days, our times of faction and confusion, it ever met with: that by a person that is a citizen of London, and one of the commonalty, that ought to have paid submission to the lord mayor as his chief magistrate, and was bound so to do by his oath, as a freeman, should, without cause of suit, arrest the lord mayor of the city. That there was no probable cause, is evident by his not proceeding in the action, that he had thus brought. But, gentlemen, we shall shew you in the course of our evidence, that there lay a further malice in this case, and that there was a design in it against the government. For we shall give you evidence, that this design was laid to carry on the great Plot against the lives of the king and his brother, and for the subversion of the government. For they contrived it so, that they would imprison the mayor, and then, thought they, the loyal citizens will interpose to rescue him, and then the party should rise to assist the officer, he having the countenance of authority, and being in the execution of the king's writ, (especially if it be considered then who was coroner) and so a public commotion would be made a general mutiny, and that would be a fit opportunity, in the confusion of the city wanting its chief governor, of doing what they designed. Gentlemen, we shall prove all that is laid in the declaration; and likewise that the end of this business was to have had a commotion for the accomplishing their great con-

spiracy, as has been opened. That sir William Pritchard was arrested in his mayoralty, I suppose will be agreed, or else we shall prove it.

Mr. Ward. Yes, yes, we agree it.

Solicitor General. (Mr. Finch) Then we will go on and prove the manner of it. Swear Mr. Gorges, and Mr. Keeling. [Which was done.] Mr. Keeling, pray, will you tell my lord, and the jury, were you made a special bailiff to arrest sir William Pritchard, when he was lord mayor, and what did you do upon it? Tell all you know of it, and what was designed by it.

Keeling. My lord, all that I know of it is this: It was upon the 24th day of April, I have the warrant here to shew, I met with Mr. Goodenough, at Mr. Russel's the cook, in Ironmonger-lane, and several others were there; and I went away a little while, and came again: while I was gone from them, they put my name into the warrant, and upon that warrant, I did arrest sir William Pritchard, who was then lord mayor; at the suit of Mr. Thomas Papillon, I suppose this is the gentleman [pointing to the defendant.] I had no order for it from Mr. Papillon, nor ever spoke with him about it; but I had order from the coroner, who, upon the arresting him, took my lord mayor into his custody.

Att. Gen. Where was my lord mayor then?

Keeling. At Grocer's-hall.

Att. Gen. Was that the place he kept his mayoralty in?—*Keeling.* Yes, it was so.

Sol. Gen. What was he doing when you arrested him?

Keeling. There was some disturbance upon it, among the officers and people there. The coroner came up to him and said, Sir, I have a writ against you, I pray you would please to give an appearance at the suit of Mr. Thomas Papillon, and another at the suit of Mr. John Dubois, and some words there passed between him and the coroner; and my lord mayor refusing to give any appearance, the coroner, Mr. Brème, bid us execute our warrants; upon which I came up to my lord mayor, and touched him upon the shoulder; and said, I arrest you at the suit of Thomas Papillon, esq. and one Fernando Burley arrested him again, at the suit of Mr. John Dubois.

Att. Gen. What did you do with him, when you had arrested him?

Keeling. The coroner dismissed us, and, as I take it, carried him home to his house.

Att. Gen. What instructions had you what to do, in case he made any resistance, and did not submit to the arrest?

Keeling. I know of no instructions about any such thing.

Sol. Gen. Who was by, pray, when orders were given you to arrest my lord mayor?

Keeling. Both the Goodenoughs.

Att. Gen. He in the Proclamation, you mean, and his brother?

Keeling. Yes; Richard and Francis Goodenough.

Sol. Gen. And who else, pray?

• existen', dellberavit exequend', ac adtunc et
• ibidem apud Wilhelmum adtunc Major' ci-
• vitat' London præf', ut præfert', existen',
• prætextu brevis illius præ' corp' suum capi et
• arrestari, ac in prisona sub custod' ejusdem
• tunc Coronator' per spatium sex librarum, ex
• tunc prox' sequen', detineri malitiose et minus
• juste procuravit, in vituperation', derogation',
• et vilipendium prædicti Wilhelm' et
• officii Majoratus ipsius Wilhelm' præd', nec-
• non ad damnatum, præjudiciium, et gravamen
• ipsius Wilhelm' manifest', ubi revera, et de
• facto prædictus Thomas Papillon, prædicto
• tempore captionis, arrestationis, et detentionis
• ipsius Wilhelm' in prisona sic, ut præfert'
• fact', non habuit aliquam justam vel proba-
• bilem causam actionis versus ipsum Wilhel-
• mum in præmissis præd', unde idem Wilhel-
• mus dic' quod ipse deteriorat' est, et damnatum
• habet ad valent' decem mille librarum, et inde
• produc' sectam, &c.'

Keeling. Several that I did not know.

Att. Gen. Can you remember any body beside the Goodenoughs in particular?

Keeling. There was one ———, a tallow-chandler, and a great many that I did not know.

Sol. Gen. How many do you think there were? And where was it?

Keeling. I believe there were about thirty or forty, and it was at Russel's the cook, in Ironmonger-lane.

Att. Gen. Did they all come along with you to Grocer's Hall, to arrest my lord mayor?

Keeling. No, my lord, they did not.

Sol. Gen. Did any of them, and which, may?

Keeling. Sir, I will tell you who did come to my lord mayor's. There was the coroner, Francis Goodenough, Ferdinando Burley, and myself: and after my lord was arrested, the coroner bids us be gone, and he would look after my lord mayor.

Sol. Gen. Whither did you go after that?

Keeling. I went to sir Harry Tulae's directly.

Att. Gen. Did not you expect an opposition? And had you not some discourse what you should do in case there was an opposition?

Keeling. No, I cannot tell any thing of that.

Att. Gen. You say, there was a meeting, or consult, at Russel's, of forty people; had you not there some consultation what was to be done, if my lord mayor did not obey the arrest?

Keeling. I do not remember any thing about that, at that time.

Att. Gen. Was there at any other time before? Or did you hear any of those people discourse the Goodenoughs, or any of them, what they would have done in case they were resisted?

Keeling. I do not remember any discourse of such thing, before or after.

L. C. J. (Sir George Jefferies.) Pray, Mr. Keeling, let me ask you a question or two. Were you ever employed by the coroner to be a special bailiff to arrest any body, before this time you speak of, that you arrested sir William Pritchard?

Keeling. No, my lord, I never was.

L. C. J. Then pray recollect yourself, who were at that meeting, when, as you say, your name was put into the warrant for this arrest?

Keeling. My lord, when I went away for a little while, I left these persons particularly that I did name, the two Goodenoughs, and one Burton, I think, and one Crompton, and that tallow-chandler; there were to the number of thirty or forty, that I did not know their names.

L. C. J. But pray, how came you to be employed in this service then? Were you a tradesman in town then?

Keeling. Yes, at Wapping.

L. C. J. Good now, how came you to be employed in arresting my lord mayor, more than any other of those thirty or forty that you say were there then?

Keeling. I went there among them, but did

not know then that I should be concerned in this business; and I went away a little while, and when I came back they told me, that my name was put into the warrant.

L. C. J. Pray, tell us the whole story, how you that were a tradesman at Wapping, should come to be employed as a bailiff to the coroner of London, to arrest my lord mayor? There must be some particular end in it.

Att. Gen. Mr. Keeling, tell the court and the jury the whole story, and what it was that brought you into this.

Keeling. My lord, Mr. Goodenough told me. I must be concerned.

L. C. J. Ay, prithee tell us what Goodenough desired you to be concerned in.

Keeling. Upon my coming back to the company that was at Russel's, Mr. Richard Goodenough told me I must be concerned in the business of arresting my then lord mayor, sir William Pritchard; said I to him, Mr. Goodenough, this is foreign and remote to my business, to be concerned in such a matter as this, it will seem very strange for me to do it. He pressed it upon me to do it, and says he, If you will not do it, you will be a man looked ill upon, and it will be taken strangely from that party; he meant, I suppose the discontented party, the faction, or what you please to call it, that were not contented with the administration of the government in the city at that time; and he urged it upon me with a great many arguments. I opposed it with much vigour a good while, but at last he prevailed upon me to go along with the coroner; and Frank Goodenough, his brother, said he would go with me, and he did so; and we came and arrested my lord mayor, as I told you before.

L. C. J. Where did Mr. Goodenough press you to be concerned in this business, as you say?

Keeling. At Mr. Russel's a cook in Ironmonger-lane.

L. C. J. How came you thither?

Keeling. He sent me a letter to meet him there. He was at me before to be concerned in it, but I did not comply with him in it. Mr. Richard Goodenough it was, and Mr. Ashhurst, I think it was alderman Cornish's son-in-law, was by.

L. C. J. Was Nelthorp there?

Keeling. No, my lord, he was not there; but they did not proceed then, because my lord and his brethren were gone out of town, to wait upon the king, I think; and this was six weeks or two months before this meeting at Russel's.

Sol. Gen. Pray, Mr. Keeling, recollect yourself. Had you any discourse with Goodenough, or any body else, what the consequence of such an arrest would be?

Keeling. They told me, my lord mayor, and court of aldermen, had made an ill return to the *Mandamus's* that were served for them, for the swearing of Mr. Papillon and Mr. Dugbois sheriffs, and therefore Mr. Papillon and

Mr. Dubois had good cause of action against them: and Goodenough said, he had order from them to arrest my lord mayor upon an action, and desired me to be concerned.

Sol. Gen. But pray, remember what you said before, Mr. Keeling, why should the discontented party, as you call them, be concerned and be angry with you, if you did not arrest my lord mayor?

Keeling. The particular argument that he used with me to persuade me to it, was this, That I having a trade and dealing among that sort of people, they would think ill of me if I did not do it.

Sol. Gen. But why should the party be angry with you, if you were not a bailiff to arrest my lord mayor, at the suit of Mr. Papillon?

Keeling. I did not know the reason of their anger; he might have something in his head that he did not reveal to me. But that was the argument he used, The party would think ill of me.

Serj. Meynard. If you have done with this witness, I would ask him a question. You say, Sir, that Goodenough told you, the discontented party would be angry with you if you did not do it. Upon your oath, was the discontented party named?

Keeling. No Sir, but that party of which Mr. Goodenough and I then was; and they were the discontented party, I think; for they were so discontented, that they would have killed the king and the duke.

Att. Gen. That is an answer, I hope, to your question, Mr. Serjeant.

L. C. J. I think, when he names the Goodenoughs to be of the party, nobody questions but they were discontented.

Sol. Gen. He has explained well enough, sure, what he meant by the discontented party, those that were so discontented that they would have killed the king and the duke. Those were the promoters of this action, and Mr. Keeling must engage in it, or they would be displeased. Now, my lord, we shall call Sir Harry Tulse and sir Robert Jefferies, to shew what the coroner did:

Keeling. I arrested Sir Harry Tulse afterwards.

Then Sir Harry Tulse was called.

Mr. Ward. My lord, we desire sir Harry Tulse may not be sworn, we have an exception to his testimony.

L. C. J. What is your objection?

Mr. Ward. We are informed, he and the rest of the court of aldermen have joined their purses to carry on this suit, and then, with submission, he is not a good witness.

L. C. J. Ask him that question, upon a Voyer dire.

Then he was sworn upon a Voyer dire.

Mr. Williams. Pray, Sir, is there any order of the court of aldermen to lay out money for this cause, out of their joint purses, or the public City stock?

Sir H. Tulse. Not that we know of.

Mr. Williams. Pray, Sir, do you know whether sir William Pritchard laid out money in it, or who else doth?

Sir H. Tulse. I cannot give a positive answer to that, who layeth out money upon it, nor do I know of any such order as you speak of.

Mr. Ward. Sir Harry Tulse, though you know of no such formal order of the court of aldermen, yet is there not some direction by the court of aldermen about expending monies in a joint way?

Sir H. Tulse. I assure you, Sir, I know nothing of it.

L. C. J. Come, he has given a full answer to your question, swear him. [Which was done.]

Mr. Holt. Sir Harry Tulse, now you are sworn, pray, will you give an account of what happened about this matter, within your knowledge? Pray, tell the whole story.

Sir H. Tulse. My lord, about four of the clock in the afternoon, this gentleman, and two more, came to me to my own house, and he did arrest me (I mean, Mr. Keeling, that was sworn here before me) at the suit of Mr. Papillon; and another of them did arrest me at the suit of Mr. Dubois: Said I to them, I do not know that I owe them, or either of them, a farthing. But what must I do? he told me, it was only to give an appearance. Said I, gentlemen, I shall consider of that. Then, says he, you must go to my Lord Mayor. Why, where is he? said I? Said he, he is in the custody of the coroner, at his house. Where, said I? He is gone to Skinner's-Hall, said he. This is well, said I. So I called for my man to bring my cloke. Then they told me, if I pleased, they would take my word till tomorrow morning, if I would promise to appear. I told them, they might do as they pleased. So they left me; and I went first to my Lord Mayor's house, but found him not there; so I went down to Skinner's-Hall, and there I found my Lord Mayor all alone, and no alderman, only the officers. I asked his lordship how he came there? He told me, he was arrested by the coroner. I asked him how long he had been detained? And he said, but a little time: And indeed I think it could not be long, for I met his coach coming back from Skinner's-Hall when I went. After that, he was detained there till about eleven of the clock or thereabouts. This is all that I know of it.

L. C. J. What became of the government of the City all that time?

Sir H. Tulse. There was presently a great noise all about the City concerning my Lord Mayor's being arrested, and abundance of people were gathered together about the door, but there came a company of soldiers of the trained bands, and they kept all quiet. There were great apprehensions of an uproar. I saw nothing of hurt done, though. And I asked Mr. Brome, the coroner, who was by, am I a prisoner too? for I was arrested to-day, by a warrant pre-

ended to be from you. Says he, I have a writ against you, and now you are here, I cannot let you go, till you have given an appearance. So I took myself to be detained there with my Lord Mayor in custody, and staid as long as he staid, and went away with him.

Mr. Recorder, (Sir Thomas Jenner.) Swear *Mr. Wells*, the common crier, and Sir John Peak.

Mr. Wells was sworn.

Mr. Recorder. *Mr. Common Crier*, were you at my Lord Mayor's house when this hubbub was made? Pray tell my lord and the jury what you know of it.

Mr. Wells. Yes, I was there.

Mr. Holt. Then tell what past.

Mr. Wells. I was not in the Hall where my lord mayor was, but in another room by: and the officers came running in to me, and told me, I must come to my lord mayor quickly, for he was arrested by some people. When I came, I found there were none of the sheriff's officers that used to arrest people, but the room was full of other persons. My lord mayor bid me take the sword, and go along with him, for the sword-bearer was not then just at hand. I asked his lordship whither he was going? The coroner said, he was his prisoner, and must go along with him to his house. My lord mayor bid me presently send out the officers to summon a lieutenancy, which I did. I desired the coroner and his men to be gone; said I, Cannot you let my lord alone, and go about your business? No, he said, except my lord would give an appearance, he must go along with him. I then asked him whither my lord must go? He said, he had no place but his own house to carry him to, and thither we went; where when we came, my lord was put into a little room by himself, where were none but myself and the coroner, as I remember. My lord mayor bid me go and see for Sir James Edwards and Sir Harry Tulse, and my lord mayor that now is, and so I went; but I found they were arrested too before I came.

L. C. J. How did my lord go away from thence?

Mr. Wells. In his coach.

Att. Gen. Were you by when he went away? And who was there?

Mr. Wells. *Mr. Broune*, the coroner, was not there when my lord mayor went away, but there was Goodenough.

L. C. J. Ay, he was in trusty hands upon my word.

Att. Gen. The soldiers prevented the design, and so they let him go again.

Mr. Recorder. Swear Sir John Peak. [Which was done]. Sir John, what can you say to this business?

Sir J. Peak. My lord, I had order from the lieutenancy, to raise my regiment upon the news of my lord mayor's being arrested, which I did in a very little time, and came with my soldiers to Skinner's-hall, where I heard my

lord mayor was, and prevented any stir, as it was feared there would have been. But *Mr. Keeling*, I believe, can tell something more of the design than he has spoken, for I remember at the trial of the Traitors at the Old Bailey, he did say, That after my lord mayor was arrested, they did intend something, but their hearts misgave them when the regiment was up.

L. C. J. That is nothing to this cause what he said there; now he remembers nothing of it. Have you done, gentlemen, or will you call any more witnesses?

Att. Gen. We rest it here, my lord, till we hear what they say to it.

L. C. J. Come then, what are you to say that are for the defendant?

Serj. Maynard. May it please your lordship, and you gentlemen of the jury, I am of counsel in this case with the defendant, *Mr. Papillon*. I see, gentlemen, it is a cause of great expectation, and by that means they would make it greater by far, than indeed it is in itself. But I suppose, you who are upon your oaths to try this issue, will duly weigh and consider what it really is. Gentlemen, the record tells you what it is, an action upon the case, wherein the plaintiff declares, that the defendant did arrest him, being then lord mayor, without any probable cause, and out of malice. Now, as to that, gentlemen, I conceive and think, I may appeal to my Lord Chief Justice in it, for direction in point of law, that my lord mayor, if he do mistake in his office, and do not do that which belongs to him to do, he is as much subject to the process of law and actions, as any private person in the city of London. If he does any man an injury, or does that which is not right in his office, by which another person is grieved, he is liable to the prosecution of any particular subject the king has, that is so grieved by him. Then they allege, that this particular action and arrest thereupon was prosecuted and done out of malice, and without probable cause. Now what have they proved of that? They prove the thing done, that he was arrested at the defendant's suit, and that he was kept in custody six hours. But if we can give you any account of a probable cause for it, that is sufficient to justify us from this action. Gentlemen, the question that you are to try is not, whether this man or that man were duly chosen into such an office; but whether there were any probable cause for the defendant to contest about the choice? And herein the case will fall out to be thus: There was a difference in the city of London, as is very well known to every body, about the choice of sheriffs for the city, wherein the defendant was one of the competitors; there were, upon the nomination and election in the hall, a great many more voices or suffrages for one than for the other, which was certified to the court of aldermen and lord mayor, as is usual; but some contest being, a poll was demanded and granted, and upon that poll, my lord mayor was pleased to

declare the election on one side against Mr. Papillon, who was yet apprehended, by the first choice, to be one that had most suffrages. But several meetings there were, and several common halls assembled, so that it was a contested matter, and, as I said, there had been a report made on the defendant's behalf. We insist not upon the right of election; that has been otherwise determined. But when he is put in nomination by the electors, in the city, and has many suffrages, and he conceives himself rightly chosen, and they that are managers of the election give such an account that in their judgment he was chosen, that surely was a probable cause for him to proceed upon it. And if there be but a probable cause to bring this to a question, no doubt he might very well take the course the defendant took. Here is no arrest without legal process; nay, their own witnesses say, there was an offer to take an appearance without putting it on so far as an arrest: if my lord mayor would have but given an appearance, there had been an end, but he did not think fit to do that, and so the process of law was executed upon him. Then here is the case in short: A man thinks himself rightly and duly chosen into an office, and has probable reason so to think, for the judges of the election think so too, and deliver that as their opinion: so that though he is mistaken, as the event proves, yet he is not alone in his mistake, nor without ground of his apprehension: then if it be (under favour) such a man has no other proceedings to take in the world for settling this matter, but to appeal to your lordship, and that great court where your lordship sits, to have a writ to command the mayor, or other proper officer to swear such a man into the office, or shew good cause why he doth not. If the mayor, upon the receipt of the writ, thinks fit to obey it, and swears the man, all is well: if not, he must make a return of the writ, with the cause why the command of the writ is not obeyed. Now the suggestion of the writ is, that he was duly chosen into such an office, and therefore he had a fair way to put this matter to an end; if he would have returned he was chosen, or not chosen, there had been an end of the business, which he ought (under favour) to have done in obedience to the king's writ. What then follows upon his not doing so? The party that is grieved hereby, has no other course to take, but to bring his action against the mayor for it. This course the defendant took, by taking out a writ against the plaintiff: and what was the effect of that writ? It is indeed charged here by the counsel on the other side that there was a design of a discontented party in it, and I know not what, and a great deal of stir made that a coroner of the city of London should arrest my lord mayor. It may be it was not so reverently done, but yet if he thought he had good cause of action against him, he might do it lawfully. Doth this prove to you, that this was maliciously and unreasonably done? Malice must be to the

person; zeal and earnestness to have rights done to a man's self or another, in a legal course of justice, is not malice, nor will make the prosecution of the action unreasonable and groundless. Have they proved to you, gentlemen, any particular discontent and malice that is between the plaintiff and defendant? No truly, I think, by all the proof that has been offered, the quite contrary does appear. The defendant took out a Mandamus, directed to the plaintiff, which was not duly returned: what then doth he do next? Doth he most violently arrest him? That, with submission, he might do, and so offence in law: no, but he doth not do it, but only desired from time to time, as we shall prove anon, that he would but give an appearance, that would have put a conclusion to this dispute. There is no appearance given: whereupon he is arrested, and detained in custody six hours. If a man be once in the officer's hands taken upon legal process, how long soever the officer keeps him, is not at all to be laid upon the person that brings the suit; that is to be looked after by the officer himself. Whatsoever was the usage in that manner, we are not to answer for (though it is plain an appearance would have done all presently,) we shall prove we gave order to use all deference and respect in the world. And besides (though I would not speak it to invalidate any of the evidence given about the right of election one way or other, yet) there being a return of the defendant's election by the sheriffs to the court of aldermen; but they being of another opinion, gave order that those that thought themselves aggrieved should take their remedy at law: which order we have pursued in that regular course that the law has prescribed. And I hope it will never come to that, that a man (though mistaken) conceiving himself to have a right of action, and suing out the king's writ, shall suffer for so doing, unless particular malice be made to appear. Here is a great noise of damage, and disrepute, and disgrace to the plaintiff and his office, and he has been pleased to reckon his own damages at 10,000*l*. We say he has sustained no damage by any thing we have done, but we are quite not guilty of this unreasonable and malicious prosecution laid to our charge. And that we are not guilty, the matter that has been opened, we think, will sufficiently declare. For if there was a contest about the election, and the sheriffs returned it as their opinion that the defendant was chosen, though they and he too were mistaken, yet that might give a probable ground for his pursuing the course he did take, and the very court of aldermen, and the lord mayor, bidding them take their course at law, we sure shall not be punished for it. We did not prosecute our question in any malicious way, but in that course that the law allows, by taking out the king's writ, and we hope the law will protect us for it.

Mr. *Williams*. Will your lordship be pleased to spare me a word on the same side

with Mr. Sergeant Maynard. I am of counsel, gentlemen, with Mr. Papillon, the defendant, in this action. We do not insist upon it nor now offer any thing to assert our election: we did apprehend we were elected, but that is ruled against us, and we rested satisfied with it. But we come here now before you upon this question: whether we had any probable cause of action, upon which we might take out this process mentioned in the declaration, which is a *Capias* upon a *Latitat*? And we do insist upon it, that this action of the plaintiff's must fall upon the issue joined, if we can satisfy you, and shew that it was not malicious, and without probable cause. And though our cause of action against the plaintiff falls out to the event not to be a good and sufficient cause, yet if it were probable, it will evade this action, and that is all we labour for. They do not attempt to prove, at leastwise I have not heard any thing of it; that there was an express malice, any thing either said or done by the defendant, more than the causing him to be arrested upon this writ. It is very well known, it was in the city of London a very much controverted question, whether Mr. Papillon and Mr. Dubois, or sir Dudley North and Mr. Rich, were chosen sheriffs of London? I would not run over the history of it, it is but too well known and remembered, the divisions that were in the city about it. Some were so much dissatisfied with the swearing sir Dudley North and Mr. Rich, sheriffs, as thinking them not duly elected, that they would have the court of king's bench moved for the writ of *Mandamus* to swear Mr. Papillon and Mr. Dubois. This *Mandamus* was moved for, and granted; and to this writ the mayor and aldermen, to whom it was directed, made a return that we were not elected sheriffs of London, which return was apprehended to be false; and really to try the truth of this return, was the action brought against the plaintiff. A man that is injured by a false return, hath indeed no other way to right himself, but by bringing an action against them that made it. Upon this action brought, I hope you are satisfied, gentlemen, from the evidence that has been already given, the defendant proceeded regularly and orderly, in a decent manner applying himself to get an appearance to his action. And we shall prove he did so; for, first, he took out a *Latitat* against my lord mayor, and by the attorney gave him notice of it, and desired an appearance; so that the question in dispute might come to some determination. But he was not pleased to give us an appearance to that writ, so we took out a *Capias*, gave him notice of it, and desired an appearance, but could have no appearance; whereupon we took out an *Alias Capias*, which is the writ mentioned in the declaration. And the coroner, who has been named, was then told, he should be called upon to make some return to his writ; which he acquainted my lord mayor with, and desired him to give an appearance, which he refused to do; the

officer was constrained to arrest him, to execute the king's writ, and you hear how he treated him with all due respect, and carried him to his own house, where he staid some hours, and then went away. All this time were we satisfied with what was done, we expected no more than an appearance, which at last was given. Upon that appearance we did declare, in the beginning of Hilary or Easter term (83): but it fell out, that in Easter term (88) there was an information for a riot upon Missummer-day before, about this contested election, came to be tried. And that coming to trial, 10 Maii, and being found to be a riot, and the sheriffs sworn to be duly elected; thereupon we were abundantly satisfied that we were mistaken, and under misapprehensions, and that our cause of action would not hold, and we did discontinue it. Indeed, if we had prosecuted our action after that, it would have been more like an angry and a silly prosecution, and the whole have had a worse construction, than the thing in itself would bear. But when we found the opinion of the court to be against us about correction, we immediately discontinued our action. Gentlemen, we shall prove these to have been our proceedings, and that, I hope, will satisfy you, we are not guilty, according as we have pleaded.

Mr. Ward. May it please your lordship, and you, gentlemen of the jury, I am of counsel on the same side, for the defendant, and desire to be heard one word, as to some things that have been said on the other side on this cause. There have been some questions asked, that do very much reflect upon the defendant, and which I would take out of this cause. I shall take notice, first, what the questions were, and then give them that regard and answer which they deserve. That which is urged, gentlemen, by way of crimination, in this case, against the defendant, and an unjust as well as foreign reflection, not at all concerning the cause, is, as if the defendant were acquainted with the insurrection and conspiracy that was intended against the king's life, and for subversion of the government, and procured the plaintiff, then lord mayor, to be arrested, to further and promote that insurrection. But as that was insinuated only for reflection's sake, so I hope you, gentlemen, will be pleased to take notice, that not one word of any such thing is proved at all, that the defendant ever knew of any intended insurrection, nor that this was done with any such design: for even their first witness, Keeling, from whose being employed by the coroner in the execution of the writ upon sir William Pritchard, the plaintiff, they would argue that something else was designed in it, doth give a positive denial of any such thing now upon his testimony here. And Mr. Papillon the defendant never knew him in his life, nor employed him in this business, nor ordered that he should be employed in it, nor ever saw him; but the coroner gave him his warrant to execute. If, therefore, Keeling and

Goodenough were concerned in any ill business, and have taken upon them to do that which they ought not to have done, that doth not signify any thing in this case, nor ought to turn to the defendant's prejudice. Nor, if any thing were done by the officers, that were to execute this process, that were a Mistesance, or a male-execution of their office, that ought not to be imputed as a fault in the defendant. But for this matter now before you, the case will depend upon this point chiefly, whether the now defendant had a reasonable cause, or probable ground, to bring an action against the plaintiff at the time when it was brought, and this arrest made? For there is many a man, that at the commencement of his action, doth conceive in himself, he had a good probable cause of action against another man, that in the event of things finds he was mistaken, and hath no such cause; and thereupon desists the prosecution of it. Therefore the probability of the cause, at the time when this fact was done, is the question you now are to try. For we are not now considering, whether that probable cause did continue and prove a good cause; the event of this matter has proved it quite otherwise. Indeed the original question of this whole cause was, Who were only elected sheriffs? And that at the time of such election made a great number of votes passed for the defendant, is, I think, very notorious, both upon the lifting up of hands, and upon the poll. These things we shall offer to you, and make it out that these gave occasion to the defendant to contest the election, and consequently to the bringing of the action that the plaintiff was thus arrested upon. If then there were such things as these that we have opened, which gave a colour to controvert the right, and the defendant pursued the method prescribed by the law to bring it to a determination, and there was no particular disrespect or incivility offered to my lord mayor, then sure there was no reason to bring this action against us. And that there was no indecent behaviour used towards the plaintiff, doth appear from the evidence that hath been given of the whole transaction. All that was desired of my lord mayor was but an appearance. For this was indeed an action that did not require bail, but an appearance; though, I must needs say, I never knew any one so averse to give an appearance to an action as the plaintiff was; for after a *Latitat* and *Capias* taken out, and being frequently acquainted with it, and at length upon application after the taking out of the *Alias Capias*, and many attendances, with all the deference and respect imaginable, both to his person and office, not so much as a bare appearance could be obtained. Upon the opening of the declaration and the cause, you have been told of the great dangers that were in the case, as to the infringement of public peace, and the government, which has been very much aggravated on the other side. But had the reasonable request of the defendant by his attorney, or the officer, so often repeated, been but complied with, it had been but sending

to any attorney, and ordering an appearance, and then, I hope, the peace of the kingdom had been in no peril from such a design as this arrest. Which I would not have mentioned, nor should have taken to be at all concerned in the issue now before you to be tried, but that I find them to be taken into the question, when I hope you will consider they are no way material to the point in controversy. Now, gentlemen, in our defence against this suit of the plaintiff's, we shall call our witnesses to prove what we have opened. And our defence will be in these steps: first, to shew the inducement to our action against the plaintiff: which will shew there was a probable cause. Secondly, give an account of the reverent carriage and behaviour towards the plaintiff in the prosecution; how with reiterated applications it was only desired that the plaintiff would give an appearance, which he was not pleased to do; and that thereupon, with great civility, the king's writ was executed, as indeed I see no proof to the contrary. For neither the coroner, nor those other people that gave their assistance to him, were at all rude in their carriage to my lord mayor; but as soon as the arrest was made, they were all turned off, and the coroner staid alone with my lord, and went with him in his lordship's own coach to the Skinners-Hall, which was the coroner's house. Neither was there any thing ill done, after all this was past: for, upon the plaintiff's appearance, the now defendant declared in his action, and intended to pursue it; but it happened that afterwards, in a short time, these things suffered from debate, in a trial that was here about a riot at this election, where the question of the right and election was determined on the other side, which gave the plaintiff in that action, the defendant in this, satisfaction that he was in a mistake; and so he thought fit to discontinue that action, and proceeded no further—

L. C. J. No, Mr. Ward, that was not the question determined then.

Mr. Ward. My Lord, I humbly conceive the issue of that cause did determine that question—

L. C. J. No, no, I tell you it was not the question.

Mr. Ward. I must submit it to your lordship.—

L. C. J. I perceive you do not understand the question that was then, nor the question that is now. You have made a long speech here, and nothing at all to the purpose: you do not understand what you are about, I tell you it was no such question.

Mr. Ward. My lord, I was only giving an account of what we should prove as to the fairness of our proceedings—

L. C. J. But I must interrupt you, and tell you, all you have said signifies nothing. And as to what you mention of the trial for the riot, I say, if there be any election to an office at any time, that is controverted or doubtful, you have forms and methods of law to determine the controversy—

Mr. Ward. And we say, with submission, my lord, we have only pursued such form and method—

L. C. J. You are not to try rights by club-levy, by riots, by noise, and by tumults. Therefore, you are mistaken, to say, that was the question upon the trial of the Riot. No, it was not the question, but the defendants there were tried for a notorious offence, and disorderly tumultuous assembly, an assembly that had like to have set us together by the ears. Therefore you must not talk after that rate. If you will speak, apply to the business in hand. Do not make such excursions, *ad captandum populum*, with your flourishes; for that is all that is designed by your long harangues. But I must not suffer it. I will none of your enamel, nor your garbure. The business of the court, is, and by the grace of God, it shall always be my business, and so it should be the counsel's too, 'Servare jus illorum.' But I see you do not understand the question, and that makes you ramble so much in your discourse.

Mr. Ward. My lord, I desire always to do my duty; and do it as well as I can. I know very well, and hope to apply it to this case, that in a question of right there are forms and methods of law to be pursued, and I would defend my client from this action, by proving he did pursue that method; and when he apprehended he had been before mistaken, he desisted from what he had begun—

L. C. J. I tell you, I perceive you do not understand the question.

Mr. Ward. If your lordship will give me leave to explain myself, I hope I shall satisfy your lordship.

L. C. J. Indeed Mr. Ward, you do not understand the question at all, but launch out into an ocean of discourse, that is wholly wide from the mark. I see you do not understand it.

Mr. Ward. Will your lordship please to hear me—

L. C. J. Ay, if you would speak to the purpose; but I cannot sit here all night to hear you make florid speeches about matters that are foreign to the point before us. Come to the question, man; I see you do not understand what you are about.

Mr. Ward. My Lord—

L. C. J. Nay, be as angry as you will, Mr. Ward, I do tell you again, all you have said is nothing to the purpose, and you do not understand the business.

Then there was a little hiss begun.

L. C. J. Who is that? What in the name of God? I hope we are now past that time of day that humming and hissing shall be used in courts of justice; but I would fain know what fellow that dare to hum or hiss while I sit here; I will assure him, be he who he will I will lay him by the heels, and make an example of him. Indeed I knew the time when causes were to be carried according to the mobile

hissed or hummed; and I do not question but they have as good a will to it now. Come, Mr. Ward, pray let us have none of your fragrances, and fine rhetorical flowers, to take the people with.

Mr. Ward. My lord, I do not do any such thing, but if your lordship would please to hear me, I would explain myself, I hope to your lordship's satisfaction, and the satisfaction of the gentlemen of the jury.

L. C. J. Hear you? Why, I did not interrupt you, man, till you came to launch out into extravagant things that did not at all concern the cause. Keep close to the question we come here to try, and I will hear you as long as you will. The single question is here, Whether there were a probable cause for your arresting the plaintiff, or not.

Mr. Ward. My lord, we did apprehend, I say, that we had a probable cause; but when we found our mistake, we discontinued our action, paid costs, and have a receipt for them. This was it I was saying—

L. C. J. Say what you can, in God's name, that will conduce to the point in hand; but do not make the people believe as though the right of sheriffs, or not sheriffs, were determined upon the trial of a riot.

Serj. Maynard. There are these things that are proper to be considered in this question, whether the cause were probable, or not probable; and if not probable, whether malicious, or not?

L. C. J. True, brother: if people will but understand their business, it is reduced to a narrow compass; but if they will not understand what it is they come about, they will ramble from the point, and who can help it? But we must keep to what is before us.

Mr. Williams. We shall make it out, that nothing was done but very civilly.

L. C. J. You must make it out, that nothing was done but what you had probable cause at least for.

Mr. Williams. We will, my lord, apply ourselves to that which your lordship directs. Call Mr. Brome, Mr. Courthope, and Mr. Cornish.

Mr. Brome sworn.

Mr. Ward. Mr. Brome, are you sworn?

Brome. Yes, Sir.

Mr. Ward. Have you the writs here? The Latitat and the Capias?

Brome. Truly, Sir, I have not; I did not bring them with me, they are at home at my house; if you please, I will fetch them.

Mr. Ward. Pray, can you tell, Sir, when the first writ was returnable?

Brome. In Hilary term.

Mr. Ward. When you had that writ brought to you, Sir, what did you say to my lord mayor about it?

Brome. I went to my lord mayor with Mr. Goodenough, and desired my lord that he would appear to it, as Mr. Goodenough told me he had desired of him himself before. But he

said he would give no appearance. If I would take him upon the writ, I might do as I pleased, and he would consider, and do as he should think fit; but he would not give any appearance. I told him, I had writs against several of the aldermen upon the same account, and that I would wait upon them also; and I did so, and desired them to appear, and offered to take an appearance from them, and gave my lord mayor and them time to consider of it, and came again; but they told me, they had considered of it, and would give no appearance.

Mr. Williams. When was this, Sir?

Brome. In the beginning of Hilary term, to the best of my remembrance.

Mr. Williams. What time did you give my lord mayor to consider of it?

Brome. About a week, or some nine or ten days time, as I remember.

Mr. Ward. Where was it that you had that answer, that he had considered of it, and would give no appearance?

Brome. It was at the court of aldermen.

Mr. Williams. Were the writs brought again to you?

Brome. There was not time to make a return then, and so they let all alone till a little before the beginning of Easter term, and then one day Mr. Goodenough, the attorney, brought me the writs again, and threatened to complain to the court of me, and acquaint them, that I had neglected the execution of the king's writs, two of them.

Mr. Ward. Upon your oath, Sir, did he threaten you, that if you did not make a return of the writ, he would complain?

Brome. He said I had exposed him to the complaint of his client; and if I did not do it, he would complain to the court of me: if I would make a return, as I ought to do, well and good, if not—

Mr. Williams. If not, what then? Did he use any other threatenings, pray, Sir, but that he would complain to the court?

Brome. He did threaten to complain of me.

Att. Gen. You say, Sir, he threatened you; what answer did you make to him?

Brome. I did not use to execute writs myself, I told him: thereupon he did propose two persons to me, Mr. Keeling, and one Mr. Bursleigh, for he told me the sheriffs officers would not do it.

Att. Gen. Pray, Sir, did you endeavour to get any of the sheriffs officers to do it?

Brome. He told me he could not get any of them to do it.

Mr. Ward. Mr. Brome, what did you do after he had proposed those two persons to you?

Brome. After I had given those warrants to the officer he had named, I told him, I was willing to go once more to my lord mayor, to see if I could get an appearance of him without arresting him; so I waited on him at his house at Grocer's-hall, but found him then at dinner; so I went away, and came again about four o'clock, and I first spoke to Mr.

Gibson, and intreated him to let my lord mayor know, that I desired to speak with his lordship at his leisure; afterwards, when I came up to my lord mayor, he asked me, what was my business? I told him the writs were renewed, at the suit of Mr. Papillon and Mr. Dubois, and I was pressed to make a return; and I desired his lordship that he would be pleased to give an appearance. He told me he was ready to submit to the king's writ, but would not give an appearance; thereupon the officers named in the warrant by my command did arrest him.

Mr. Ward. How often did you wait upon my lord mayor for an appearance upon both the writs, before he was arrested?

Brome. Several times; I cannot exactly tell how often.

Mr. Williams. Had you directions, if he would please to give an appearance, to take an appearance and not to arrest him?

Brome. I had directions to take an appearance, if he would give it.

Att. Gen. From whom had you that direction, Mr. Brome?

Brome. From the attorney Goodenough.

L. C. J. Now, Mr. Brome, let me ask you a question or two: how long had you been coroner before?

Brome. About two years before, or thereabouts.

L. C. J. Had you ever made any warrants upon writs of Capias before?

Brome. Yes, my lord, several.

L. C. J. Who did you use to make your warrants to, to be executed?

Brome. I never keep my warrants; they that execute them have them.

L. C. J. But answer me, To whom did you make them?

Brome. To one of the sheriffs officers commonly.

L. C. J. Then I ask you, upon your oath, did you before this time ever make any warrants to any other person, till such time as you made these warrants to arrest sir William Pritchard?

Brome. I have made several to the sheriffs officers, that I cannot remember now particularly.

L. C. J. But mind my question, man, and answer me directly; for I expect you should answer me positively to it. Have you ever at any time made any warrants to any other but the sheriffs officers till this time?

Brome. I cannot remember that I have.

L. C. J. How then came you at Russel's house to discourse with Mr. Goodenough about who would be fit to execute the writ, when you used to employ the sheriffs officers, and there were so many of them?

Brome. He told me he could get no one of them to execute it.

L. C. J. But there must be something more in it than ordinary, that you and Goodenough, and all those other people, should come to meet about such a thing as this, to discourse and consider who should be fit to be put into a war-

not to make an arrest upon a Captain, when before that time you used to make it to those that are versed in those matters.

Brome. When the attorney came with a writ, and desired a warrant upon it, it is usual to take whom he nominates, and make him the officer to execute it.

L. C. J. Then give me, if you can, any one special instance, wherein you have taken the direction of the attorney, whose name to put into the warrant.

Brome. Yes, my lord, I can.

L. C. J. Do then, let's hear it, when was that?

Brome. I did it in the case of his royal highness against Mr. Pilkington. Mr. Swift came for a warrant, and directed me whom to put into it.

L. C. J. What directions did he give you?

Brome. He gave me the names in writing.

L. C. J. Where is Keeling?

Keeling. Here, my lord.

L. C. J. What was the meaning of that word that was used by you, 'that the party would be angry, if you did not arrest my lord mayor;' for that is it, which makes me so inquisitive into this matter, how these people came to be employed?

Sol. Gen. Ay, pray consider with yourself, and recollect, Mr. Keeling; when you were first mentioned to be a special bailiff to arrest my lord mayor, you say you opposed it: how then came you to be drawn in, and engaged to do it?—*Keeling.* I will tell you, my lord.

L. C. J. Ay, and tell us what number of people were there.

Keeling. There was about thirty or forty.

L. C. J. Was Brome among them?

Keeling. He was there some part of the time.

L. C. J. Well, what was the reason that you should be engaged about this thing?

Keeling. I went away a while, and came again: Mr. Brome came in, and I was away an hour and a half, as I remember, or some considerable time. Mr. Brome cannot forget, that, when I came again, I found my name inserted in the warrant, as a bailiff to the coroner, to arrest sir William Pritchard, then lord mayor. I disputed it, as being never concerned in any such thing before, and was very unwilling to be employed in the affair. Says Mr. Goodenough to me thereupon, You will disoblige the party in case you do not do it.

L. C. J. Was Mr. Brome in the company when Goodenough said so to you?

Keeling. I know not that truly, but he was before in the company.

L. C. J. How many were there in the room?

Keeling. About twenty, or more, as near as I can remember.

L. C. J. You, Brome, did you ever, when you received a writ to arrest a man, and were to give a warrant upon it, call a consult of twenty or thirty, how to do it, before this time?

Brome. I did not do it now.

L. C. J. No, no, a-lack-a-day thou wert as

innocent in all this matter as a sucking child.

Mr. Williams. Was Mr. Papillon in the company, Mr. Keeling?

Keeling. No, he was not.

Att. Gen. Mr. Brome, pray answer me; when you had my lord mayor in your custody, how came you to discharge him out of custody?

Brome. I was taken into custody myself.

Mr. Ward. Did my lord mayor give an appearance?

Brome. I was committed to the compter myself.

Mr. Williams. Were you by when it was agreed that my lord would give an appearance?

Brome. I believe not; it was afterwards as I have heard.

L. C. J. A-lack-a-day, it went strangely against Mr. Brome's stomach, all this did. I know it very well he had no mind to it at all.

Att. Gen. Mr. Keeling, did you hear any discourse between the twenty or thirty that were in that company about this business?

Keeling. I cannot say who in particular discoursed of it, or what was said.

Sol. Gen. Was it discoursed of in the whole company?

Keeling. There was some discourse about it in the company.

L. C. J. You, Brome, were you ever acquainted with Keeling before?

Brome. I had the misfortune, my lord, to be concerned with him about some coal-works.

L. C. J. Did you know that Mr. Burleigh before, that was the other bailiff?

Brome. I knew him by sight; I had no great acquaintance with him.

L. C. J. Pray where lived Keeling?

Brome. At East-Smithfield.

L. C. J. And where lived Burleigh?

Brome. Truly, my lord, I know not; I think at the other end of the town.

L. C. J. But prithee, how came you to join these two people together in this business; the one from Wapping, the other from Westminster?

Brome. Where the sheriffs were concerned, as they were in this matter, and therefore it came to me, I thought it not so proper to pitch upon the sheriffs officers, nor would they do it, as he told me; and especially it being to arrest my lord mayor, I did not think proper to employ any one that lived in the city.

L. C. J. But there were abundance of people that were not citizens, that were nearer at hand, and nearer together, and fitter for such a purpose than a tradesman fetched out of the east, and I know not who out of the west, to arrest a man: there must be some other meaning in it.

Brome. I gave them the nomination, as I used to do in like cases.

L. C. J. Upon your oath, Sir, was it you or the attorney that named these persons?

Brome. He told me he could get none of the sheriffs officers to do it; and I did not think it indeed proper for any of them.

L. C. J. And why, good Sir?

Brome. I did think so, truly, my lord.

L. C. J. Why? Why? What reason had you for it?

Brome. It was reasonable, as I apprehend, my lord, for me to think so, it being in a matter wherein the sheriffs were so much concerned.

Sol. Gen. But did you propose it, or any one else in the company, upon your oath? and who was it?

Brome. The attorney named them.

Com. Serj. It seems here were a great many persons met at Russel's about this business. I desire, my lord, that Mr. Brome may name as many of them, as he can, that were there.

L. C. J. Ay, as near as you can, name the twenty or thirty persons that were there; for you living in the city, and having an acquaintance among that sort of people, must needs know most of them.

Brome. Why, my lord, there were both the Goodenoughs, and Mr. Nelthorp, and who in particular else, I cannot well remember.

L. C. J. Yes, yes, I am sure you can tell more of them.

Brome. My lord, I cannot swear that I remember any other in particular.

Com. Serj. It seems he has named some of those that are in the proclamation; pray, Sir, do you remember any others were there, that were in the proclamation?

Brome. I do not remember any other of those in the proclamation were there.

Att. Gen. Can you remember any that were not in the proclamation?

Brome. There were several people that I knew by sight; but I cannot remember their names.

L. C. J. Nay, nay, pray open your eyes a little, and recollect your memory, and tell us who were there; I know you can do it.

Brome. My lord, there were many citizens that I knew by sight; but had no particular acquaintance with them.

Sol. Gen. Did you know any of the company besides the Goodenoughs, and Keeling and Nelthorp?

Brome. I had little acquaintance with him.

Sol. Gen. How come you to remember him so particularly?

Brome. I verily believe he was there.

Recorder. Was Mr. West there?

Brome. I cannot positively say whether he was or not.

Mr. Williams. Swear Mr. Cornish then. [Which was done.]

L. C. J. You, Brome, was Mr. Cornish there?—*Brome.* Not that I know of.

Att. Gen. It is strange we cannot learn who those persons were that met there.

L. C. J. Oh these fellows have strange memories for their purposes. Well, what do you call him for?

Mr. Ward. My lord, we call Mr. Cornish to give an account what he knows of this matter; what directions were given by the plaintiff to

his attorney; how he should carry on this matter.

Mr. Cornish. My lord, That which I particularly remember, I shall fully and very faithfully declare. I was with Mr. Papillon and Mr. Dubois, at my house. The occasion of their coming thither, I knew not, nor did expect either of them there; I myself came from Guild-Hall, either from a court of aldermen, or from a committee; and when I came home, I found them there. We had not been many minutes together, but in comes Mr. Goodenough the attorney; and he applied himself particularly to Mr. Papillon and Mr. Dubois, to receive their orders what he should do; for he said the time was almost spent, and he had addressed himself from time to time to my lord mayor, and some of the aldermen, to get them to appear, but they would not. They told him then, they had given him what orders they had to give him already; that it was fit the matter should be brought to some trial or issue, that there might be an end of it. He pressed them then earnestly to know what he should do: Said they, You are to desire an appearance to the action, and if he will give it, take it, and remember my lord mayor is the chief magistrate of the city; and pray, carry it with all respect and regard imaginable to him.

Mr. Williams. You say, Sir, they bid him to take an appearance, if he could get it?

Mr. Cornish. Yes, and they declared, that their design was only to bring it to an issue to be tried, and they would not insist upon any thing but an appearance, if it might be had.

L. C. J. Wonderful careful and civil they were, no doubt of it.

Mr. Cornish. This is the truth, and the whole of the truth, that I know of, relating to this matter.

L. C. J. Mr. Cornish, you speak of some of the aldermen, that he said he had been with: what aldermen were those?

Mr. Cornish. There were several of them, that he said he had writ against.

L. C. J. You were an alderman then; pray had he any writ against you?

Mr. Cornish. I know not whether he had or no.

L. C. J. But he did not require an appearance of you, I suppose?

Mr. Cornish. If he had, I must have taken notice of it to defend myself as well as I could.

L. C. J. Ay, no question but you would, but were you asked for an appearance, or no?

Mr. Cornish. I was told I should be sued among the rest.

L. C. J. But was there any writ shewn to you?

Mr. Cornish. No, my Lord.

L. C. J. Then pray let me ask you a question or two. Did you ever know any man before bring an action, or sue to be sheriff of London? You have been sheriff yourself we know.

Mr. Cornish. This was a matter that had

how much disputed in the city; and a question had been depending upon it, whether the right was to my lord mayor, or in the sheriffs.

L. C. J. But the question of right between my lord mayor and sheriffs, what was that to Mr. Papillon? Did you ever know a man bring an action, or sue to be sheriff?

Mr. Cornish. Truly, he that experienceth the trouble of it, will, I believe, never be desirous of it.

L. C. J. But that is no answer to my question, answer me directly: did you ever know any such thing before?

Mr. Cornish. I never did hear of any such that I know of.

L. C. J. How then came Mr. Papillon so officiously to desire it?

Mr. Cornish. I cannot answer; what his reasons were, I know not.

Mr. Williams. It was an action to determine the question that was at that time so much litigated in the city of London.

Att. Gen. Mr. Cornish, pray, will you answer me one thing; were you never in no company wherein it was agreed this suit should be brought and carried on in their names?

Mr. Cornish. Mr. Attorney-General, I never wedded or managed it.

Att. Gen. Did you never hear it was so agreed?

Mr. Cornish. It is known to thousands, as much as I know of it; the matter was disputed of in all companies in the city.

Att. Gen. But you do not answer to my question; were you ever in any company when it was agreed that so it should be?

Mr. Cornish. Sir, I tell you as well as I can, the matter that was to be disputed by that action, was the general discourse of all societies of men whatever in the city at that time.

L. C. J. It is a strange thing, that one cannot get a direct answer from these people, to any thing one asks them; I desire to know one thing of you, Mr. Cornish: you have known Mr. Papillon, the defendant, before this time?

Mr. Cornish. Yes, my lord, I have known him several years.

L. C. J. Was he ever chosen sheriff of London before?

Mr. Cornish. Yes, my lord, I suppose he was.

L. C. J. How chance he did not hold then?

Mr. Cornish. I have heard he fined, as was common and usual, when persons' occasions would not permit them to attend the service of the place.

L. C. J. He did so, it is known to thousands, as you say, that he did. Now, pray, let me ask you another question: was Mr. Bethel ever chosen sheriff before that time you and he were sheriffs together?

Mr. Cornish. I do not know that he was chosen before.

L. C. J. How is that?

Mr. Cornish. My lord, I do not understand what the question is, or else I know nothing of it.

L. C. J. How, did you never hear of that before? For, Mr. Cornish, I do not speak of a thing that nobody knows; alas, thousands, and ten thousands of people know that too.

Mr. Cornish. My lord, upon my oath, I do not know that ever he was.

L. C. J. Did you ever hear it?

Mr. Cornish. I do not know that ever I did.

L. C. J. Did you never hear that Mr. Bethel swore himself off, as they call it? You know what I mean.

Mr. Cornish. I do not remember any thing of it.

L. C. J. Nay, nay, it is to the matter, I assure you, Mr. Cornish, whatever you think of it. I ask you then another question, that lies something nearer your memory: upon your oath, when you two were elected upon Midsummer-day, was not that election vacated, and you chosen again within a week, or some little time after? And was it not because you had not taken the sacrament, and the corporation-oath?

Mr. Cornish. My lord, I do remember there was a second election.

L. C. J. And we remember it too well enough.

Mr. Cornish. That was so lately, that any citizen of London, or any one that lived here, may remember the passages of those times.

L. C. J. And you have as much cause to remember it as any man, I assure you, for several reasons that I know.

Mr. Cornish. My lord, I think I have reason to remember it.

L. C. J. Lest you should forget it, I will enlighten you and refresh your memory a little: I ask you again, upon your oath, was not your first election set aside, because you had not taken the oaths and the sacrament?

Mr. Cornish. There were two elections, my lord, I say, I do remember.

L. C. J. Sir, do not prevaricate with me; I expect a positive answer: Was not that the reason, upon your oath?

Mr. Cornish. I cannot say that was the positive reason.

L. C. J. Then I ask you upon your oath, had you taken the oaths and the sacrament, as the law requires?

Mr. Cornish. My lord, Mr. Bethel was a stranger to me, I did not know him before that time.

L. C. J. Gentlemen, men must not think to dance in a net, and blind all the world. As to my own self, I know these things very well, without any of their assistance, and I only ask these things by the by, to let the world be satisfied what sort of men these are, that pretend to sainship; and yet, you see, one can hardly get one word of truth out of them: let the law, in God's name, take place, and let every man prosecute his legal actions; but when, under the umbrage and countenance of law, men shall desire to put themselves into offices, and places of trust, on purpose to disturb the government; do you think the government will ever

suffer itself to be snivelled at, and overthrown by a company of such whining fellows? Let them hiss and hum, and make a noise and ado as they will; thanks be to God, it is not that time of day now: such things have passed too much uncontroled in the body of this city heretofore. What, gentlemen, are you bawling the law with such pretences as these, now-a-days, and do you think to sham people into offices? No, I tell you, villany was the foundation of it, and knavery the superstructure; and it is high time it should be told out, since I hear people begin to doubt of it as a question.

Mr. Ward. Where is Mr. Serjeant? Swear him. [Which was done.]

L. C. J. Do not I know, as sure as I sit in this place, that Bethel did once before swear himself off? and that there were two elections of these two very men that year? and that one of the reasons was, because they had not taken the oaths and the sacrament according to law? Nor would they ever have done it, we know them, neither Bethel, nor that very fellow that stands there, Cornish, neither, till they found it would contribute to the design of subverting the government; then these rascals could qualify themselves for an office, only to put the kingdom into a flame.

Mr. Cornish. When the city chose me, I had good reason for what I did.

L. C. J. Reason! I tell you, the city was in great happiness and quiet, ever since the late times of rebellion and confusion; every one knew his duty to his superiors, and did it cheerfully and conscientiously, till such time as a couple of busy fellows came to get into the public offices. Let the whole party go away with that in their teeth, and chew upon it, if they will.

Mr. Williams. Mr. Serjeant, will you please to tell my lord and the jury, what directions you heard the defendant, Mr. Papillon, give about the plaintiff, how they should treat him?

Mr. Serjeant. My lord, I was in the counting-house at Mr. Alderman Cornish's house, when Mr. Papillon and Mr. Dubois were there; I went into the parlour to them, and Goodenough coming in, they fell into a discourse about this action, that was brought by them against sir William Pritchard, then lord mayor, and some of the aldermen; and Goodenough gave them an account how far he had proceeded in it; he said, he could not get any of them to give an appearance, and the time was near spent, and he desired to know of them what he should do. Mr. Papillon and Mr. Dubois both did declare to him, over and over again, that it was their mind only to have the matter brought to a fair trial; and they charged him to look to it, to do nothing but what was legal, and carry it with all respect imaginable to my lord mayor, as the chief magistrate of the city; that he should by all means get an appearance from him, if he could, and get the coroner, who was an officer of the city, to go

with him, and carry all things fairly and decently.

Att. Gen. Who gave these directions, Sir, do you say?

Serjeant. Mr. Papillon and Mr. Dubois, both of them did.

Mr. Ward. Now, my lord, we shall shew that we proceeded so far in the action as to declare; but afterwards apprehending ourselves to be under a mistake, we discontinued our action.

Mr. Williams. And the costs upon the discontinuance were received by my lord mayor's attorney. Here is the declaration as it was filed.

L. C. J. Ay, it may be there was a declaration filed, but not regularly.

Mr. Williams. My lord mayor after appeared.

L. C. J. How doth that appear in evidence? For the coroner says he himself was in custody, and knows no more of the matter afterwards.

Mr. Williams. I believe your lordship doth remember there were many motions made in court about this matter, on the one side and the other, and at length in court it was compromised, and my lord mayor promised to give an appearance.

L. C. J. Prove what you can; prove the appearance entered, and declaration received.

Mr. Williams. My lord, I only offer this as an evidence of an appearance.

L. C. J. A record, I know, is a good and fair evidence, shew that if you can.

Mr. Ward. It is not usual to declare till the defendant appears.

L. C. J. A declaration may well be upon an appearance; but because it cannot be good without an appearance, therefore it cannot be a sufficient evidence of it.

Mr. Ward. We will prove the costs of the discontinuance paid and accepted. Swear Mr. Baker. [Which was done.] What do you know, Sir, of any costs that were taxed and paid for a discontinuance in this case?

Baker. My lord, Mr. Aston told me, he appeared for sir William Pritchard, then lord mayor, and had a declaration from the now defendant's attorney: so I entered up a discontinuance, and paid the costs, and have Mr. Aston's receipt for them.

L. C. J. He says well. Go on then.

Mr. Williams. My lord, it is a thing that hath frequently happened, that after a man has brought an action against another, he finds he was mistaken, and hath no cause of action, and thereupon relinquisheth his suit: but sure that will not make him liable to a suit.

L. C. J. Well, pray go on with your evidence.

Mr. Ward. My lord, we are not now offering to try the right of election, though that really was the foundation of the action that we brought, but we apprehended that question to be determined, and we acquiesced in it, when that trial was over. Now, my lord, we shall shew, that

apprehending ourselves really chosen, we did in a due course of law sue forth our Mandamus, directed to the plaintiff and the aldermen; and there is a return made. I pray these may be read.

The Mandamus and Return were read.

Mr. Williams. Then that which we shall next shew, is the grounds and reasons why we thought this return was false, and thereupon brought our action. We shall shew, that at a common hall, held for the election of sheriffs, the defendant was in nomination, and had a great number of hands and voices for him. Pray, call Mr. Gilbert Nelson, Mr. William Wightman, and Mr. Leonard Robinson. [Who all appeared and were sworn.]

Mr. Ward. Mr. Nelson, pray were you at the Common Hall for election of sheriffs, in the year 1682?

Nelson. I was at the Common Hall in June, 1682, on Midsummer-day.

Mr. Williams. Pray, Sir, will you tell us who were then in nomination, and how they did proceed?

Nelson. There were in nomination for sheriffs, he that is now sir Dudley North, then Mr. North, Mr. Box, Mr. Papillon, and Mr. Dubois.

Mr. Ward. Pray, Sir, who had the majority of hands?

Nelson. I did see the poll books after they were cast up.

Mr. Williams. But did you observe the holding up of the hands?

Nelson. Upon the holding up of the hands, the election was by the sheriffs given to Mr. Papillon and Mr. Dubois.

Mr. Williams. But pray, Sir, upon your view, and in your judgment, were there many hands for Mr. Papillon?

Nelson. I guess there were the most hands for him and Mr. Dubois.

Mr. Ward. What say you then to the summing up of the poll-books, that you spoke of?

Nelson. I did see the books after they were cast up.

Mr. Ward. Was there a great number for Mr. Papillon?

Nelson. Yes, there was the greatest.

Com. Serj. What books do you mean, Mr. Nelson?

Nelson. The books in the sheriff's custody, Sir.

Com. Serj. But did you see my books?

Nelson. That was upon the second poll.

Mr. Ward. Then which is Mr. Wightman?

Wightman. Here I am, Sir.

Mr. Ward. Were you present at this common-hall? Did you see this election?

Wightman. I can say nothing to the election.

Mr. Williams. Were you at the Common-Hall on Midsummer-day, 1682?

Wightman. I cannot say that, Sir.

Mr. Ward. Then what is it you can say to this matter in question? Did you take any poll?

Wightman. I did take the poll in one of the books.

Mr. Williams. Was there any number for Mr. Papillon?

Wightman. There were 2400 and odd for Papillon and Dubois.

Mr. Thompson. Who were in nomination, sir? Who were the persons polled for?

Wightman. Sir Dudley North, Mr. Papillon, Mr. Dubois, and Mr. Box.

Mr. Ward. What say you, Mr. Robinson? Were you at this common-hall, in 1682?

Robinson. Yes, I was.

Mr. Williams. Who were named to be sheriffs then?

Robinson. Mr. North, new sir Dudley North, Mr. Ralph Box, Mr. Thomas Papillon, and Mr. John Dubois, they four.

Mr. Williams. What number had Mr. Papillon for him?

Robinson. I never saw the poll.

Mr. Ward. But upon the view in the hall, in your opinion, did you look upon it as a doubtful case which was elected?

Robinson. By the hands, I judged the majority was much more for Mr. Papillon and Mr. Dubois, than for the other two.

Mr. Williams. So you think in your judgment?

Robinson. Upon my oath, that was my opinion.

Mr. Williams. Well, my lord, we must rest it here, unless they give us further occasion.

Att. Gen. You say the majority was for Papillon, and Dubois: pray was the election declared at that time by the mayor and aldermen, or was there a poll demanded?

Robinson. Mr. Attorney, first the question was put for the persons, then the sheriffs declared their opinion, and a poll was demanded, and a poll was granted, and the sheriffs went with the common serjeant up to the court of aldermen, and acquainted them with it; and then they all came down again, and declared that there should be a poll.

Sol. Gen. Who were the sheriffs then, pray Sir?

Robinson. Mr. Alderman Pilkington, and Mr. Samuel Shute; and in the evening, after the poll was closed, the books were numbered up, the sheriffs came down upon the hustings, and declared the numbers; and then, as I remember, the numbers declared for Mr. Papillon and Dubois was above 2000, and the number declared for the other two, was some hundreds under 2000.

Mr. Ward. My lord, we leave it here.

L. C. J. Will you, that are for the plaintiff, say any thing more to it?

Att. Gen. Yes, my lord, we have more evidence to bring in answer to what they have brought here. My lord, that which they would excuse themselves by, is, that there was a probable cause; but that will fail them, if it be

but observed what doth appear upon their own evidence. It is true, where a man hath a probable right, he may sue. But this matter here contended for, was never such a right as a man may sue for. No man can ever shew, that for the shrievalty, an office of burden, an office of hazard, and an office of charge and expence, any man did ever sue, so little ground of reason had they to bring this action for this office. And then for their title to the office, that will appear but very weak. They pretend that my lord mayor and aldermen could not try the right who was elected truly and rightfully, and they bring this action to try it, and then they produce some of the men that held up their hands, and in their opinions, gentlemen, they say, the election fell upon Papillon and Dubois. But, gentlemen, that my lord will tell you is nothing at all of title, but a poll was demanded, and by that it must be decided. Then one of their witnesses tells you a story of what the sheriffs did upon the poll: but all that is nothing too. For we tell you, and shall prove it, that those sheriffs did, in a riotous manner, assume and take upon themselves the supreme government of the City, and would have excluded my lord mayor from it. But all their proceedings, and all that they call a poll, was void, and can make no title to any thing at all. It was a bare dispute of a factious party, to subvert the orderly government of the city. There was no probability of title or right could be gained by it. For the chief magistrate of the city, for the time being, ever did direct the poll, and all the proceedings upon election of officers. And when he did so in this case, we shall prove to you there was not any considerable number (that is, not twenty men) to give any pretence of title to this gentleman, that thus sued for this office. But indeed in that most riotous assembly one of them that ever was, they do pretend to be elected: but we shall shew that for that riotous assembly they were convicted here as rioters upon an information, and fined to the king for it. And I could tell them of a like case of an illegal title; a man goeth by a false oath to get a possession of goods, takes out a capias, and with others, getting into a house to arrest the party, he then carries away all the goods, and upon this possession would set up a pretence of title. But upon an information for a riot, he was severely punished for it. Mr. Papillon, if he had thought he had had a good title, or cause to bring this action, he would have employed better instruments to have proceeded in it. The attorney he makes use of, who is it but Mr. Goodenough? One who did not live within the city, nor had any thing to do in it, till brought into office as the great instrument of Mr. Bethel in his actions, and a great plotter in the late horrid and dreadful conspiracy. And this cause, how is it managed? Not by any counsel of worthy men of the robe, or grave citizens, but by a cabal of thirty or forty rioters, most of them in the proclamation proscribed as traitors, and run

away from justice upon the discovery of the plot. All this speaks malice, and the worst of malice, the thing itself speaks it, to pretend a title with so little or no ground. For you plainly observe, there is no title, but this riotous assembly to ground their pretences upon. In the prosecution of this action there was no order, whatsoever they pretend, for to take an appearance, I mean by those that really were at the bottom of the design. For the forty men at the consult at Russel's did not meet, to be sure, to give order for an appearance. No, they had other work to do. An appearance would not do their work: for, as Mr. Keeling at large could explain it, they took all opportunities to rise and make a mutiny, and take advantage of the mobile and disturbances to bring about their main plot. They did not care five-pence for the appearance: but when the soldiers were up, then the plot was spoiled, and then my lord may go home, if he will. Gentlemen, we shall prove what I have opened to you, though I am persuaded not one of you but know it as well as I.

Sol. Gen. Shew the records of the conviction of the riot.

L. C. J. Hold, Mr. Solicitor, I tell you before hand, that as I stopped them from urging the trial for the riot as any determination of the right of election, or as any ways tending to the question now before us; so I must not let you neither enter into that matter. The business of the indictment, conviction, and sentence upon the rioters, makes nothing, either to the right of election, or this right of action. And therefore, as I said to Mr. Ward, it was nothing to the purpose to mention it on that side: so it is to no purpose, I must tell you, to mention it on the other side. For it was no determination of the point of right one way or other. And he could not give it in evidence, that that was a litigation of the matter in dispute, and upon the decision of that indictment (till which he apprehended he had a right) he found it was against him, and so desisted. No, the right, I say, was not at all affected by that trial, one way or other. For admitting they had a right, or you had a right, yet the gaining your right must not be attempted in a wrongful manner, but they had a lawful way to come by their right, and if they pursued that, well and good; if not, then they must take what comes of it.

Att. Gen. My lord, that right was insisted on by them as the probable ground of their action; and that, we say, was no right.

L. C. J. Therefore it is to no purpose to urge it.

Sol. Gen. But, my lord, with submission, our answer to their title is, that there was no colour of pretence; and this conviction proves it.

L. C. J. No, Mr. Solicitor, that is not any evidence one way or other.

Sol. Gen. If your lordship please, it destroys their very title, which is the number of the poll.

L. C. J. Lord! the thing is as plain, your

den, as any thing can be: You or they may have a good title, and yet do a thing that is unlawful to bring the title into possession. But then the punishing you for that unlawful act is not an evidence, either against or for the title, nor doth determine it for you, or against you.

Sol. Gen. My lord, we submit to your lordship's directions in it. But then this we say to it, the question now is reduced to this point: whether there were any probable cause for the defendant's suit against the plaintiff? They have insisted upon it that there was, from two grounds. They call witnesses, who declare they were of opinion, that the defendant had the right of election by the holding up of the hands. That is one of the probable causes of their suit. Now that is clearly gone by this single point, whether the election was determined upon that holding up of the hands, or they went to a poll to decide it? If they went to a poll, then it is clear the right of election was not determined; and he could have no right to be sheriff upon the holding up of the hands. Then they went a little further, and offered in evidence the sheriffs poll books, or the numbers taken out of them, wherein they say, the majority was for Mr. Papillon, and so thereupon, say they, we brought our action. Now, to that objection it is proper for us, with submission, my lord, to answer it, that that can be no manner of cause of action in the world; because, say we, that was no part of the election at all; nor was it at all to govern the question of right one way nor other, it was a number of names taken out of the regular course upon elections by persons that had no legal authority; nor was it such a method, as was a foundation to ground any opinion upon one way or other, much less, such a one, as would be a cause of action. These are all the grounds they went upon. The first by their own shewing, was no ground at all; for there was no determination of the right upon the view, but a poll was agreed upon: the other; we shall call witnesses to prove was irregular, and so not legal. Swear Mr. Town-Clerk. [Which was done.]

Att. Gen. Pray, Sir, will you give my lord and the jury an account who is to govern the poll upon the election of sheriffs, or other officers, at the common-hall?

Town-Clerk. My lord, I never knew a poll about sheriffs till about five or six years ago; and that was the first poll that ever I knew, and it was between Mr. Jenks and sir Simon Lewis, and indeed it was the first that ever I did read of in any time within the city of London. I think, I have seen the entry of all the elections of sheriffs, that are extant in our books in all times; and I think, I did never see in any of those entries one poll that was ever taken for sheriffs; it is only mentioned, Such an one elected by the mayor, by prerogative, and such an one by the commonalty. Among other books of the city's, there is an old book, that is called by the name of Liber Albus,

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which, speaking of the constitution of the common-hall for the election of sheriffs, says, 'First of all the mayor shall choose one of the sheriffs for London and Middlesex, for whom he will answer; and then the commonalty shall choose another to join with him, for whom they will answer. And if there arise any difference between them, who is elected, or not elected; it shall be determined in the same manner as it is in common council.' This is all the notice, that I find in any of the city-books, that looks like a deciding the election, when disputed, by a poll. Now in another chapter of that book, where the common-council is mentioned, it is said, 'If there be any division of opinions in the common-council, the common-serjeant and the town-clerk shall examine every man severally, what their opinion is, which is by way of poll at this day when we had a common-council.' But till that time that the poll was between Mr. Jenks and sir Simon Lewis, I never knew any poll for sheriffs, and that poll was taken immediately by telling-one and the other. For my lord mayor and aldermen, as soon as ever they come upon the hustings, make proclamation to have the liveries attend for such elections, and then withdraw, and leave the sheriffs and the common serjeant.

Att. Gen. Sir, the course is very well known, I suppose, to the gentlemen of the jury. But pray, did any persons poll at my lord mayor's books for Dubois and Papillon?

Town-Clerk. Not that I know. As to this poll, my lord mayor caused the common-hall to be adjourned to such a time; and after that sent for the common-serjeant, and myself, and required us to go get books, to take the poll for Mr. Box, Mr. Papillon, and Mr. Dubois; as for sir Dudley North, he was not to be polled for, he being chosen before, by the prerogative of the lord mayor, and my lord mayor and aldermen declared him fully elected; and upon that he was called out by public proclamation upon the hustings, to come and take the office upon him, as is usual in such cases. But we had directions to provide books to take the poll for Mr. Box, Mr. Papillon, and Mr. Dubois; and we did so, and took the poll for these three gentlemen, and upon closing of the poll, we all of us sealed up our books, and delivered them to my lord mayor, and at a common-hall afterwards he did declare Mr. Box to be chosen the other sheriff, to be joined with sir Dudley North: the poll was, as it always ought to be, by the direction of my lord mayor, and the sheriffs are but officers, and not the judges and managers of the poll, without my lord mayor's direction.

L. C. J. What say you to it, gentlemen? Have you any more evidence?

Serj. Maynard. My Lord and Gentlemen, Here has been much said in this cause that is nothing to the purpose. As particularly, that which the plaintiff's counsel did last insist upon, who took the poll, and who had right to

take the poll or not, is not any thing to this question: this action is not at all concerned in that matter. For whatsoever the dispute was, and whichever had the right, and because it was a dispute, some it may be, could not poll at the one; and others would not poll at the other, yet the lifting up of two thousand hands might make him think that he was chosen sheriff; and there lies the cause of his action, his apprehension of a right: your lordship did object this to us, Whoever before brought such an action as ours, and did sue to be sheriff of London, a place of charge and trouble?—

L. C. J. No, I did not make it as any objection. I asked your witness, Cornish, that question indeed, for some reasons that I know.

Serj. Maynard. That may be objected indeed to the prudence of my client, Mr. Papillon, to desire such an office: but that proves nothing of malice in him against the plaintiff, for if he were never so unwise as to desire it, if he had a right to it, or thought he had, it is not a malicious thing in the eye of the law, for him to take his legal course for it. And then the objection that is made of the instruments that were used: our attorney Goodenough is in a plot: what is that to us? There is not the least suspicion upon us. He is a bad man: but that doth not make all his clients bad. But the question now before you is, first, Whether there were any probability of a cause of action? Secondly, If there were not a probable cause; yet whether that action was grounded upon malice? What malice, I pray, is there in this against my lord mayor, to desire an appearance of him, when it is conceived, though upon mistake, that there is cause of action against him? We did not press him to give us bail to our action, or threaten else to arrest him: no, it was a decent rather than an irreverent application to him. If, then, there be not both concurring, want of title, or probable cause, and malice too, this action of the plaintiff's is without ground. No man, that has any sense, if he knows he has a clear title against him, will bring an action; but though it should be clear against him, yet if he do bring an action, but not vexatiously and maliciously, that cannot subject him to an action; that would frighten men from bringing actions upon doubtful matters, which certainly is lawful for any man to do. Now, what malice is proved in the defendant against the plaintiff, the jury here are judges of. If we were criminal in the manner of our proceedings, they might come before your lordship in another way; but sure this is not the way; and if it should be actional, and we likewise subject to be punished as a criminal, then we should suffer twice for the same fault. Now, gentlemen, upon this action we are not to be fined; but they, if they can, are to shew what damages the plaintiff sustained by our action; and if what we have said do not satisfy you, that we had probable reason for what we did, then you, upon your oaths,

are to give him what damages you, in your consciences, think he has received by it.

Mr. Williams. My lord, if your lordship please, I would ask one question of Mr. Townclerk, as to the right of managing the election. Sir, you have observed many common-halls for elections?

Townclerk. Yes, Sir, I have for these twelve years.

Mr. Williams. Did the common-hall ever go to a poll upon an election, before this time that you know of?

Townclerk. Never but once for the elections of sheriffs, I say.

Mr. Williams. I speak, Sir, of any sort of poll; for I suppose you do not call the holding up of hands a poll.

Townclerk. Mr. Jenks's poll was the first that ever I knew for sheriffs.

Mr. Williams. Well, Sir, was that managed by the sheriffs, or by my lord mayor, or by you, and the common serjeant; or who was it by?

Townclerk. Sir, the mayor and aldermen withdraw, and leave the sheriffs to view the election by the hands; and the common serjeant propounds the question, "So many of you as will have," &c.

Mr. Williams. By whose direction doth he propound the question, pray?

Townclerk. By the direction of the common hall, I take it.

Mr. Williams. But if a question do arise upon an election, so that it cannot be decided by the view, but they go to a poll, who is to manage that poll?

Townclerk. The officers of the city, by direction of the lord mayor.

Mr. Williams. That poll you speak of, for Lewis and Jenks, was that managed by any body but by the sheriffs?

Townclerk. It was managed by the sheriffs and the common serjeant, in the accustomed manner.

Mr. Williams. How! in the accustomed manner, when you say that was the first that ever you knew?

Townclerk. It was so for sheriffs; but there have been polls for other officers.

L. C. J. Why, Mr. Williams, every body knows that well enough, that the sheriffs are concerned in the management of the election, or the poll, as all the rest of the officers of the city are, under my lord mayor; and the common serjeant consults with the sheriffs officers and people about him, upon the view.

Mr. Williams. Pray, Sir, do you remember the election of Mr. Bethel and Mr. Cornish?

Townclerk. Yes, Sir, there was a poll there too; that was the year after.

Mr. Williams. Who managed that poll?

Townclerk. The sheriffs, and the common serjeant, and I, did agree to take it thus in two books, whereof one was with the one sheriff, and the other with the other sheriff, at the two ends of the hall.

Mr. Williams. That was taken in writing, Sir, was it not?

Townclerk. Yes, Sir, that other of Jenks was only by telling.

Mr. Williams. Were you concerned in taking this poll?

Townclerk. I did assist at it one day.

Mr. Williams. Who ordered you to take the poll that day?

Townclerk. Truly, I did concern myself as little as I could in those things; what report was made to the court of aldermen, I cannot tell; but one day, coming into the hall, I had no mind to concern myself in it; but some gentlemen did pray me to go up to the poll; and I did go up.

Mr. Williams. Sir, upon your oath, did the sheriffs direct you to take it?

Townclerk. I really think they did not.

Mr. Williams. Did my lord mayor direct you?

Townclerk. No, Sir.

Mr. Williams. Did the sheriffs manage it?

Common Serj. I did it by sir Robert Clayton's order, who was then lord mayor.

Mr. Williams. My lord, all that we say to it is this, we are not now proving our right upon which we brought our action; that we submit unto, it is against us, we must agree it: but be the right one way or other; yet we might, from a supposed right, have a probable cause of action. It seems to be a doubtful business, by all that Mr. Townclerk has said, who has the right; for all he knows of the constitution is from Liber Albus, and that is somewhat dark. You, gentlemen, hear what is said; the thing was a question of five or six days, and a puzzling one it seems; and therefore we might be misled into an apprehension that what the sheriffs did was right, and so not at all concern ourselves with what my lord mayor did—

L. C. J. Mr. Williams, you talk of that you do not understand; for my lord mayor was not there at that time of Jenks's poll: I was common serjeant myself, and I know the sheriffs have nothing to do with it.

Mr. Williams. It should seem by Mr. Townclerk to be doubtful, sometimes one, and sometimes another did direct the taking of the poll.

L. C. J. But you are out still. But for all that, this is nothing to your right of action, one way or other.

Mr. Williams. My lord, I must lay it here, it was a doubtful thing, and we brought our action to try the right; but afterwards conceiving we were out, and had no right, we discontinued and desisted.

L. C. J. It was so far from being their right, that I desire you to call me any one witness, that can say, before Jenks's time, there was ever a poll for sheriffs, or such a thing thought of.

Mr. Williams. We were under an apprehension of a right in them.

L. C. J. There could be no colour for any such apprehension in the world.

Mr. Williams. We must submit to your lordship's directions.

Att. Gen. So do we.

Serj. Maynard. Whether this action brought by us, was malicious?

Mr. Ward. My lord, Mr. Attorney doth challenge the defendant to shew that his action was brought by advice of counsel; we shall shew it was with good authority of counsel. Mr. Baker, can you tell whether it was by any advice, and whose?

Mr. Baker. It was by the advice of Mr. Thompson, Mr. Pollexfen, and Mr. Wallop, as I have heard.

Att. Gen. But you hear what Keeling says, there was a party, that were at a consult about it, and that were concerned in it.

Sol. Gen. My lord, we have done on both sides, I think, and submit to your lordship's direction in it.

L. C. J. Will any of you say any thing more?

Mr. Williams. No, my lord, we have done, we leave it upon this evidence to your lordship and the jury.

Att. Gen. My lord, we have no more to say for the plaintiff.

L. C. J. Then, gentlemen of the jury, as my brother Maynard said in the beginning of his defence in this cause; so I say now to you, to set all things straight and right; God forbid, that any heat, or transport of the times, should bring us into that condition, but that every subject of the king's, that hath a right of bringing an action at law against another, should have free liberty so to do. And the courts of justice are now, and I hope, always will be so open, that every one that would take a remedy prescribed by the law for a wrong done him, may be received to bring his action, which is a legal remedy.

And I am to tell you, gentlemen, that much has been said in this case (which I perceive is by the concurrence of people a cause of great expectation, as my brother likewise said,) which is not at all to the case. I am sorry truly at this time of day, that we should stand in need of such causes as these, to settle and keep people in their due bounds and limits. But though many things have been said in the case, that are quite besides the natural question, yet they having been made dependencies upon that question, and because it seems to be a case of such expectation, I think it will become me, in the place wherein I am, to say something to you, and, according to the best of my understanding, tell you what I apprehend to be the legal part of it, stripped of what hath no relation at all to it. And if I shall omit any thing that is material on the one side or the other, here are gentlemen that are learned in the law, who are of counsel both for the plaintiff and the defendant; and I shall not think myself under any sort of prejudice in the world, if they take the liberty, as they may freely do, to interrupt me, and remind me of what I forget, or wherein I may mistake.

For, Gentlemen, I assure you, for my own part, I would not have the law made subservient

to any purpose but the exact rule of justice. I would, to the best of my understanding, in all cases *servare jus illatum*; preserve the law and the right of every man inviolable. I would have the law of the land to be the measure of my own and all other men's actions. And I hope no man can justly (I am sure I do not know they can) complain of any breach or invasion that is made in the courts of justice, either upon law or right. But all those that have the administration of justice committed to them by the government, do behave themselves with all equity and impartiality towards all the king's subjects; and the law has as full and free a course, and justice doth every where take place as much as can be desired by any honest and good man.

Gentlemen, in this case, that you now are to try, I must first of all tell you, that this business of the right of election, one way and the other, hath been too much insisted on on both sides. And I speak it, because though I myself in my own mind know what of it is true, and what not; yet I conceive it not so proper to be mentioned in this case, it being no legal evidence to the point in question. Now it is a duty incumbent upon you to observe, and upon the court to suffer nothing to be urged so as to have any weight with you, but what is legal evidence. That you are only to mind, gentlemen. So that if I mention to you any point of fact, that hath not been given in evidence, as having a true relation to this issue, you are not to mind what I say to you about it. On the other side, I must likewise acquaint you, if there be any difficulty in point of law in the case; you are to observe the directions of the court, who will be always ready to assist and direct you in it. Or the gentlemen, that are of counsel on the one side, or the other, may have the matter found specially, if they think there is fact enough to be found to ground a question upon.

Therefore, gentlemen, for the customs of the City of London, as to the manner of elections, or who hath the right to manage them, they are not at all material to this business; and if they were, there is never a one of you, but know it as well as we, or any body doth. I myself had the honour to serve the city of London in the places of common-serjeant and recorder several years: so long ago, that not above one or two, that sit upon the bench in the court of aldermen, have been longer conversant in Guild-hall, or know the customs of London in those matters better than I do.

It is notoriously known to all that have had any dealing in London, or been acquainted with any thing there, that till within these six or seven years last past, the lord mayor and the court of aldermen, and the common-hall used to go a birthing for sheriffs (you very well know what the phrase means,) and perhaps it was not once in ten times, that those that were chosen sheriffs, held; but generally every year, there were I know not how many elections upon *fining off*, or swearing, or some reason or

other; so that now and then there was but one sheriff chosen for a great while together; and now and then never a one from Midsummer-day till near Michaelmas. And the way was to consider, such a one hath most money in his pocket; Oh, then put him up for sheriff: and then if he went off, then another would be found out. And there was one old deputy Savage, that used to keep a black book, that would furnish names for I know not how many elections. And who should be sheriff, so as to divide into parties, and poll, was never a question before such time as Mr. Jenks, that they speak of, came to be put up, and there the dispute began; then the faction began to appear.

Now, if any man offers to tell me, I apprehended always it was the sheriff's right to manage the poll; I would ask him how that can be a right that never was done before? Let them shew me any one instance of a poll for sheriffs before that time. No, it was notoriously known when the polls began, persons did not think the shrievalty such an office, that it was so earnestly to be coveted and desired. Polls, indeed, used to be heretofore for the bridgemasters places, that are places of profit and advantage; and so for aleconners, and the like, those have been often in your time and mine, gentlemen; we may very well remember them. But this office of sheriff, people were not heretofore so ambitious of, as to poll for it; but the city was glad if they could get any worthy and fit person to accept of it.

And for the management of the election, we all can tell the manner of it, as well as any thing in the world. After any lord mayor and the court of aldermen were gone off the hustings, and retired to this place, the common-serjeant staying there with the sheriffs, used to make a speech to the common-hall, a rehearsal of what had been before said by the recorder; and then received the nomination of such persons as were to be put to the question for election from the common-hall. And upon the putting of the question, every man held up his hand for those that he desired should be chosen; and if it could be decided by view of the hands, well and good; and the common-serjeant, consulting with the sheriffs and those about him, declared their opinion, that the election fell so and so, on the one side or on the other; but if doubtful, or a poll demanded by any one, then they used to acquaint my lord mayor what was done in the common-hall; and thereupon they gave order for declaring the election, or granting the poll, and used to come down to the hustings for that purpose; and no one ever thought that either the common-serjeant or the sheriffs, or any body else, but my lord mayor, had the power of those courts. For the common hall was always summoned by precept from the lord mayor; and when the business was done, or was to be put off to another day, the common cries by command from the lord mayor makes proclamation, 'You good men of the livery, &c. may depart. Sit

'his time, and give your attendance here again such a day, or upon further summons.' Nobody ever talked of summoning a common ball by any body but my lord mayor. He did by virtue of his office, and he dissolved or adjourned it by virtue of his office. All this is as seriously known to all men, that know any thing of London, as the faces of you of the jury are to the people here, or to one another. And this never came to be a question, till the business of the poll between sir Simon Lewis and Jenks came about, which you have heard of. Mr. Papillon himself, when he was chosen sheriff before, and fined for it, was chosen in this manner, and no other.

Mr. Cornish, he comes and gives evidence that the common-serjeant was reckoned to be the man that managed the choice by command and direction of the sheriffs. And some of those gentlemen, that have been produced on the defendant's side, they say, they have looked upon it as the sheriff's business. But alas a day, it belongs to neither of them, they are but officers to the lord mayor. The common-serjeant's business is but to put the question into the mouth of the common crier. In so much, that when I myself was common-serjeant, as I need to pass by the shops in London, they used to cry, 'there goes So many of you as would have.' It was as plain a road of things, that every body knew before these things unawardingly have come to be imbrangled by our factions and divisions, and the heat of some busy fellows. Here are a great many ancient citizens, that I see, that know, and so you do all, gentlemen, that this is true. So that all the discourse of this matter about flourish and garniture, and doth not affect, this case at all, one way or other.

Another thing, gentlemen, hath been mightily talked of, and urged, and insisted upon both by plaintiff and defendant: and that is, the defendant's right, or not right of election to the office of sheriff, and that the majority was on his side, say his counsel: on the other side, say the plaintiff's counsel. And for the settling that right, he brought his action against the plaintiff; but it being determined upon the conviction for the riot, there is no such thing, gentlemen, as that it was therein determined: that cannot be a determination of any right at all. For though I may have a right to an office, or any such thing; yet I must pursue a legal method to attain to that right; and not go irregular ways to work.

As if I have a right to come into your house, because you have not paid me your rent (to make my thoughts and meaning intelligible to you by a familiar instance, which will shew what I intend) I must not make a riot, and turn you by violence out of possession. Nor I have a legal course to come by my right; to wit, by bringing an action, and evicting you. But if any man attempt to get a right in an unjust manner, and be punished for it by an indictment or information, that, I say, doth not determine the question of right, one way or other.

To come then to the issue, that here you are to try; the point of this action before us resolves itself into a narrow compass, and is only this in short, which you are to enquire of, whether or no the plaintiff was arrested by the defendant without probable cause, and maliciously?

Now matters of malice are things that remain in a man's heart; and it is impossible for me to discover, whether another man hath a malice against me, if I do not see it in his actions. Malice being a thing that is internal, is not else discernible.

Therefore you must consider the circumstances that do attend this action of the defendant, and if so be they are malicious, then you are to find for the plaintiff: but if they for the defendant have offered to you any circumstances, that can prove, or convince you, that he had any probability of a cause of action, and that not attended with a malicious prosecution of that probable cause, then the issue is with the defendant.

This is the right question, and the law of this action; and the fact to make it out one way or other is now in judgment before you, upon the evidence that hath been given on both sides.

Now, in point of law, I am to tell you, and that you must observe, that though I have a probable conjectural cause of action against another man; yet if, to obtain my end in that, I prosecute him maliciously, with a design to ruin him, or to put an indignity upon him, or the character he bears in the public, or put a hardship or difficulty upon him (I mean hardship and difficulty in point of time), when it is probable the remedy may be had at another time, and the same thing done with less injury and less trouble; then an action will lie against me, for bringing my action in such a manner; though it be true, that I had a conjectural cause of action against him.

As in the case that was here in this court the other day, of Mr. Swinnock against the serjeant, that came to him, and told him in his ear, that he had an action against him; and this was upon the exchange: thereupon Mr. Swinnock brings his action for this, against this man, for whispering this in his ear: if he had proved any malicious intention to disgrace him, no doubt the action would have lien. For though there might be a cause of action against Swinnock, yet if that be maliciously pursued to get him arrested, and held to bail, where no bail is required by law; or with an intent to disgrace him upon the Exchange when it might have been done elsewhere, or at another time, this irregular malicious proceeding will bear an action. The pursuing malicious ways to obtain a right, makes a man obnoxious to the action of the party so prosecuted. I desire to express myself by words, that may declare my meaning as plainly as can be: and I hope I do so.

Then, gentlemen, taking it thus as the counsel for the plaintiff say, to shew that the

defendant had no probable cause of action against the plaintiff; they endeavour to answer what is alledged on the other side as their probable cause. And therefore, that we must consider first, what is said by the defendant.

They tell you, here was an election for sheriffs of London, at Guildhall, where those persons that they have nominated, were candidates, and put in nomination for that office. And upon that nomination, as say those three witnesses, we were the persons that had the majority of voices; and thereupon we apprehend ourselves chosen, which gave us the right of action: so the defendant, say they, sheweth some probability of a cause of action; and if he have not pursued it with malice, but in a regular way, the probability of the cause doth take off from the malice, that else the very bringing of an action without cause, would imply in itself. And they say true, for I must repeat it again; if I have, *prima facie*, a probable cause, and pursue it legally, no action will lie against me for it.

But then, say they on the other side for the plaintiff, That is no probable cause; for you could from those transactions have no such apprehensions of a right; for that is not the measure of a right of election, or a rule to guess who is elected by: for there being no decision of the election upon the holding up of the hands, and a poll being demanded, whereas the usual method is to have, by the lord mayor's order and direction, the poll taken by such as he shall appoint; you went another way to work, you go your ways, and take books to yourselves, and come not to the fair determination of the question: and they bring Mr. Town-clerk to prove. You have heard what the evidence is, and you are judges of it.

Now take it, that this were in the case of an office of profit; as suppose it were a question between me and John-a-Stiles, for the place of Bridgemaster, for the purpose, and a poll is demanded, and granted; if they, that have no authority, shall go after the court is adjourned by him that has power, and take a number of names in the way of a poll by themselves, and upon that come and say, J. S. has four and twenty hundred, and I have but so many, that sure is not any probable cause, nor a right; for you have gone here out of the known and usual method of such matters, and depend upon that which can give no foundation of right at all. This is the answer that is given to that by the counsel for the plaintiff.

You may have fifty thousand names for you after that rate, and yet not be elected, nor have probable cause of any such apprehension. We all remember sir Samuel Sterling's case, which was upon the denial of a poll for a place of profit, that is to say, the bridgemaster's place: but this is upon a wrong poll.

Suppose there had been a poll granted (as there was) in this case, and upon that poll thus managed, sir Dudley North and Mr. Box had had the majority but by a very few, and there had been an action brought in such a case,

here was a probable cause as good as in this case, as it now stands, because some of them might happen not to have legal suffrages, yet the taking the poll by persons of their own heads, after the court was adjourned, avoids all: so that that would have signified nothing. You are to consider of this answer of theirs.

Then the great thing, gentlemen, that you are to observe, is this: to bring an action alone will scarce amount to a proof of malice; therefore malice being in this issue a great point of fact, you must weigh the evidence whether the circumstances do shew it, that there was malice in Mr. Papillon. If the circumstances are enough to amount to a proof of malice, you then are to find for the plaintiff, and you are the judges what damages it is fit to give him for that injury: he has laid ten thousand pounds; but you must do what you, that are judges of it, think fit in it.

Come, gentlemen, it is best to be plain, and no man needs to be thought wanting of an apprehension, what is the meaning of all these things. It is commonly and universally known to all mankind:

First, That no man ever did pursue such an action as this is, to be sheriff, till these unhappy times, wherein we are, and wherein we have lost that quiet and felicity, which I pray God we may be restored unto. And though it is true, a man may lawfully sue for such an office, and it is no offence, yet it looks somewhat extraordinary; and that a man has a mind to do something unusual in the place, it is for some strange purpose or other, especially when a man has fined for the office once before, as we all know Mr. Papillon did.

Again, It is notoriously known, That for several years last past the government hath been beset: and that which is a baser thing than ever was thought of, or acted in the highest times of villany in these kingdoms (I mean those of the late rebellion), the very methods of justice have been corrupted, and all to serve the main design of subverting the government.

Gentlemen, this is so black a wickedness that no honest man, that has any sense of loyalty, religion, or common justice, but must tremble at the very thoughts of it. When we see such fellows as are obnoxious to the government, known dissenters from the established worship, and that never thought of conforming to the government, or the laws, civil or ecclesiastical, or complying with the church, but only to capacitate them to destroy it; nay, when men, that are taken notice of to be common reproachers to the government under which they live, shall get into office to make Ignoramus juries, and to enable people to commit and be guilty of the falsities and basenesses, that human nature is capable of, no man living that has any ingenuity or goodness in him, but must cry out against it.

When men begin to take oaths to sanctify villainy, and enter into clans, and clubs, and cabals, to destroy the most merciful of kings,

and to disturb, distract, and overthrow the best of governments, what shall we say? And all this you, all of you, gentlemen, know to be true. Was it not more safe to commit treason in the city, than to sit upon a bench of justice to bring the traitors to judgment? Was it not more safe to conspire the death of the king and his brother, than to give the least frown, or look of displeasure against one of these snivelling saints? Did not we know that men were sanctified to be jurymen, to enquire of conspiracies against the king's life and government, that before that time were never thought fit to be trusted with the common discourses or society of honest men?

When men were thought fittest for offices of such high trust, according to their being thought capable of, and well-intended, to the overthrow of the government: do not we all know this to be as true as that the sun shines at noon-day? When traitors at the bars were in less danger of being convicted of their treasons, than the judges were of their lives?

Mr. Papillon knows all this to be true eminently. When packed juries were grown to that height, and though seven or eight witnesses came and swore positive downright treason, the traitor could not be by these men so much as thought fit to be accused by an indictment; to that stupidity in villainy were things brought by these fellows: nay, so far were the proceedings in courts of justice tainted, that in no common action whatsoever, that came here to be tried, but cropped hair and a demure look were the best signs of a good evidence, and the business of an oath signified nothing, provided the party were to be propped up, and the faction to receive an advantage by it.

For God's sake, Gentlemen, let any man but seriously consider and believe that there is a God in heaven, and a dreadful Day of Judgment when every one of us must answer for every thought of our hearts, every word of our mouths, and every action of our lives; and then tell me, what horrid impieties these are; such as any ordinary ingenuous person would blush and tremble at.

And I would have Mr. Cornish to consider whether ever, till that time of famous, or rather infamous memory, that he and his fellow-sheriff Mr. Bethel came into that office, there were ever in London such things as tavern-returns of juries, or clans and cabals how to pack fellows together for such wicked purposes as these?

Do not most of you here know this? And doth not every one of your hearts and your consciences agree with me in it? How far unlike the proceedings of those times, in reference to juries, were from what they anciently were? I have had the honour to practise in this place among you in my profession, when without any disturbance, or mixture of faction and sedition, we were all quiet, and every one knew his duty, and justice was done in this place so regularly, that it was grown to a common proverb: if there were any cause of any

difficulty, they would use to say to one another, 'Come, we will be so fair with you as to try it by a London jury.' So far was it then from being thought, that in the city of London justice should be corrupted, that the ordinary juries of London were thought the best judges and most impartial of any in the kingdom. I appeal to all the practisers of those times that hear me, if what I say be not true.

But when once they had begun to pick and cull the men that should be returned for a purpose, and got this factious fellow out of one corner, and that pragmatist, pricked-eared, snivelling, whining rascal out of another corner, to prop up the cause, and serve a turn, then truly people's causes were tried according to the demureness of the looks on the one side or the other, not the justice of the cause.

Gentlemen, I take myself bound to tell you of these things, and I wish I had no reason for it; and especially in this case I should not do it, it being a private action between man and man, were it not for the ingredients that are in the case, and any man, that has any sense, perceive.

Now, then, for this case before you, Gentlemen, I desire, if possible, to be satisfied in one thing or two: my lord mayor of London, it is true, is not, nor no person whatsoever, be he of never so great quality, is exempt from the law: if he owe any man any thing, he is bound to answer it to him, as much as any the meanest citizen of London, or poorest subject the king has. But is he to be arrested just at such a time, because he is chief governor of the city, and the action will sound the greater? And the court of aldermen, are they to be arrested, because they are his ministers, and necessary subaltern assistants to him in his government, in such a time as this was, when the government, both in the city and elsewhere, was surrounded with difficulties, and in great danger on all sides? What occasion was there for such haste and speed in this action to be done just then? Would Mr. Papillon and Mr. Dubois have starved, if this action had been suspended for a while? Sir W. Pritchard would have been answerable to this, or any man's action, when the year of his office had been out: but it carrieth vengeance and malice in the very face of it; it speaks, that therefore they would do it, because he was then lord mayor, the chief person in the city for the time, and thereby they should affront the government, in arresting and imprisoning the king's lieutenant, in one of the highest places both of trust and honour. And this would be sure to make a great noise, and the triumph of the action would make their party then to be uppermost, having got the chief governor of the City in their own clutches.

Nay, and because they would be sure their malice and revenge should take place, they take the very scoundrels of the party to be employed in this great work. For before that time, the coroner (as he tells you himself) used to make his warrants to the officers that usually

were versed in that business; but here he must have the direction of the attorney, and who is that but Goodenough, a man we have all heard enough of; and then Burleigh and Keeling must be employed, and by whose advice, but by Goodenough and Nelthorpe's? And all these rascals, who now stand attainted of treason, must be fetched in to consult about a fit man to make an arrest: and then they pitch upon this man Keeling for one, who was one of the principal conspirators in that damnable, hellish plot against the king's life, and that of his royal brother; but, by the blessing and Providence of Almighty God, was made use of as a great instrument of preserving those precious lives, and with them our government and religion, and all that is dear to us, which by that conspiracy was undermined, and I wish we had not reason to say, and think, the conspiracy still to be going on. But I, hope in God the government, as established both in church and state, will always be able to prevail, maugre all designs, and those that are engaged in them, for its destruction.

Now Keeling tells you he scrupled the employment: No, said he, I desired not to have my name put in, because I was never concerned in any such thing before, and my business was of another sort. But then Mr. Goodenough (and Mr. Brome the coroner no doubt had a hand in it, though now he has a very treacherous memory, and has forgot all that was done) comes and tells him, you must concern yourself, and do this thing; for you have a trade with the party, and it will be ill taken if you do not do it. And being asked, whom he meant by the party? He tells you, the discontented party: and he explains their discontent to be such, that they would have killed the king and the duke. Now how far he was engaged with that party is pretty well known, and therefore if he boggled at such a thing as this, which that party it seem swas engaged in, they would suspect him, and so, for the party's sake, he was drawn in.

But then, when this thing is done, pray, Gentlemen, do but consider what the consequences might have been, and which, perhaps, (nay upon what has happened to be discovered since, doubtless,) they did design it. But, God be thanked, those consequences were prevented, and they themselves have cause to be thankful to God Almighty for it. For here all the magistrates of the city, that had any care for the good government of it, were to be taken up, and then here was a body without a head, a town full of faction without any government, and if the heady rabble had been once up, without those that had authority to restrain them, where then had been your liberties or properties, gentlemen, or any man's; nay, theirs that were engaged in this design, if they had any? For those were things much talked of by them. In what danger had you, and all you had, for life, estate, relations, and every thing been? But it pleased God in his infinite mercy to shower down upon us, and upon

this city, and the government, in a mighty preservation, putting it into the hearts of some in power, to bring the city-militia some of them together, and prevent this mischief, or else, God knows, this whole city might have been by this time once more in ashes, and most of the king's subjects wallowing in their own and one another's blood: and their party too would have felt the sad effects of it, no doubt, as well as others. So that the consequence of it was to destroy the government, and that appears by the party's being engaged in it; it could not be to gain a right, to make this hubbub and ado to arrest the magistrates of the city, and then take advantage for some other wicked purpose.

Another point of circumstance that is considerable in this case, is the particular persons; that were to be sued: The mandamus, that was directed to the lord mayor and aldermen; and there is a return made, not by this, or that, or the other man, but in the name of them all, the whole court. How comes it then to pass, that my lord mayor, sir Henry Tulse, and those other gentlemen, must be sued and arrested? But I warrant you Mr. Cornish, or his party, were not to be meddled with: No, he had so much zeal for justice, and to do the defendant right, that if he should have been called upon to appear, he would not have stood out an arrest; so just a man he is, and such a lover of right without all doubt: but he was in no danger, I dare say; they loved one another too well to sue one another. That, I say, gentlemen, is another circumstance, that carrieth malice in it. For I must tell you, these things cannot be smothered, they are as apparent as the light: and though it falls to my turn in this cause, to remind you of them; yet they are as well known to you all, as the passages in your own families.

No, gentlemen, there was not a pursuit of right in the case; it was a designed piece of villany on purpose to affront the government; nay, to destroy it, and set us all together by the ears. And if he were ten thousand times Mr. Papillon, I would, and must tell him so; and if it were not for some such devilish end and purpose, he would never have been so greedy of an office he had before declined and fined for; and which he was only called to by a turbulent, seditious, factious party, that had further aims in it: Otherwise, I know Mr. Papillon's humour so well, that I am confident, he would much rather have been contented to sit in his counting-house, than in Guildhall in a scarlet gown. Alack-a-day! I know Mr. Papillon knows how to spend his time to better advantage to himself.

Ay, but say the counsel for the defendant, We did go on very tenderly, and civilly, and respectfully; for there met at Mr. Cornish's house—Who, I pray? Mr. Papillon, and Mr. Dubois, and Goodenough, the prime attorney in this cause: and there, forsooth, they tell Goodenough, Be sure you do nothing but what is exactly according to law; and be sure

you carry it very civilly and respectfully to my lord mayor, good Mr. Goodenough. Alack-a-day! how wonderful pious and considerate these people are! If Mr. Cornish had gone to my lord mayor, as it was his duty to do, being then an alderman (we know it full well) and said to my lord mayor, there were such persons at my house talking of such a matter, and I come to advertise you of it, and desire you would consider of it, he had shewn his piety and zeal, and love for justice, much more in that, than in admitting such cabals in his house. But we know very well, as well as if we were in them, that they must go hand in hand in all these seditious and factious businesses.

It is plain, gentlemen, what the design was from the beginning to the end; nothing but to cause a tumult and confusion in the city, in order to put that damned hellish conspiracy, for the destruction of the king and his brother, and every man that was honest and loyal, in execution. This is certainly known to you all; and that there should be such a parcel of people untowardly linked together in this matter, not one man of which that they can pretend to be in any wise a well-wisher to the government, or to any that have any share in it: no, they are all persons that are obnoxious to the government, that had any hand in it; but none of them church of England-men, or friends to her established worship; notorious dissenters, or profligate Atheistical villains that herd together.

This, gentlemen, is plain English, and necessary to be used upon all these occasions: So that it remains now upon your consciences, whether upon all these circumstances that have been mentioned, you think the bare obtaining of a right in a legal course, or some worse thing was designed.

We all know Mr. Papillon to be a wealthy man, an able merchant; one that had rather have minded his affairs abroad, or at the Exchange, than the expensive, troublesome office of sheriff of London, but that something was to be done to wreak a damned malice and revenge upon the government. And sure, he must think, as his party it seems did, that they would not be sufficient to subvert the government, unless he could get into that office.

This I tell him openly; and let him or his party make their remarks upon it as they please. But you are to judge whether these things be a sufficient evidence of malice to support the plaintiff's action.

There was unquestionless a devilish malice fixed in his heart and mind, and he wanted an opportunity to effect it; and he thought it for his own security to be best to take this course, and nothing else was in it. For abundance of people have a mind to do mischief, but want opportunity and safe ways to do it in: and, Oh! they rejoice, if they hit upon a project, that shall carry a specious pretence and colour of law; for then they think they are safe enough.

As in case I have a mind to do any particular man an injury in his reputation and business; the business must not be done downright, by going to every body, and saying, Such an one is poor, or a beggar, and do not trust him; but I must cunningly and slyly insinuate it, I am sorry for such a man; I believe he is an honest man, but however he oweth money; and under this sort of snivelling, canting, whining, sly rate, do a man any injury whatsoever: and yet, forsooth, he shall have no advantage against me for it: I shall strike a dart into the very heart of that man's credit, and yet he have no remedy.

So, if I have a mind to talk against the government, I will not do it aloud, and speak what I mean openly; but I will whine, and snivel, and cant, and make people believe I have dreadful apprehensions of what is designing; and yet not bring myself in any danger; for I will keep within bounds all the while, though I do more mischief than if I dealt fairly and above-board. 'Alack-a-day!' (as Mr. Pilkington said) 'I am for the preservation of the liberty and properties of the subject, and I am for the law; but I find the city is strangely run down in their rights and privileges, and there are very arbitrary proceedings. And I am a citizen, and have taken my oath to preserve the privileges of the city; and I will rather submit to the inconvenience of a troublesome office, than let all run thus:' and immediately he sets himself cock-a-hoop, as if there were no one that took care of the city besides himself, and he were such a patriot, that there were none like him: and he, and Mr. Bethel, and Mr. Cornish, forsooth, are the only men of the times; the only good men; men that are for the liberties and properties of the subject, and the rights of the city: whereas these are the only men that have made an invasion upon them, and done what they could to destroy them; and God knows we might all of us have enjoyed very quietly every man his own, if these contesting rioters, and busy factious fellows, had not come among us. Every honest man, I tell you, knows this to be true.

Gentlemen, As to the business concerning the Damages, that, if you find for the plaintiff, is left to your judgments to consider of, and give what you shall think fit upon such an occasion. It is very true, it is not so easy a matter to ascertain particular damages in such a case; nor is it in an ordinary way so easy to prove, that because sir William Pritchard was in prison but five or six hours there, he could suffer so much damage as comes to ten thousand pounds. As in the case of a person of great quality and honour, it is not easy to prove his particular damage: nor in the case of any of you, that are wealthy, able, sufficient citizens, to say you are a bankrupt, when we all know it is impossible to be true; and so no particular damage doth ensue that can be proved; yet, however, if the thing for which the action is brought were designed with malice, though

the ill design be not effected, that is no thanks to the party, nor is to weigh with you, but the malicious design must govern you.

Now, here I have taken notice to you, that the malice of this design here was not against sir William Pritchard as such a particular man, but against my lord mayor, that this clan that met at Russel's was an overflowing of that gall or malice that was in his heart.

If Mr. Papillon had brought an action upon a bond only, certainly it had been nothing but what he might very well do; or if he had pretended to sue for a bad debt, that if he had staid would have been lost, it had been something: but you see what it was, and it is as apparent why it was, in that Mr. Goodenough said to Keeling, threatening him with the displeasure of the party if he did not do it; and Mr. Goodenough and Mr. Brome were such strangers to one another, that he must threaten Brome to complain of him, if he did not execute his writs presently. Do they think all mankind are so dull or blind, as not to see through such thin artificial stuff as this?

Gentlemen, this is the matter: the government is a thing that is infinitely concerned in the case, that makes it so popular a cause: the government of the city, the honour of your chief magistrate, and indeed the honour of the king, whose substitute he was, is concerned, and that puts a weight upon your inquiry into the damages of this case. You are to consider you give damages to the plaintiff, not as sir William Pritchard, but as lord mayor: and your severity in this case will deter all people from entering into clans and cabals to make disturbances, and affront the government.

It is a thousand times better to keep within their own bounds, mind their callings and employments, and concern themselves with

their own affairs, and leave the administration of the public to them to whom it belongs, and is intrusted with. And according as we say in the law maxim, so say I to Mr. Papillon and all the party, 'Ad Concilium ne accedat, antequam voceris.' And do not be scared with imaginary dangers, and groundless jealousies, into tumultuous and disorderly courses. You had much better keep in your counting-house, I tell you again, and mind your merchandise. Nay, and I do not doubt but you would much rather have done so, if there had not been some further fetch in it. It was not, I dare say, out of a frank, generous humour to oblige the city, that Mr. Papillon would have spent his time and money in the office of sheriff; so, I know he had better ways to employ both.

It was not the generous mind of Mr. Bethel, that called him on to be sheriff of London, to entitle him to spend his money; but on purpose to be one of the first, that should turn all things upside down in the city, and disturb the government: and they that succeeded him, carried on the project; and they that would have been in, but could not, had a mind, no doubt, to follow so worshipful an example as he laid before them.

Then the Jury withdrew to consider of their Verdict, and after half an hour's stay, returned, and found for the plaintiff, and assessed damages to Ten Thousand Pounds, and costs to Four Marks.

L. C. J. Gentlemen, you seem to be persons that have some sense upon you, and consideration for the government, and I think have given a good verdict, and are to be greatly commended for it.

§12. THE GREAT CASE OF MONOPOLIES, between the East-India Company, Plaintiffs, and THOMAS SANDYS, Defendant: Whether their Patent for Trading to the East-Indies, exclusive of all others, is good? 35 CAR. II.—1 JAC. II. A. D. 1683—1685.

THE East-India Company having a Patent granted them of the sole Trade to the East-Indies exclusive of all others, commenced a suit against Mr. Sandys for trading thither without Licence; in which case the following Arguments were made, viz.

MR. HOLT'S* ARGUMENT.

(AFTERWARDS LORD CHIEF JUSTICE.)

The Governor and Company of Merchants of London, trading to the East-Indies, v. T. Sandys, T. Mich. 35 Car. 2. Rs. Rot. 126.

The Defendant comes and prays Oyer of

the Letters Patent, which are set forth, as we have declared and pleaded.

To this plea the Plaintiffs have demurred. My lord, I do conceive the general question in this case will be this, Whether or no an action lies by the Company upon this charter; for that the defendant not being a member of the Company has traded into the East-Indies without licence of the Company? My lord, I think there may be two questions made in this case, first, whether or no this grant of the king to the Company to have the sole trade to the Indies, exclusive of all others his subjects, whether that be a good grant? Secondly, supposing it to be

* "The six following Arguments in this Great Case, were copied from the MSS. of Samuel Pepys, esq. (Secretary to the Admiralty) in Magdalen college, Cambridge. These Arguments are of great concern to the public in general, and to every individual man in this

ralty) in Magdalen college, Cambridge. These Arguments are of great concern to the public in general, and to every individual man in this

a good grant, yet whether or no it does rest such an interest, liberty or franchise in the Company, that an action may be brought and maintained by them, against any person trading to the East-Indies; who is not qualified by this charter? My lord, for the first, I do humbly conceive that this charter granted to the company to have the sole trade to the Indies exclusive of all others is a good grant; and, my lord, I shall endeavour to make it appear to be a good grant from these considerations: first, my lord, from the consideration of the persons that are to be traded withal, and they are infidels, and not christians. Secondly, my lord, from the consideration of foreign trade itself, how and in what nature by law, it may be restrained by the king's royal power. And in the third place, consider the circumstances and particulars of this grant made to the company in this case.

My lord, for the first, that does relate to the persons to be traded with, they being infidels and not christians; I do conceive that by the law of the land, no subject of England can trade with infidels, without licence from the king; or at least it is in the power of the king to prohibit it, and for this very reason, because

kingdom, either immediately or by consequence, since trade is the life of a nation; and must be of great service to the professors of the law, to shew on what grounds and reasons the case was adjudged. And the proceedings on the Quo Warranto (vol. 8, p. 1039), having been found useful to the gentlemen of the law, is the reason why these Arguments, (though not so properly a Trial) spoke by some of the greatest men that ever appeared at the bar, are here inserted. The Arguments of Holt, Treby, Finch, Pollexfen, and Sawyer, are very briefly abridged in Skinner's Reports. But the Arguments of Mr. Williams, and the Lord Chief Justice Jefferies, are not mentioned there." Note to former Edition.

See, also, 2 Shower's Rep. 366; and the books referred to in Mr. Leach's edition of that work.

Among the MSS. of Owen Wynne, in the Library of All Souls' College, Oxford, is a report of the Arguments in this Case of Holt, Treby, Finch, Pollexfen, and Williams. In that report there are not inserted any observations from Jefferies at the close of Pollexfen's Argument, nor is there at the conclusion of the whole, any mention of the Judgment. The arrangement of Pollexfen's reasoning is somewhat differently exhibited, and the arguments of the other counsel are reported with some verbal variations of trivial importance from the report in the text. To Pollexfen's Argument, is there, as here, prefixed a recital much at length, of the Declaration of the Plaintiffs. On the whole, the report in the text is much more full; and, as it seems, better arranged than Owen Wynne's, which contains not the Argument of sir Robert Sawyer, the occasional

infidels are by the law taken notice of; and the law hath adjudged them to be perpetual enemies; the law hath set a mark upon them, and they are used as all other enemies are. And so 7 Rep. 17. 6. the express words of my lord Coke are in Calvin's case; says he, infidels are perpetual enemies: Reg. 282. That sets forth the writ of protection, that was given to the prior and brothers of the hospital of St. John at Jerusalem, that it was contra dei omnium Christianorum inimicos, 12 H. 8. 4. If a man do beat a man outlawed, a traitor, or a pagan, and they bring an action, he may plead his being a pagan; and in abatement of his action: I mention this, my lord, to shew what opinion the law has of these people, judging of them to be enemies as they are infidels; and for that reason has excluded them from the benefit of the law, and the common justice the nation affords: and from that it may be inferred, that since the law hath excluded them from common justice, surely the law will not allow an intercourse or intimate correspondence with such persons to the subjects of England. And, my lord, this is grounded upon the care that the government hath, or ought

observations of the Court, or the conclusion of the cause: and it exhibits Pollexfen's Argument less correctly and less intelligibly.

This Case is briefly noticed in Anderson's Historical and Chronological Deduction of the Origin of Commerce, vol. 2, p. 566, edition of 1801. What is there said of it is thus concluded:

" Lord Chief Justice Pollexfen laboured not unsuccessfully to prove the Company to be a true monopoly, and Sandys to be innocent, as the Company was not established by any act of parliament. Yet the king's prohibition for the ship not to sail, obliged Sandys, after a year's suspense, to sell off his ship and cargo with great loss. The ships and goods of some other interlopers, as they were then styled, were likewise seized and confiscated in the following reign, in the years 1686 and 1687; but they took out no licence from the Company. All which was decided against the spirit and maxims of our common law, partly for supporting a lawless prerogative in the crown, which, under a better monarch, six years after this time, was agreed to be legally disclaimed."

As to the king's prohibition here mentioned, see 2 Shower's Rep. 302. Raym. 488. Some particulars respecting the East India Company's Complaints against Interlopers are given by sir Richard Bulstrode in his Memoirs. He also notices the grounds of Jefferies's Judgment.

See the Arguments in the Case of the Company of Merchant Adventurers against Rebow. 3 Mod. Rep. 136, and the books referred to in Mr. Leach's edition of that work.

to have, by the constitution of the government itself, of the christian religion, which I conceive is the main end of government. The profession and preservation of christianity is of so high a nature, that of itself it supersedes all law: if any law be made against any point of the christian religion, that law is *ipso facto* void. Why? Because it is made against the prime and original end of government. If the king conquer a christian country, their law continues till it be altered by the king; but if he conquers a pagan country, the law ceases *ipso facto* to be law; for the law of infidels is contrary and repugnant to the christian religion. Why then, if the christian religion have the prevalence in christian countries, there must be some means provided by the law, whereby the king may have a power to preserve it: and there is nothing more dangerous to the right religion, than for the professors of that religion to have commerce with pagans; we read how the children of Israel were perverted from the true religion, by converse with the nations round about them, in the Book of Judges.

And Grotius De Bello et Pace, l. 2. c. 15 parag. 11. says, 'Cavendum est enim ne nimia commixturatio contagium adferat infirmis, quamobrem utile erit, sedes distinguant sicut Israelitæ seorsim ab Ægyptiis habitant.' The government is to take care that there is not an infection, by correspondence with infidels; my lord, it is not to be doubted but that the king is to have a care of the christian religion. In old times of popery, Bracton, lib. 2. ch. 24. the king of England, says he, is 'Dei minister et vicarius.' Et 5. ch. Bracton, 'Jus publicum est quod ad statum.'

This is looked upon to be part of the Jus publicum, the care of religion and sacred things, and the propagation thereof; why then, my lord, if this be true, then it is lawful for the king to take care and use his royal authority, to prevent all his subjects from being perverted. My lord, I think it is plain by the writ of *Ne exeat Regnum*, that says the king may prohibit any person from going beyond sea. Why? For the defence of the realm; that is a sufficient reason, it is not in the power of the party to litigate it with the king, but he must submit. Now always religion is first to be regarded; secondly, the defence of the kingdom; and thirdly, the trade thereof. Now, my lord, the subjects of a Christian prince going to trade with Infidels, being in their company, that may be dangerous to the state and religion; so that it must necessarily be in the power of the king to controul it. Hob. 217. Courteen's case, it was adjudged that an information did lie at the common law, before any statute, against any persons that should transport coin, because it is against the policy and state of government that money should be transported; now, if it be against the policy of state to trade with infidels, by the same reason that ought to be restrained. In the next place, I will consider foreign trade, and whether the

subjects of England have right to such a foreign trade, that they can, *ad libitum*, trade without any controul; and I conceive they have not.

First, my lord, I conceive that the liberty and right of a foreign trade, depends upon agreement and contract with foreign princes, in whose country the trade is; and if so be it do depend upon agreement and amity with the prince; then have not the subjects of England such an uncontrollable right of trading, because it depends upon the accidents of peace and war; which, if there were such a right, it could not. 30 ch. Magna Charta, 'Omnes Mercatores, nisi publice antea prohibiti fuerint, habeant saluum et securum conductum exire de Anglia et venire in Angliam, et morari et ire per Angliam præterquam in tempore guerra.' Then he goes on further, if there happen to be war with a foreign prince, and the kingdom of England, and the merchants of that country be found in England; this shews that war is an interruption of the commerce. 12 H. 7, ch. 6, my lord, that statute recites, that the merchants-adventurers inhabiting within the city of London, and divers parts of England, had free passage, &c. into divers parts of Spain and other places, that were in league and amity with our kingdom and sovereign; so that it appears that league and amity is the foundation of commerce.

Selden, in his *Mare Clausum*, says, the rights of trades are founded on the covenants of princes. What is the reason? Lest the manners and morals of the people should be corrupted by the example of foreign nations. My lord, 2 Rolls Abr. 314, mentions the parliament-roll of 1 H. 5, wherein it is said, That the Commons did petition the king that the merchants of England, paying their customs and other duties, might have liberty to export their goods to any place or country, notwithstanding any proclamation to the contrary: and the king says, He will be advised, he would advise with his council. My lord, from that time to this it appears that there was no complaint of the king's proclamation as illegal, that did prohibit their trade; but they only pray that he would make an alteration of the law. But there were several proclamations at that time to restrain the subject from trading with foreigners (therefore they desire he would consent they might trade); but the king in that case did think fit to part with his power, but gives the usual answer in such cases. My lord, in the next place it is necessary for the king to have power to restrain a foreign trade; because a foreign trade, as the case may be, may be very inconvenient and mischievous: for it is well known, that if so be the importation of foreign commodities do exceed the exportation of domestic, that trade is rather a grievance than a benefit; so it is said, 2 Inst. 325, and, my lord, there has been sufficient appearance of this matter of late days.

My lord, the importation of Irish cattle, by the 18th of this king, chap. 2, was declared to

be a nuisance. So the 39th of king Charles 1, the importation of French commodities: why this, my lord, is declared, the statute does not enact it, but declares it to be in itself a common nuisance: why now, if so be a trade come to be a nuisance, that it is rather hurtful than advantageous; the king, by virtue of his prerogative, is to defend the nation, and protect his subjects from these evils; he has a power to restrain these evils, especially when we have the judgment of the parliament, by whom these things have been declared to be nuisances, 10 Rep. 141. In the case of the Isle of Ely, the first statute that was made concerning Sewers, was in H. 6's time; there was a question, that since there was a thing so necessary as the taking care of the inundation with remedy there before any statute, says the book, the king by his prerogative, as the fountain of justice, might take care of it, though there was no statute then. My lord, when foreign commodities come to be an annoyance to the people, the law must be defective, if the king had not a power to restrain them. But in this case here it is only a regulation of trade, a grant of it to the company; and it is only specified how they shall manage that trade, to the intent all people might trade under the government as they ought to do: and I think, my lord, it is well known, that if this company had not settled and established a trade in the Indies, Mr. Sandys, nor none of these gentlemen could have had an opportunity to do it. And if they have liberty to interfere with the Company, they would ruin the Company, and they themselves could not trade; but I know what objections will be made against me, even by the defendant's plea. My lord, that 18 E. 3, ch. 3, to-wit, that the sea shall be open to all merchants to part with their merchandize where they please; which, with submission to your lordships, cannot be taken so universally as they themselves would have it. For if you will take the words to be so large, without any manner of restraint, you will make this statute to give liberty of trade to the king's enemies, for they are merchants. But, my lord, the next answer I give to it is this; I conceive the true meaning of the statute is, that the sea should be open without paying any extraordinary duties but what might justly be imposed: that is, that none should pay any duty or custom for navigation, but only the due custom, that is, when they come into port. And so I must compare that statute with Magna Charta, 30 ch. 'Omnes Mercatores nisi publicè antea prohibiti fuerint, habeant salvum et securum conductum exire de Anglia et venire in Angliam, &c. sine malis tolneis'; so that they have liberty allowed in this case to trade without unlawful exactions. But, my lord, in the third place, supposing this statute to be taken in general, as I know the other side endeavours it should, yet it cannot extend to this case; for I think they can hardly make it out, that at that time there was any trade drove with

infidels, but the trade was drove with Christians: why now, if there was not such a trade had at the making of that statute, we must not extend the law to this case, which differs from the reason of trade in other cases. That there was none, I think appears plainly by history; Hollingshed's History of England, 163, 'whereas,' says he, 'in times past, the chief trade was in Holland, Portugal, &c. now,' says he, 'men not being content with those journeys, they have sought out the East and West-Indies, and have made now and then 'suspicious voyages.' And it appears by the statute of H. 7, that I mentioded before, that the ancient trade of England consisted with near countries, and so the trade was at the time of the making of this statute.

My lord, I do observe as to the case I reported before, when the Commons did petition the king, that they might have liberty to trade notwithstanding any proclamation, Rolls Abr. 214, they were not of an opinion at that time, that this statute did extend to merchants; to give them liberty to trade every where at their will and pleasure; if they had, they would have insisted upon it, and urged it to the king, that whereas there was a statute gave them free liberty, therefore desire the law might be observed: but they do not deny, no, they tacitly acknowledge the king had such a power.

My lord, it does appear what the ancient trade of England was by the customs; for at the common law there was no custom but in three things, wool, woollfell and leather; these are the customs that were due to the king by common law: indeed, there was foreign custom, but that was for a foreign commodity, and was prize; Dyer 165, 2 Inst. 52, and 43. Davies, Rep. 3.

Now, my lord, if so be the trade of the nation had consisted of other commodities, it may be supposed there would have been custom paid for them afterwards; in Ed. 3rd's time, when new trades were introduced, we find acts of parliament made for raising new custom; therefore since no custom was paid, but these ancient customs, we may suppose the trade of the nation mostly consisted of those commodities. Fitzherbert, Nat. Br. 85. Dyer 165. Merchants as well as others may be prohibited from going out of the land, or any person whatsoever; and Davies, Rep. fol. 9, b. gives one reason why the king did permit the merchants to trade, when it was in his power by writ of *Ne exeat Regnum*, or a proclamation, to put a stop to them.

My lord, in many cases, when the doing of an act may be to the public detriment the king hath power to restrain it, and it cannot be done without the king's licence: Co. Litt. fol. 5. a subject cannot build a castle, or other fortress defensible, without licence of the king; why? because it may be dangerous. Why then should a subject trade with an infidel country, without licence from the king? for by trading with infidels they endanger their religion. And, therefore, as it requires licence to build a

castle, though a man otherwise might lawfully do it upon his own ground; so for the same reason does it to trade with infidels, 9 Rep. 87. b. 2 Inst. 199. A man cannot inclose his ground to make a park without licence of the king; in that case he takes nothing from any body, but such inclosing and turning profitable ground into a place of pleasure, may be of public consequence, and therefore cannot be done without the king's licence, 11 H. 7. 23. If two men play at sword and buckler, and one kill the other, that is felony; but if they play with licence of the king, that is not felony; so that the king hath power to prohibit, and by his command make that unlawful, that otherwise would be lawful. For the king may command a man, by his writ, to stay in the kingdom, and if he go contrary to the king's writ or proclamation, in that case the king may seize all his lands for the contempt, as in the case of sir Francis Ingfield: so that as the king may govern the trade of the nation in regard it may be mischievous, the king may hinder it, when it will be apparently mischievous.

In the third place, I shall consider the Grant; and the Grant hath these things in it; It is a grant to a company, that they and their children shall trade to the Indies, notwithstanding any statute or diversity of faith or religion; and that they should have the sole commerce and trade there. There is a prohibition to any of the king's subjects to trade there without licence. Now, my lord, this grant I take to be good; for, my lord, though it may not in itself be lawful without the king's licence, yet it is in the power of the king to make it so. And for this reason can the king make an alien a denizen.

The reason of the law, why an alien is uncapable to purchase lands here, is because it is against the policy of the land for to suffer a foreigner to come into England, and enrich himself with the lands and goods of the kingdom, yet the king may cure this incapacity; but notwithstanding he be made a denizen, yet does he remain an alien still, and subject to that price from whence he came; Dyer, 3 ch. B. So that notwithstanding it may be dangerous for an alien to have land, yet the king is entrusted with it, and may give this alien liberty to purchase land.

My lord, it is, as I have observed, unlawful to transport the coin of England; yet the king may give leave to transport coin, as there is a precedent 5 Car. 1. of a licence to transport 10,000*l*. So, my lord, for the trading with infidels, though in itself it is against the policy of the government; that is, for the subject to have an uncontrollable liberty to trade at their pleasure; yet the king, who is entrusted with the administration of the government, may give authority to do it. And there is a great deal of difference between trading in a company, and trading out of a company: if they trade in a company, they trade under the government of England; if they trade out of a

company, then they trade out of the government of England, and out of its protection. This Company is incorporated and made to have the government of this trade; they being christians, no question, are to take care of the christian religion; and to take care that their agents and factors that trade under this constitution, keep up to that religion they profess; but certainly it is quite another thing when people trade of their own head; there they converse only with infidels, they cannot have divine offices.

My lord, it has been objected; Oh, but say they, if the king give a licence to some, though they cannot do it without the king's licence, yet the king having dispensed with this law, this dispensation shall have an universal influence, and give licence to others.

My lord, it seems to me a very strange inference; they acknowledge, that make this objection, that without the king's licence, beyond what it is, where the king hath qualified his grant solely to the company and their factors, they would have it extend to all the people of England. I think it is the first time that ever the king's licence, or authority that he gives, should be extended beyond itself. But, my lord, the great objection will be, that this is a monopoly, and therefore the grant is void in law; with submission, I think it is none; and I hope I have said something already to prove it to be none, and it does not come within the definition of a Monopoly, 3 Instit. 181. A monopoly is an institution or allowance of the king, by his grant, commission or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working or using of any thing; whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade: restrained of the freedom they had before, that I think they cannot make out, that they ever had any such freedom. They cannot make out that they were in possession of this trade before, therefore this charter does not restrain them of any freedom they had; then say they, it hinders others lawful trade.

My lord, I have made it appear, that the trading with Infidels without licence of the king is not a lawful trade. But to go further, though the proof lies on their side, they having the affirmation; yet I hope to give such evidence, as is even as much as can be expected in any case. In the 43d of queen Elizabeth, a parliament was sitting at Westminster, and at that very time there was a charter granted to this Company; and a charter that had these very words, of having the sole trade exclusive of others; and there had been another charter granted before of having the sole trade, 27th of the queen. Now, in this parliament, 43d of the said queen, the parliament fell very vigorously against Monopolies, and brought in a great catalogue of them. But, my lord, I do observe, that in all the catalogue, and in all the debates of parliament, at that time, there's not

now mentioned of the East-India company's charter, neither of the charter of the 17th of the queen, nor of the charter of that very parliament; nay, there is not so much as mention made of the charter granted to any other company. My lord, I have this from a book that is lately come out, Townshend's Collection of Proceedings in Parliament, 244, 245, there is the whole catalogue of Monopolies and the full debate of them: but as for any charters of corporations, though there were many at that time, there is not the least complaint.

My lord, between the 43d of the queen, and the 20th of king James, is about twenty-three years; in the 43d of the queen, the discourse of Monopolies first began in parliament; and they were considering, it may be supposed, all this time, how to settle the matter of monopolies, and to declare what were monopolies. And after all this long consideration, and so great an agitation as it had, they came to make the statute of 21 Jac. which seems to be a settling and bounding the prerogative of the crown, and right of the subject; it does condemn monopolies, and has these words, all monopolies, and all commissions for the sole buying, &c. or using of any thing within the king's dominions, why that is condemned. But, my lord, it does appear that the parliament were so far from condemning the charter of this Company, or the charter of any other company; that there is an express proviso that the Statute of Monopolies should not extend to any company for the ordering or managing of trade, though I think the words of the statute did not reach this case, yet they were so careful, that they would have a proviso to save this and all other companies. And, my lord, there is a statute, 3 Jac. cap. 6. by the preamble of which statute it appears that the king had granted a charter to divers merchants to be a company, and to have the sole trade into Spain and Portugal, excluding all others that were not members. The statute recites the mischief of liberty to all the king's subjects to trade there: I observe, the parliament did not condemn the charter to be unlawful, but took it to be good, and that nothing less than an act of parliament could restore the liberty of trade to the subjects against the charter; for they do say, notwithstanding the charter had given the sole right of trade to the company, yet it should be lawful for all people to trade there, notwithstanding that charter. Now, my lord, I do think that practice and usage is a great evidence of the law: I shall shew your lordship some precedents of some charters, that have been granted to persons of a sole trade exclusive of others: 6 Feb. 26 Eliz. she granted to Abraham Gilbert and his associates the sole trade to China, prohibiting others: 6th March, 27 Eliz. there is a patent to sir Walter Raleigh to discover new countries that were heathenish and under infidels: 11 Sept. 23 of her reign, there was a patent to divers Turkey merchants to have the sole-trade to Turkey,

excluding all others: 1st of Jan. 34th of the queen, a charter granted to the Turkey-company: 5th July, 27th of the queen, there were letters patents granted to certain noblemen and gentlemen to trade into Barbary, and that during twelve years none should trade there, but they, their agents and assigns: 30th Eliz. a patent made to the merchants of Exeter to have the sole trade to rivers of

In Guinea: 34th of the queen, another patent to Gregory and Pope, to have the sole trade to Guinea. My lord, all these I have now quoted, I have caused to be examined on the Rolls, and are to be found there: 2 Brownlow, 296, there it was held by my lord Coke, that no subject ought to trade to an infidel country without licence of the king, for fear of being perverted from the Christian religion; this my lord Coke says, and he says he had seen an ancient precedent of a licence, More, 675, Darcy and Allen. Justice Doderidge (that I think was only then Serjeant) argues against the patent, but he did agree that a grant to a company to have the sole trade with infidels is a good grant, and the king by his prerogative might restrain his subjects from it: he admits a patent for sole printing was good; why, because the public was concerned; my lord, the parliament of late time have been so far from looking upon the East-India company to be a monopoly, that they have declared it to be for the good of the kingdom; 14th of this king, chap. 24, in the preamble it is recited.

Now, my lord, I hope I have made good, that the king has this power both by precedents, by authorities, and opinions of lawyers; and also the judgment and the opinion of the parliament: and that it was never condemned, and so I conclude this first point. The second point, my lord, in the next place, which I shall be very short upon, for that it will be consequential to what I have endeavoured to prove before; that is supposing it to be a good grant, whether if any person do trade to the damage of the Company, it is a good ground for an action.

First, I do think the Company have, and it is very plain they have an inheritance, and it is a franchise and liberty they could not have, unless they had the king's grant, and others excluded from it; then it does agree with all the cases of this nature; wherever the king grants a franchise to one, and another person violates the franchise, the king's patentee may have an action of the case, against the person that does interfere or violate the franchise: 22 H. 6. 14. 11 H. 4. 47, supposing the king grant a man a fair or market, if any man set up another fair or market, though with the licence of the king, yet he that has the grant shall have an action. Now the East-India Company are to be at great charges, nay, there is a trust reposed in them, that they shall trade, and carry on this trade for the good of the Company; so that they are put into a trade, and are obliged to carry it on. The

defendant hath no right; if they have a right, they shall have a remedy against any that invade it. And for these reasons, I pray your judgment for the plaintiffs.

SIR GEORGE TREBY'S ARGUMENT.
(AFTERWARDS LORD CHIEF-JUSTICE.)

The Governor and Company of Merchants of London, trading into the East-Indies, against Thomas Sandys. Trin. 35 Car. Secundi Reg. Rot. 126.

May it please your Lordship; I am of counsel in this case with Thomas Sandys, the defendant. The case arises upon a charter set forth by the plaintiffs, and a statute pleaded by us; and it is as Mr. Holt has opened it. Only I shall, for my purpose, open it a little more than he did.

It is a special action on the case, declarative; wherein the plaintiffs declare, that king Charles 2, our present king, by his letters patents, bearing date the 3d of April, in the 13th year of his reign, reciting that the governor and company of merchants trading into the East-Indies, had been of long time a corporation, and enjoyed divers liberties, privileges and immunities, by virtue of divers letters patents, and charters, granted to them by queen Elizabeth and king James; and the king being informed, that divers disorders and inconveniencies were then lately committed, to the great prejudice of the said company, and interruption of their trade: whereupon they had humbly besought the king, to grant and confirm their said charter, with some alterations and additions, tending to the advancement and benefit of their trade.

The king gives and grants to them, that they shall be a corporation perpetual, to have succession and capacity, &c. And further willed and granted, that they, and every one that was, or should be of the Company, and their sons at their several ages of 21, and their apprentices, factors, and servants employed by them, might and should freely traffic, and use the trade of merchandize by sea, by such ways and passages then found and discovered, as they should think fittest, into and from the East-Indies; and into and from the islands, ports, havens, cities, creeks, towns and places of Asia, Africa, or America, or any of them, beyond the Cape of Bona Esperanza, to the streights of Magellan, as by the court of the Company shall from time to time be limited and agreed, without any molestation, impeachment or disturbance; any statute, usage, diversity of religion or faith, or any other cause or matter whatsoever notwithstanding, so always the same trade be not undertaken, or addressed, to any country, island, port, haven, city, creek, town, or place, already in the lawful and actual possession of any such christian prince or state, as at this present is, or at any time hereafter shall be in league of amity with

the king, his heirs or successors, and who doth not, or will not accept of such trade.

And further grants, That they and their successors, and their factors, servants, and assignees, in the trade of merchandize for them, and in their behalf, shall for ever hereafter have, use and enjoy, the whole, entire and only trade and traffic; and the whole, entire, and only liberty, use and privilege of trading and trafficking, and using the feat and trade of merchandizing, to and from the said East-Indies; and to and from all the islands, ports, havens, cities, towns and places aforesaid.

And further grants to them, That the said East-Indies, or the islands, &c. shall not be visited, frequented or haunted by any of his subjects, during the time that these letters patents remain in force, contrary to the true meaning of the said Letters Patents, and the virtue of the prerogative royal. Charging also and commanding, and prohibiting all other subjects, that none of them visit, haunt, frequent, or trade, traffic or adventure by way of merchandizing into or from any part of the said East-Indies, &c. unless it be by and with the licence and agreement of the company, in writing first had and obtained under the common seal.

Here the declaration makes a break, or stop, and so it would seem as if the restraint and prohibition were absolute and general; but upon Oyer prayed of the letters patents, they being set forth *in hæc verba*, it appears to be, *sub modo*, under the following penalty, viz. Upon pain that every such other person or persons, that shall trade to or from the East Indies, shall incur the king's indignation, and forfeiture and loss of the goods, merchandizes and other things whatsoever, which so shall be brought into this realm of England, or any of the dominions of the same. As also the ship and ships, with the furniture thereof, wherein such goods, merchandizes and other things shall be brought or found, the one half of all the said forfeitures to be to the king, his heirs and successors; the other half to the company. And further, all and every the said offenders, for the said contempt, to suffer imprisonment during the king's pleasure; and such other punishments as to the king, his heirs and successors, for so high a contempt, shall seem meet and convenient; and not to be in any wise delivered, until they and every of them shall become bound to the governor, in the sum of 1000*l*. at least, at no time then after to sail or traffic into any part of the said East-Indies, &c. And further grants, That the Company may grant and give licence under the common seal, to any persons to sail and traffic to the East-Indies; and that the king, his heirs and successors, will not, during the letters patents, give licence to any person to sail or trade there.

By virtue of which letters patents they alledge they have been, and are a corporation; and have had, established and managed, and do still manage a great trade of merchandize to

the said East-Indies, with the inhabitants there; who at the time of making the said letters patents, or since, were not christians, nor subjects to any christian prince or state; but were, and are infidels and enemies of the christian faith; and have spent and laid out many and great sums of money on that occasion.

And further say, That the commerce and trade aforesaid cannot be established, managed or carried on but per hujusmodi Corpus Corporatum, by such a corporation; and that they ought to have and enjoy the sole trade there according to the form and effect of the said letters patents.

But the said Thomas Sandys being a subject of the king, and no member of the Company, nor son, apprentice, factor, servant or assignee, sufficiently knowing the premises, and designing to prejudice the company, contrary to the form and effect of the said letters patents, after the making the same, and after the Company had settled their trade, 19 Jan. 34 Reg. did trade into the East-Indies, within the parts, regions, and places above specified, beyond the promontory of Good-Hope, on this side the straits of Magellan aforesaid, in certain ports and places, called Atcheon, Mechlopotan, and Porta Nova, with a certain ship, called the Expectation, without the licence, and against the will of the governor and Company, and to the prejudice, impoverishment, and manifest grievance, and against the form and effect of the said letters patents; to the damage of the plaintiffs 1000*l*.

The Defendant prays Oyer of the letters patents; whereupon they are set forth in *hec verba*.

And thereupon the defendant pleads the statute, 18 Ed. 3. cap. 3. whereby it is enacted 'That the sea be open to all manner of merchants, to pass with their merchandize where it shall please them.'

Upon this the plaintiffs demur.

My Lord, I shall not differ with Mr. Holt in the state of controversy, but make the same two points, viz. 1. Whether this patent, as it purports an exclusion of all other subjects from this trade, be good or void? 2. Whether here be an apt suit brought?

In the first place, I shall not question but the patent is good, to make these persons a corporation, and all the privileges and benefits they can derive from being a body corporate, they may enjoy, and apply them to trade if they will. Yet as to this particular, I shall observe thus much, that when such charters of incorporation were first taken notice of in Q. Elizabeth's and K. James's time, they did not escape the censure of learned men, who foresaw the ill use of them. Co. Mag. Char. 540. Three things which have fair pretences are mischievous: 1. New Courts; 2. New Offices; 3. New Corporations trading into foreign parts or at home; which under the fair pretence of order and government, in conclusion tend to the hindrance of trade and traffic, and in the end produce monopolies.

1 Rolls Rep. 126. Justice Dodderidge says, these things would overthrow the realm.

In this argument I am sensible I am to speak of a tender point, the King's prerogative; but I shall treat it with that regard and deference that I ought, and as our books teach us. The prerogative is great; but it has this general and just limitation, that nothing is to be done thereby that is mischievous or injurious to the subject.

Finch's Law, 81, 83, 84, speaks highly of it, as a matter divine: 'The King' says he, 'carries God's stamp, and has the shadow of God's excellencies given him; the power of God is always joined with justice; for to do wrong is not omnipotence, but weakness. So it is with the king; he can be no wrong doer, he is all justice; therefore he has a prerogative in all things that are not injurious to the subject, as he may create corporations, &c.' (says he.) And so say I, he may create corporations, and this corporation; but for the same reason, he cannot add a restraint to all other subjects from exercising this trade.

I shall lay for my foundation, that this patent, as to restraining the trade, and excluding all other subjects, has the nature of a monopoly; and is therefore void in that particular.

Mr. Holt and I are agreed on the description of a monopoly, which is made by my lord Coke, Pla. Coron. 181, viz. an institution by the king, by his grant, commission, or otherwise, to any person, or corporations, or for the sole buying, selling, making, working or using of any thing whereby any persons or corporations are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.

And the like description is made in the preamble of the Act concerning Monopolies, 21 Jac. cap. 3. where it is also declared, That all grants of Monopolies, and all other matters or things whatsoever, any way tending to the instituting, erecting, strengthening, furthering, or countenancing of the same, are altogether contrary to the laws of this realm, and utterly void, and of no effect; and in no wise to be put in use or execution.

If therefore this trade to the East-Indies be a lawful trade, then this patent for the restraining it must be a monopoly. The nature of a monopoly consists in restraining a common right; it appropriates to one, or a few, what others had the lawful use of before.

I confess, I did a little wonder to hear merchandizing to the East-Indies objected against as an unlawful trade, and did not expect so much divinity in the argument; but to that I shall endeavour to answer by and by. Generally speaking, merchandizing was always reckoned a lawful trade; every man might use the sea, and trade with other nations as freely as he might use the air. And for this trade to the East Indies, it was lawfully used before there was a company, or else there had never been a company. This trade has been long, but this company is made by these letters

patents 22 years ago. This is not distinguished, nor distinguishable from the reasons and rules laid down in the other cases of Monopolies.

I shall chiefly insist upon two cases in one book, Coke 11 Rep. the Taylor of Ipswich's case, fol. 53. and Darcy and Allen's Case, called the Case of Monopolies, fol. 86. It is the main ground of both those cases, that at common-law no man could be prohibited to exercise his trade, for that is an avoidance of idleness, it helps to provide sustenance for a man and his family; and it is a service to the king: and the consequences of restraining trade are pernicious, as raising prices of commodities and impoverishing men, bad commodities, &c.

Now, that foreign trade was understood to be comprehended under this general resolution, I desire your lordship to look upon the report of the Taylor of Ipswich's case, in 1 Rolls Rep. 4. where it is said, that no trade of merchandize can be hindered by patent, and a charter to hinder trade at sea is void; as that a hundred men should have the sole trade, or the like.

The king's prerogative cannot make this good; it is not lawful for a man to restrain himself from his trade, 5 Moor 242. 2 Leon. 210. a bond not to use his trade of a dyer or smith is void, so a bond not to plough his land.

And so a bond that a man shall not go out of his house, for a man must serve the king and do his duty with his liberty and his labour; and if merchants and mariners should enter into a bond or a covenant not to trade, or not to trade to the East Indies, it were void. And if it be unlawful for a man to restrain himself from it, the king cannot restrain him.

Another reason is, the king cannot by his letters patents take away the subject's property, and I do not know a greater property than freedom of trade and labour; the king cannot take away six-pence that a man has got by his trade, much less can he take away his whole trade: if the profit which a man gets by his trade be his own, the liberty whereby he acquires it is his own; otherwise the whole property of traders were precarious.

Mr. Holt would expound the statutes that are pleaded, to signify that the king shall not lay an imposition upon merchandize. Though that be not the true meaning of the statute, yet even that were sufficient for our purpose, and will prove that the king cannot totally prohibit a man to trade, for if he can prohibit absolutely, he can prohibit *sub modo*, and require that none shall trade unless they pay so much and so much for licence; and so by that means he might lay that imposition, which, it is agreed, he cannot.

In Darcy's patent there was a rent of a hundred marks per annum reserved to the queen; and they that drew, and they that argued that patent, supposing the grant of the sole trade to have been good, made no doubt of the consequence, that the reservation was good.

It is truly said by my lord Coke, Co. Mag. Cha. 47 and 63. That all Monopolies con-

cerning trade and traffic are against the common-law, and divers statutes; and it is as truly said by him, Co. Placita Coram, 182, that though these monopolies were ever without law, yet they were never without friends.

Several attempts have been made for them; Mr. Holt has cited some; for the most part, they lurked private, sometimes they have appeared in courts of justice, but there they have always been disappointed.

Rot. Parl. 50 Ed. 3, nu. 33. It appears there had been a patent granted to one Peachy for the sole selling sweet wine in London: this concerned a thing of delicacy, and was a matter of small moment then; yet the patent was brought into parliament, and adjudged void, and the party punished.

Co. Mag. Charta 61, and Pla. Cor. 182. A patent granted by Philip and Mary (in respect of Philip's landing there) that all Malmseys should be imported at Southampton, and not elsewhere, adjudged void. 14 H. 8, was the College of Physicians erected by letters patents; wherein there was a clause, that none without their allowance, should practise physic in, or within seven miles compass of London. Coke's 3, Rep. p. 114. Dr. Bonham's case, but they were well advised that that clause in the letters patents was void; and therefore 16 H. 8, they procured an act of parliament to make good their letters patents; and the very reason of making that act, was to give that force to that restraint, which could not be by the letters patents only.

15th Jacobi, was granted a patent for sole printing of Law-books, the validity of which happened to come in question in 1668, in Chancery between the patentees and some book-sellers, who had acquired copies of law-books to be printed, and it was referred to all the judges.

Many specious reasons were given to maintain it; as, that the invention of printing was new, that it concerned the state, and was matter of public care; that it was in the nature of a proclamation, and none could make proclamations but the king. That the king had the making of serjeants and officers, and judges of law; that they were printed in a particular language and character, with abbreviations, &c. But it was the opinion of all the Judges certified to my Lord-Keeper, that those persons who had acquired copies since the patent, could not be restrained by the patent from printing them.

Lord Chief-Justice. It received another Judgment in the House of Lords.

Sir George Treby. Not this case, my lord. But besides the common-law, our point is most strongly established by particular statutes, and it has been the wisdom and care of princes and parliaments in all times to assert this freedom of trade.

Magna Charta, cap. 30. All merchants (if they were not openly prohibited before) shall have their safe and sure conduct to depart, come and tarry, to buy and sell without any

manner of evil toll, by the old and rightful customs, except in time of war,

It is true, as Mr. Holt says, that this provides against 'mala tolmeta,' but it is plain too, that it establishes their liberty of trading, and coming and going with their merchandize.

My lord Coke says, indeed, that this respects aliens only, but more strongly proves that the English had this liberty; for they would never have extended it to aliens, and have left the English without it.

From this exception ('nisi antea publicè prohibiti fuerint') it cannot be inferred that the king may restrain his subjects from trade; for my lord Coke, in his Comment. fol. 57, says, that this prohibition must be intended by act of parliament, for that it concerns the whole realm, and is implied by the word 'publicè.'

Besides that, this prohibition must relate to aliens only, and that likely in respect of war too.

Subsequent statutes make it most clear. 2 Edw. 3, cap. 9. Merchants strangers shall go and come with their merchandize. 6 Ed. 3. (stat. 1.) cap. 1. all merchants, strangers and others, may freely buy and sell their commodities, from whencesoever they come, without interruption; notwithstanding charters or usage to the contrary. Which charters and usage (if any be) the king, lords and commons hold to be of no force, as being to the damage of the king and his great men, and the oppression of the commons.

14 Ed. 3, stat. 2, cap. 2. All merchants, aliens, denizens and foreigners (except those which be of enmity) may without let, come with their merchandize, tarry and return.

25 Edw. 3, stat. 4, cap. 2. If any charter, proclamation, command, usage, allowance or judgment be made to the contrary, it shall be void.

28 Ed. 3, stat. 1, cap. 2, establishes the like freedom, as in the time of that king's progenitors, and there is used the word English merchants, as in other statutes the word Denizens.

I observe that it was then looked upon as an ancient right, it having been in the time of his progenitors.

2 R. 2, cap. 1, 11 R. 2, cap. 7, and 16 R. 2, cap. 1, are to the like purpose.

When there has been occasion to prohibit any merchandize, it has been done by acts of parliament.

27 H. 6, cap. 1, confirmed 28 H. 6, cap. 1, prohibits merchandize growing or wrought within the dominions of the duke of Burgundy, and the like, 4 E. 4, cap. 5, till that duke revoked his proclamation concerning our cloths.

3 E. 4, cap. 4. Forbids importing woollen caps, cloths, laces, &c. and many other statutes of like nature; whereof some in his present majesty's reign, as concerning Irish cattle, French goods, and concerning our foreign plantations: all which were vain and needless, if the king alone could have restrained the same.

26 H. 8, cap. 10. Gives power to the king, during his life, to restrain or set at liberty traffic beyond sea for certain countries. Now Henry the 8th, as my lord Coke (Inst. Co. 361,) observes, stood as high upon his prerogative, as ever any king had done; and would never have accepted his power from a grant of parliament, if he had had a prerogative of this nature before.

35 Eliz. cap. 7. It is enacted that the queen may prohibit transporting of corn by proclamation; and so it is 1 Jac. cap. 25, which shews that a proclamation, which is an act of prerogative, was not sufficient for the purpose, without the authority that was derived upon it from the acts of parliament.

My lord, I shall now answer Mr. Holt's Arguments and Allegations.

First, He says, that, by the law of the land, no subject can trade with infidels without the king's licence.

But I say, this is gratis dictum, and I must deny the law to be so. He cannot find any statute, judgment or resolution in all our law-books to this purpose.

All the authority he has is a casual saying of a single judge in Michelborn's case.

For in Darcy and Allen's case, there is not a word spoken by Dodderidge, or any other, concerning trade with infidels.

Dodderidge says nothing of foreign trade; cites and affirms the law of Mag. Charta, cap. 30.

Michelborn's Case is in 2 Brownlow, 296, and it is in these words: Hill. 7 Jacobi, in the common bench, upon a motion made for consultation, upon a prohibition awarded, it was said by the lord Coke, that no subject of the king may trade with any infidels without licence of the king; and the reason of that is, he may relinquish the catholic faith and adhere to infidelism. And he said, he had seen a licence made in the time of Edw. 3, where the king recited, that he having a special trust and confidence that his subjects will not decline from his faith and religion, licensed him *ut supra*; and this did arise upon a recital of a licence, made to a merchant to trade to the East-Indies.

First, To this slender authority, I answer, If the law had been according to this conceit, there would have been much said and done about it in divers cases; there would have been proceedings against persons that had traded to Grenada, (of which the Moors lost the dominion within these 200 years) to Barbary, to Turkey, and other infidel places in Asia, Africa, or America, but we never heard or read of any till now.

Secondly, It is an apocryphal case; that book, called Brownlow, is of little authority; it was printed without approbation of the judges, or any legal licence. And the conceit is of less authority, it is reported as *dictum obiter*, upon a motion, a casual saying of the judge; which the clerk took, and likely mistook, for it is no where said in my lord Coke's

own books, though they are voluminous. And the ground of his saying (if he did say) it is, that he had seen a licence in Edw. 3's time, but I cannot learn that it has been seen by any man else. Neither Mr. Holt nor I can find it, nor does my lord Coke tell us where it was; perhaps it was taken upon trust, and mistaken, perhaps not authentic, and perhaps a sufficient answer to it would have been found in it; however, it was but one, and certainly, if the law had required it, there would have been more than one licence from the beginning of our Records till that day. 'Una Hirundo,' &c.

Thirdly, The reason there given makes strongly against this charter; the reason is, lest men should decline from the faith; so that it seems there is a special trust in the king, that he should suffer none to go into infidel parts, but such as are orthodox, sound and firm in religion; such of whom the king is specially assured that they will not fall from the faith, which is to be exercised by the king only; and he is to grant licence to particular and known persons of whom he has this confidence, the king cannot grant his royal care to the company.

But now this charter would have this trust deputed and transferred, for it contains a licence not only for the then members of the company (who were twenty-two or twenty-three years ago), but their unknown successors, and to their sons begotten, and to be begotten, and their servants, factors, apprentices, and licensees.

Mr. Holt also gives a reason for this trade being unlawful, namely, That the law has judged infidels to be perpetual enemies, for which he relies upon another singular saying of my lord Coke in Calvin's Case, fol. 17, and recites two authorities cited there, namely, the Register, 282, and 12 H. 8. 4.

And he takes notice that the children of Israel were perverted from the true religion by converse with the nations round about them. And he cites Grotius de Jure Belli et Pacis, lib. 2, cap. 15, par. 11, where he says, 'Cavendum est ne nimia commixtio contagium adferat infirmis.'

As to this singular opinion of infidels being perpetual enemies, it is not easy to understand what my lord Coke means by it; his words are these: All infidels are in law *perpetui inimici*, for between them, as with the Devil, whose subjects they are, and the Christian, there is perpetual hostility, and can be no peace; for as the Apostle says, 2d Corinthians, 15, 'What agreement is there of Christ with Belial, or what part has the believer with the infidel?'

It seems by these words, that it is to be understood of a spiritual discord in respect of religion, and not a temporal between the nations: for he says, it is because they are the Devil's subjects, and he relies upon the texts of scripture: and if this perpetual hostility be taken in a political and proper sense, and the law be so, it destroys the licence and privilege of the

Company, and their action brought, and all possibility of such a thing for them: There is not nor can be any peace, treaty or intercourse between the English and the Indians, but a constant never-ceasing state of war; and especially if it be founded upon a Divine precept: for whatsoever prerogative the king may have, he cannot have a prerogative to dispense with the canon of the scripture.

But my lord Coke himself does much clear this matter, Jur. Co. 155, where he says, that there may be peace and leagues of commerce with infidels. All that the register says, is that the Hospitallers were instituted for defence 'contra Christi et Christianorum inimicos!' which is an expression of the enemies of religion, not of the state. In the book of Henry the 8th, he said indeed *obiter*, that a person outlawed, a traitor, or a Pagan being beaten, shall not have an action; it is true in case of an out-law, or a traitor, it may be pleaded in abatement: but no other book says, nor can any man maintain that the law is so in case of a Pagan.

A Pagan, Turk or Jew, may maintain an action of debt or battery, or other personal action here; were it otherwise, there could be no trading of the Jews here, nor of the Turks; the contrary whereof is implied and admitted in the Act of Navigation, 12 Car. 2, c. 18, par. 18.

By the like reason that there should be no trading with infidels, there ought to be no foreign trade at all, for there is no country where the religion does not differ in somewhat or other from the religion established in the church of England.

And whatever he says of the children of Israel, I think there are many instances in the Old Testament of commerce with the heathen, though I, not foreseeing such use of divinity here, am not so well furnished.

As to the citation out of Grotius, it is by way of caution only; but the whole drift of that chapter demonstrates, that commerce and leagues with infidels are lawful, and he expounds that text of 2 Cor. which my lord Coke bottoms upon, to refer only to joining with them in idol-worship. And to shew clearly the mind of that author, he has writ a whole book, intitled, *Mare Liberum*, to manifest the right and lawfulness of trade to the Indies; and he says, that God in nature appointed all people to resort to, and trade with others, for that he hath given several commodities to some, which others stand in need of.

I must take leave to say, that this notion of Christians not to have commerce with infidels is a conceit absurd, monkish, fantastical and fanatical. 'Tis a-kin to *Dominium fundatur id Gratia*. The Indians have a right to trade here, and we there, and this is a right natural and human, which the Christian faith doth not alter.

I agree with Mr. Holt, that an act of parliament made against the Christian religion is void; but I think a charter against natural and civil right is as certainly void.

Mr. Holt further says, that public safety and policy are concerned in this trade, and therefore it should be restrainable by the common law; and he cites Courteen's case, Hob. 370, where several merchants were punished for buying and transporting great sums of money, because (the book says) it was against the state-policy and safety of the kingdom; and so punishable, and not permitted by the common-law! and Mr. Holt says, that trading with infidels is in like manner against the state-policy too.

Ans. That was in the Star-chamber, and perhaps it was one of the errors for which that court was dissolved, 16 Car. 1. cap. 10. in which act it is said, that the judges of that court had undertaken to punish where, no law did warrant.

If transporting of money had been prohibited by common law, the statutes 9 E. 3. cap. 1. and 5 R. 2. cap. 2, &c. had been needless; but before those statutes every man might dispose of his own private money as he would. And in that case of Courteen's the offence seems to have consisted in engrossing great quantities; and so it more fully appears in a contemporary report of the same case, in the select cases added to Popham, 149 and 150, where it is said, that as one shall be punished for ingrossing commodities, so another for great quantities of money, all other commodities being thereby ingrossed. And this point of Courteen's case is a good authority against the privilege claimed by the Company, which in truth is nothing else but to ingross to themselves all the commodities of India, &c.

But if the common law would have all the treasure kept within the realm, it does not follow that we must keep all other commodities, and have no trade at all; at least without special licence, I know no state-policy or law for that.

In the next place Mr. Holt considers foreign trade, and says, the subjects have not a right to trade abroad, *ad libitum*.

Ans. This is against the former argument and the ground of the plaintiff's declaration, for that was, there should be no trade to those places, for a special cause, (*viz.*) because they were infidels; but this argument imports, that there ought not to be any trade at all abroad, no not with Christian countries, without the king's licence.

The reason with which he would support this argument is, because trade depends upon treaties, and upon the accidents of peace and war, which the king has the power of.

But this too thwarts the former argument, for infidels he says are perpetual enemies; and if so, there is no peace nor treaty with them, and therefore no trade to be (as not by the Company) with them.

Besides, allowing there may be peace and treaties with them, I cannot see how this consideration can conduce to the present question; for it cannot be pretended, that the king makes leagues with Indian princes, that one part of

his subjects should trade thither, and the rest should not, or that the king is or can be in amity with them, as to one part of his subjects (namely the Company); and in enmity with them, as to the other of his subjects.

The king has, and is to preserve, the high-ways, but it is to keep them for the passage of himself and his people; not to shut them up against any of his people at least, except in case of war.

He cites the statute 12 H. 7, cap. 6, where the merchant adventurers say, they had commerce with Spain and Portugal, and other places in league and amity with the king.

No doubt they had, and beyond this is truly said in the same statute, that of right they ought to have it, which shews that it was not by the king's grant or licence. And in like manner the defendant of right ought to have with the Indians, there being no war betwixt this realm and them.

He cites out of Roll's Abridgment, 2 Pars, 214, a note of Rot. Parl. 1 H. 5, nu. 41, where the commons pray that all merchants may export and import to and from any place, any goods at their pleasure, paying the customs and other dues, any proclamation notwithstanding; the king answers, that he will be advised by his council.

And Mr. Holt takes this to be an acknowledgment by them of the legality of the proclamation.

Ans. It is not so, for it was the course then, to propose and pass declaratory and confirming (as well as other) laws, by way of petitions to the king; and though they thought the proclamation illegal, yet it was more proper for them to endeavour to obtain redress by prayer than contest. But their petition was a petition of right, and the proclamation (especially if there was no war a-foot) was void, being against the common and statute law. And to cite and set up such a proclamation, is to set up grievance to the law: and yet I take it there was an extraordinary occasion at that time, Hen. 5, having occasion to lay an embargo on ships, in order to his proceeding to his great war in France.

He says that foreign trade may be mischievous, it may be a nuisance, so the importing Irish cattle and French goods have been declared to be by the parliament, and the king may restrain such evils.

Ans. These acts of parliament were enacting, and they enact if shall be adjudged a common nuisance. They did not find and declare it to have been one before.

If it had been so, there had been no need of these acts, and we know the reason of that clause was to make the matter dispensable.

If the importing East-India commodities be a nuisance, it is not licensable, and the company cannot maintain their trade, much less their action; unless it should be thought that the bringing in of those commodities by the defendant is a nuisance, but the bringing in the same by the plaintiffs is not.

He inforces this with a reason, that there may be mischief from the abundance of the importation exceeding our exportation, and resembling it to what is said 10 Rep. 141, that by the common law the king ought to save and defend his realm as well against the sea as against enemies; that it should not be drowned nor wasted; and as the king may prevent inundation of water, so he says, he may as to trade.

Ans. This is a similitude in words, but not as to the nature of things, and if there be any force in it, it is against the plaintiffs; for there is not in their charter any limitation, the Company may bring in as much as they will, nay, it seems by their allegation, that this trade is to be managed most largely by means of the Company, and therefore thence is rather the danger of the glut.

Mr. Holt makes it a great argument to maintain the charter, that it is a necessary regulation of the trade, and that the trade could not have been settled but by such a Company; and says, if it should be laid open, it would ruin the trade both of the Company and the defendant.

And it is averred in the declaration, that this trade cannot be managed, but 'per hujusmodi Corpus Corporatum.'

Ans. This contradicts Michelborn's case, for that was upon a licence granted to a single merchant to trade to the East-Indies; and it is known that this trade has been managed by private persons before, and since there was a Company.

And this is to set up convenience or pretence of convenience against law; the statute, which we have pleaded, says, that all trade shall be open; the plaintiffs say, it shall be open to them only, because they can manage it best.

If other men should say that they could manage it better, the pretence were as fair for them to exclude the Company from the trade.

But I except against this averment, it is a frivolous and impossible averment, no issue can be taken upon it, unless issue should be taken upon a similitude, (viz.) 'hujusmodi Corpus Corporatum.'

If a licence were granted (as it is said to be in Michelborn's case) to one man to trade to the East-Indies, and he should bring such an action, and aver that the trade could not be managed but by such an one as he, it would not be good, and yet as good as this is. In an action for words, it is not allowable to alledge that the defendant spoke such words, or *hujus similia*.

Moreover, the declaration, as it is penned, contradicts itself; for it says, that the trade cannot be managed but by the Company, and yet charges the defendant that he did manage a trade there; which is not possible, and it is penal enough upon the defendant that he attempts to manage trade where he cannot.

Mr. Holt objects, that the statute we plead, ought not to be taken universally, that the sea shall be open to all merchants; for then it

would extend to give liberty of trade to the king's enemies who are merchants.

Ans. True it is, neither this, nor any such law extends further than to alien armies and subjects, there are *jura belli*, as well as *jura pacis*; and it is understood, that enemies who are foreigners may be taken and proceeded against according to martial law; but the defendant is a subject, and cannot be an enemy.

He says further, that this statute should not extend to this trade, because that in Edw. 3rd's time, when it was made, trade was driven with christians only, and not with infidels.

If this be so, it destroys the only authority he has (viz.) Michelborn's case, where the only ground of the opinion is, that there was a licence granted to trade with infidels, in the time of the said Ed. 3.

But this statute must be taken, as it is penned, universally, and not confined to those countries, places and parts which were then used; the statute does not distinguish, 'et ubi lex non distinguit, ne nos distinguimus,' otherwise no man must trade, but to those few places that he can prove were traded to before 18 E. 3.

He says (as *ff. n. b. 85.*) that the king may restrain men, by *Ne creat Regnum*, from going beyond sea; and cites Davis, 9. b. that one reason of the king's being intitled by prescription to the great custom, was for his leave to merchants to go and carry goods out of the realm.

Ans. It is true, that book of Davis does say so, but he cites to prove the opinion, Dyer 165. and this statute, 18 E. 3. which we have pleaded; so that that book is of no further use, than the authorities upon which it is founded do warrant; which if we examine, we shall find that in Dyer it is, among other things, made a *quere*, in a case referred to the judges concerning a new imposition set by queen Mary on merchandize, whether by common law merchants were, or might be restrained from going out of the kingdom, without leave of the king or queen; to which the judges give no resolution: which shews, they thought the law was, that there was no such restraint or need of leave; for when judges give no resolution, in the case of the king, it is a sign that in their opinion the law is against him; and for the statute, 18 E. 3. which we plead, it is flat against it.

F. N. B. 85. a. is express, that by common law, every subject may go out of the kingdom for merchandize, or travel, or other causes as he pleases, without leave, V. Co. pl. Cor. 180.

5 R. 2, cap. 2. Restrains people passing out, but it excepts merchants, and even that statute is repealed. 4 Jacobi, cap. 1. it is clear that the king may restrain his subjects from going out of the realm, by his writ of *Ne creat Regnum*. But that writ was originally for the clergy only, and is properly granted for matter of state only; and the words of it are, 'Quam plurima nobis et Coronis nostris pre-judicialia ibidem prosequi intendis.' Of late indeed it has been extended to confine a person

to abide the justice of a court here, but I think no further. It is always to restrain a man from something unlawful, and against the duty of a subject; and not to restrain from a lawful act, as trade is.

Neither is it general or universal, but always particular, and granted upon oath, made concerning a particular person; and since there needs such a special writ to restrain an obnoxious person, it proves the law to be, that all other persons are at liberty to go.

And there was no *Ne exeat Regnum* against the defendant, nor cause for any; and if there had been, and he had gone against it, though it were an offence to the king, it would not give cause of action to the plaintiff.

He cites Co. Litt. 5. a. That no subject can build a castle or a fortress without the king's licence, and 11 Rep. 87. b. and Co. Magna Charta 199. that no man can make a park without the king's licence; and 11 H. 7: 13. that the king may licence, where if one kill another it is no felony.

Ans. These instances agree not to our case: a man may not build castles without the king's licence, any more than raise forces, or appropriate beasts, which are *fera nature*, and the king's game; much less take away the lives of the king's subjects; but there is no parity of reason, that a man should not use an innocent trade.

It is more suitable thereto, to instance, that a man may without licence build a house, or make a hedge, and inclose a garden or field, and thereby preserve the lives of himself and his family.

In the next place, Mr. Holt says, there is a great deal of difference between trading in a company, and trading out of a company; that this charter is good because it gives the trade to a company, and being a company, and christians, they will take care that their agents and factors keep up to the christian religion; but other people will converse only with infidels, and cannot have divine offices.

Ans. It is not required by the Charter, that the members taken into the company, should be christians, and their sons, servants, and factors may be no christians, nor are they bound to have divine offices. And the defendant and others are likewise christians, and may have divine offices as well as they; and in this trade, the defendant and those with him converse with the same persons, as the Company and their agents do; or if not, then there is no interfering, no cause of complaint.

He observes out of the Journal of the House of Commons, 43 Eliz. that the House of Commons fell vigorously upon monopolies; and there was brought in a catalogue of them,* but therein is nothing of the East-India trade, though there was such a charter then in being.

Ans. I know not whether there was such a charter then in being; but if there were,

possibly it was not taken notice of, or possibly no grievance then appeared from it; and likely that Company was better advised, than to endeavour to restrain others from trade.

Besides, I have heard a vote of the House of Commons cited sometimes, but never knew the silence of the House of Commons cited for authority before; doubtless in that parliament as in others, the members complained of those grievances, which then affected the boroughs and places they served for: they undertake not to enumerate all the monopolies, that were or might be, and it is most prudent, in order to obtain redress, to limit their complaints to the present occasion.

First, Mr. Holt mentions three statutes, 3 Jacobi, cap. 6, there having been a charter obtained by some merchants for sole trade into the dominions of Spain and Portugal. It is enacted, that it shall and may be lawful, for all subjects to trade thither, notwithstanding that charter or any other; and thereupon he infers, that the parliament takes the charter to be good, and therefore enact that the trade shall be laid open.

Ans. There is no just ground for this inference.

First, It were a strain beyond the plaintiff's own foundation, for that it related to a trade to Spain or Portugal, which are Christian countries.

Secondly, The preamble of the act sets forth reasons enough to destroy the patent at common law, (*viz.*) that all subjects ought to enjoy equally the benefit of peace and free trade; that otherwise the subjects of England would be in a worse condition than those of Scotland and Ireland: that it was attended with the impoverishing of merchants, mariners and manufacturers, lessening the price of their commodities, and enhancing foreign, &c.

Thirdly, The act calls it a common traffic, and does not only say it shall be lawful, but that there shall be free liberty to trade there, in such sort and manner as was accustomed: so that the act did not make the charter illegal, but found it so, as being an innovation against what is used and ought to be.

Also he mentions the Statute of Monopolies, 21 Jacobi, cap. 3, wherein he observes, there is a proviso to save the Companies or societies of merchants. And the statute 14 Caroli 2, cap. 24, which in the preamble declares the putting in of stock into the East-India Company to be for public good.

Ans. That last statute indeed in the preamble says, it is for public good, but it is the public good of the Company; and the same preamble says, that divers noblemen, gentlemen, and other persons of quality, not bred to trade or merchandize, did put in stock there; and enacts, that they shall not in that respect be reckoned traders, and so liable to a commission of bankrupt: whereupon I might observe, that this Company is not to be reckoned a Company of merchants, and therefore not within the proviso, 21 Jac. above-mentioned.

* See 1 Cobb. Parl. Hist. p. 923.

But I give this further answer concerning that proviso: the words of it are, Provided also, and it is hereby further intended, declared and enacted, that this act, or any thing therein contained, shall not in any wise extend, or be prejudicial to the city of London, &c. or to any companies, or societies of merchants within this realm, erected for the maintenance, enlargement or ordering of any trade, or merchandize, but that the same, and their liberties, privileges, powers and immunities shall be, and continue of such force and effect, as they were before the making of this act, and of none other; any thing before in this act to the contrary in any wise notwithstanding.

Now first, this is but a general saving; and supposing, as Mr. Holt does, that there was such an East-India Company then in being; if the parliament had had as favourable an opinion of their charter, as they had of Mansell's or Maxwell's or the other there mentioned, they would have saved it by particular mention, as they did those, which would have been some countenance to such a charter.

Secondly, Admitting it saved generally or particularly by the proviso, that does not make it better; the proviso only says, it shall continue of such force and effect, as it was before the making of the act, and none other: *i. e.* If notwithstanding the body of the act, if it were a monopoly and void before, it shall remain so, and if it were good before, it shall remain so notwithstanding the proviso.

If it be asked, to what purpose the proviso was made, it is answered clearly thus; the statute giving an additional penalty of treble damages and double costs against any person, that should, after forty days, after the end of that session of parliament, hinder, grieve, disturb or disquiet any person, or any ways seize, attach, distrain, take, carry away or detain his goods, by occasion or pretext of any monopoly, or of any such commission, grant, licence, power, faculty, letters patents, &c.

Now the proviso appointed that nothing in the act shall extend to any society or company of merchants; it saves persons that shall hinder, grieve, disturb or disquiet others by occasion or pretext of such a society or company from that penalty; so that the plaintiffs have this advantage from the proviso (if they are at all within it), that they shall not be liable to the defendant's treble damages and double costs for bringing this present suit against him.

6 Car. Jones 231. *Mounson versus Lister*, was a case concerning an office granted by letters patent, 4 Jacobi, for sole making all bills, informations and letters missive in the council of York. Now the next proviso in the statute does save officers in the same manner as this proviso does societies or companies of merchants. It was adjudged, that though this grant of this office were saved by the proviso, yet it was still a monopoly, and void; it being unreasonable that one person should have the making of all bills, &c. which is proper work for counsel or attorneys, and that (in case

of cross-bill) both parties should be obliged to disclose their evidence to that person; but by reason of this proviso, this grantee should not be liable to the treble damages and double costs; the proviso saves us against that statute, but does not establish against the common law.

Besides, this proviso does not at all extend to this charter; it only concerns such as were then in being, and says, they shall continue, in such force, as they were before the making of that statute. But this Company that is now plaintiff was made not long since, viz. by charter 13 of this king.

Mr. Holt cites seven precedents of grants by queen Eliz. of sole trading to several infidel parts.

To which I answer, That the more there are of this kind, the stronger the argument is for us; for the greater occasion has been administered to bring actions or informations of this nature, but none was ever brought; and the reason why none has been brought is, because none could be upon this score.

The clauses in this charter, for forfeiting ship and goods, and imprisonment, &c. may as well be cited for precedents hereafter; and yet it will not be denied, that at least some of these clauses are void; it has been frequent to insert clauses in charters, which will not hold water, they serve for a flourish, and *in terrorem*, like the penalty of 1,000*l.* in a subpoena.

Also these charters were temporary, and they were bottomed upon some new discovery of a trade or a passage; and in truth that is the only good foundation upon which such a charter can be granted, Godb. 254, when a new invention or discovery has been made, or is making by any person, by his skill, charge, and perhaps peril of his life, the king may remunerate him with such a grant; but that must be only for a reasonable number of years, and no further by the common law: and before the statute of monopolies, 21 Jacobi, adjusted that reasonable time to fourteen years. And I take it that the first grant made in England to persons for sole trade to the East-Indies, was upon suggestion and consideration of their being first traders there, and that was for fifteen years, which is long since expired. Though it seems, trade to the East-Indies was known to other Europeans many hundred years ago.

“*Impiver extremos currit Mercator ad Indos Per Mare.*” Hor.

I shall mention two or three acts of parliament, which do countenance and encourage free trade by any person to the East-Indies.

17 Caroli 1, cap. 21. It is made a preannure to hinder any persons from importing salt-petre; the defendant did import salt-petre in this ship, and so do all ships that come from the East-Indies; it is their usual ballast.

12 Caroli 2, cap. 18, parag. 3, (confirmed and re-enacted 13 Car. 2, cap. 14,) forbids the bringing in of any goods of Africa, Asia, or America, and in any vessel, but such as belong

to the people of England, Ireland, Wales, and Berwick, or of the king's foreign plantations; and paragr. 13, mentions East-India commodities. Here was just occasion for the parliament to take notice of the Company (for this present charter was in being in 13, when the last act passed, and a like former charter in being in 12, when the first passed) and so they would, if they had thought the trade restrained to the Company. But they seem to allow, that these goods may be imported in any English or Irish vessels, whether of the Company or of other persons.

22 and 23 Car. 2, cap. 11, It is enacted, that all and every person or persons, that shall build or cause to be built any ship or vessel of three decks, with a fore-castle, and five foot between each deck, mounted with thirty pieces of ordnance, and other ammunition proportionable, shall for the first two voyages, which the said ship or ships make from his majesty's dominions to any foreign port, have and receive to their own proper use and benefit one tenth part: and all persons that shall build any ships of two decks, above three hundred tuns and thirty guns, shall have one twentieth part of the customs, that shall be paid to his majesty for all such goods or merchandize, as shall be exported or imported on the said ship or ships, to and from this kingdom.

It is known that such ships used to be built and employed for the East-India trade, and not for trade to any Christian country; but the act takes no notice of this Company, or of a licence to be from the king; but allows and declares, that all and every person or persons may build any ship of three decks, and make a voyage with her to any foreign part, and encourage people so to do, with a reward; to which reward (if the defendant's ship be within the circumstances) the defendant might be entitled for this voyage for which he is now sued. And certainly no law appoints a reward and a punishment for the same thing.

I will establish this point with two authorities, not of a private nature, like dormant patents, but the judgment of parliaments, and of the court of King's-Bench.

1 and 2 Ph. and Mar. the Muscovy Company was erected by letters patent, and therein a clause, to restrain all others from trading upon a like penalty, as here; but notwithstanding that, other people did trade thither: and thereupon 8 Eliz., an act of parliament was made, reciting the charter, and that other persons did trade thither notwithstanding; and therefore enacts that the charter shall stand, and no other person shall trade thither; which shews the judgment of the parliament, that without this act the restraint was not good.

The other concerned the Canary Company.

It is Mich. 20, Car. 2, Rot. 403. Banco Regis, Horn. 118, &c. Ivy.

They had a charter with like restraint and penalties as in this; and in trespass brought for seizing the ship, the defendant justified by

virtue of the charter, and judgment was given for the plaintiff against the charter, by the uniform opinion of the whole court.

That case indeed was not the same with this, as to the manner; but as to the matter and substance it is the same.

I shall conclude with an observation of my lord Coke, Jur. Co. 31, that acts of parliament against the freedom of merchandize never hold long.

If that be the fate of acts of parliament, which are laws, certainly a charter made to such purpose, ought not to be allowed.

The Second Point.

I take the law to be clear with F. N. B. 85. a. that every subject may go out of the kingdom for merchandize as he pleases, and whither he pleases, without asking leave of the king, and shall not be punished for it.

But now taking it by admission, that persons are restrained, and that the defendant ought not to have traded to the East-Indies without licence; yet I conceive this action upon the case can never be maintained.

In maintenance of it, Mr. Holt says, that this privilege of trade granted to the Company is a franchise; and if another violates it, the grantee may have an action of the case against that person, as 22 H. 6, 14, and 11 H. 4, 47, where the king has granted a fair or market; if a man set up another fair or market to the damage of the former, he that has the grant shall have an action in the case.

I observe, that in the arguing of the first point, Mr. Holt all along called this a licence, which now (to support this second point) he would have a franchise; but these two things differ greatly. A franchise (understood properly) is an hereditament, a thing of interest, and assignable and transferrable; but a licence is only *Relaxatio Juris*, a dispensation with the law, a privilege to certain persons to do an act with impunity. When the king grants a market, he creates or grants a real thing; but when he gives liberty to trade, he does not create or grant a real thing, but only discharges or prevents a penalty inflictible for trading without such leave.

When the king creates or grants a market to any person, if he makes a grant of another market to another person, to the damage of the first, it will be void, because the grantee has a franchise that is a real interest; and the grantee may have an action of the case against him that sets up a market under pretence of such a grant, as well as he may against a man that sets up a market without any pretence of grant.

But if the king license any person to trade, he may notwithstanding license others too, although that be to the damage of the first; for he has not conveyed any interest to the first, that should hinder him from dispensing with others.

There is no bottom for this action to stand upon; there are but two things in the charter

towards it; first, a licence to the Company to trade; secondly a prohibition and restraint to others, whereby the company is to have the sole trade.

If the king had only granted a licence to the Company to trade to the East-Indies; the company could not thereupon have an action against the defendant for trading thither. Now when the king, in the same charter, adds a restraint and prohibition to the defendant and all other subjects; this Mr. Holt would have to be no more than the law said before; but if it be more, this does not add any real interest to the company, or better entitle them to an action.

Suppose it to be an offence, and punishable for the defendant to trade to the East-Indies without the king's licence; the king dispenses to the plaintiffs, so that they may trade there freely; the defendant trades there without licence, this may (according to that supposition) subject him to penalty at the suit of the king, but this gives no title to levy money upon the defendant for trading without licence, there is no privity, no cause of action.

The resolution at the end of the case of monopolies, 11. Rep. 88. b. is a clear authority to this purpose: Cards were prohibited by act of parliament to be imported; and the queen grants to Darcy that he should have the sole importation of cards, *non obstante* that statute; and during that grant, another man imported cards, against whom Darcy brought an action on the case for it, and therein alledged too that he had been at great charge to make and provide cards sufficient. But resolved that the action would not lie; but for punishing the party, the remedy which the statute appointed against importing must be followed.

It is insisted upon, that the plaintiffs have been at great charge to carry on this trade, and by others interloping they should lose the fruits of it.

The defendant has as much to say, that he has been at great charge, and by restraining and prosecuting him he should be a loser.

But I say, this is 'damnum sine injuria.' In the mentioned books of 22 H. 6. 14. and 11 H. 4. 47. it is held, that the action on the case would not lie, which was brought by a school-master (or two), for that he had an ancient school in a town, and one set up another near, so that whereas before he had two shillings a quarter for a boy, now he could have but one shilling: so for erecting a mill, that withdraws custom from a former mill, no action lies.

In every action on the case, there must be 'damnum et injuria,' there must be a wrong to the party plaintiff; it is no wrong to the plaintiffs here that another offends against that law, which is dispensed with to them.

If the defendant's trading without the king's leave be an offence against the king, it is punishable by the king still, and that way of punishment must be followed, if there is to be any; besides, all the foundation the plaintiffs should stand upon is the charter, but they do

not follow that; the charter appoints the penalty to be forfeiture of ship and goods, whereof one half to the king; but no action on the case is given, or meant, wherein the carriage may be more or less, and wherein the king is excluded from any share.

If an act of parliament prohibit under forfeiture of ship and goods, the one half to the king, the other to the party, that must be followed, there shall never be an action on the case; for the common-law shuts it up with a strong negative, and says, there shall be no other penalty. And in all cases of statutes, by-laws and charters, the method of punishment prescribed must be observed.

To obviate this the plaintiffs have been cautious, and have misrecited the charter in their declaration; they, to let in a pretence for their action, recite the prohibition or restraint, and stop there, as if the prohibition were absolute and general; whereas it is *sub modo*, under a special penalty of forfeiture.

And this appears upon Oyer, and therefore for this variance, judgment ought to be for the defendant, if there were nothing else in the case.

But waving this concerning the form of the suit, I insist upon the main matter.

There is a natural necessity that every man that will live must eat, and thence a necessity and obligation to labour; and there is a property in this means of livelihood as well as in life.

The king's power and prerogative is to establish and preserve this to all his subjects.

Traffic is one of the honestest and justest sorts of industry, and is more especially proper for an island.

The king cannot prohibit merchandize, nor lay a penny imposition upon it; therefore our kings have received tannage and poundage from the grants of parliaments: whereas if they had such a power (as the plaintiffs counsel speak of) over all trade, they might by the means of that, have made an undeniable title to such a revenue, without the consent of the Lords and Commons.

Restraining of trade (though but for a time or place) is one of the great things which has been always reserved to, and exercised by authority of parliament, as we find almost in every sessions.

This which is now before your lordship, is the greatest monopoly that has been attempted. It monopolizes Africa, Asia, and America, at least on the south; it devours above half the trade of the nation, the trade of linnens from Hamburg, Flanders, and Holland; silks from Italy and Turkey, and when the prohibition expires, from France; and affects our manufactures at home, upon all which the livelihood of many thousands depends.

It is against the common law and many express statutes.

No man was ever punished, in any court, for using foreign trade; no, not in the Star-Chamber, which extends the prerogative most. It is

'*Causæ primæ impressionis,*' although there has been occasion to have had precedents, if any such action could have lain.

But as this is the first that has been brought, I shall presume it will receive that just discouragement from your lordships, that it will be the last. And I pray your Judgment for the Defendant.

MR. SOLICITOR GENERAL FINCH,
(AFTERWARDS EARL OF NOTTINGHAM.)

De Term. Pasch. Anno Regni Regis Caroli Secundi xxxvi. Die Sabbati xix Aprilis, Anno Dom. 1684. Banco Regis.

The East-India Company v. Thomas Sandys.

Mr. Just. *Withins.* Mr. Solicitor-General, do you argue that case to-day?

Mr. *Solicitor General.* Yes, Sir.

Mr. Just. *Withins.* Mr. Pollexfen, do you argue on the other side?

Mr. *Pollexfen.* I do, Sir.

Mr. Just. *Withins.* Then, gentlemen, let him come down to the bar.

Mr. *Solicitor General.* My lord, this is an action upon the case, brought by the East-India Company against Sandys; wherein they do set forth that the king, reciting former letters patents granted to this company to incorporate it, did grant a charter to such particular men, and made them a corporation by the name of The governor, &c. and did grant to them the sole trade in all the parts upon the coasts of Asia, Africa, and America, from the Cape of Good-Hope to the Straights of Magellan. And further, that he did likewise grant to this Company and successors the sole trade; and granted to them, that no other of the king's subjects should trade within those limits, and did expressly prohibit all his subjects, to trade thither, not being of the Company, without a licence from them. Then they say, that Mr. Sandys, being one of the king's subjects, did take upon him to trade within the limits of those letters patents, to wit, at Mesopotam, not having a licence from their Company, or any other authority to do it. And this they lay to their damage of 1000*l.*

Mr. Sandys to this, after he prayed Oyer of the letters patents, which are set forth in *hac verba*, pleads the statute of 18 E. 3. which says, that the sea shall be open, and all merchants shall go with their merchandize, where they please. To this plea we have demurred.

Upon this Record, the questions will be these two:

First, Whether or no the patent to the East-India Company, with a prohibition to all others to trade within their limits, therein set forth, be a good patent? The next is,

Secondly, Whether, admitting it to be a good patent, this action will lie; that is, whether it be a bare licence to the Company, or whether it

pass such an interest to the Company with that licence, as will entitle them to an action against any that shall intrude or inroach upon their trade?

First, My lord, I am to prove that this grant is good; and here these considerations will fall in.

First, Whether the king had power at common law to have made such a grant?

Secondly, Whether that power be any ways abridged by any act of parliament, as it is much insisted upon by the other side?

Ans. First, That the king had such a power at common law, I conceive is plain, for these reasons:

First, Because no subject at the common law had a right to trade with infidels, no nor to go thither, without licence from the king first had and obtained.

Secondly, No such trade can be established without precedent treaties, and no such treaties can be made by subjects, without licence from the king to make them. If therefore this patent does not restrain any natural liberty or right that the subject had, but is introductive of a new one, they had not before; it will not fall out to be within the definition of a monopoly, in which it is one essential part that it restrains people from that liberty they had before.

Now that no subject had a right at common law to trade with infidels, or go into an infidel country, without licence from the king, will be evident thus. And,

First, It will be very considerable, before we enter upon that question particularly, to see how all right in general to trade stands circumstantiated; and there it is plain,

First, That there is no trade, but what depends upon the good-will and pleasure of the foreign prince with whom it is, whether he will admit it or no; that is pretty clear.

Secondly, This may be restrained by a total prohibition of any commerce with that prince or nation, by the king here.

Thirdly, Though every man now and merchants always were at liberty to go abroad without licence, yet the king may restrain any man by the writ *Ne erant Regnum*, from going out of the kingdom; and that without shewing any particular cause why, or alledging any matter that is traversable and triable with the king. And

Fourthly and Lastly, If any foreign prince, upon concluding any league or treaty with the king, should restrain trade to any number of persons, or any particular qualification of manner of proceeding in it; I see not how any man can pretend to a right, to act contrary to that, in breach of such a league or treaty made with the king by such a foreign prince.

Then we say further, by the statute of 3 and 4 Jacobi, which opens the trade to Spain and Portugal, that does show plainly that that trade was before inclosed; and it does not show that the inclosure of it was illegal, but gives a right that was restrained before: and yet I am far from affirming that the subject has no right to

trade, though it has been objected that this clogs it, and makes it as none; and therefore, they held it absolutely necessary to disaffirm that power and prerogative, which the law, for the public good, does repose in the king, and that upon reasons that will not hold, nor are so fit to be urged in decency: for I take it, the possibility of the abuse of power, is no objection against that power. For by this argument, though the king has a power and prerogative by law to restrain subjects from going beyond the sea, by a *Ne Exeat Regnum*, no, say they, he cannot; for then he may restrain all his subjects from going out of the kingdom, and so imprison and hinder every one from going out of the nation. It is the same argument with this, that they urge the king claims a prerogative to restrain such trade upon occasion; they say this argument cannot hold, for by this rule he may restrain all commerce and trade whatsoever: so that this way of arguing does strike at all power, and I need give no other reason for it, for there can be no power at all, which is not accompanied with some trust; and there is no trust, but it possibly (morally speaking) may be broken. So that this is no argument against the right of the subject to trade on the one side, nor against the prerogative of the king on the other, in whom the law has reposed a trust to regulate and qualify trade.

But, my lord, in this case the question is not of so large an extent, nor so general as this is; but only here it is a question, how that right stands with respect to infidels, and that is the question before your lordship.

And I cannot but observe, in my entrance into the question, that unless the law had once been held clear in this matter, this could not have come to be any subject of debate now, for no such trade as this, could ever have been gained to the nation; for none could have ventured upon so hazardous an enterprize, or so chargeable a project as this was, if it had been any doubt whether those that run no such adventure should be admitted to reap the first fruits of it.

So that this question as it tends to overthrow this trade, if the law be taken to be as they would have it, so it overthrows the Turkey trade too, which stands upon the same foundation, with respect to the prohibition by letters patents as this does; for the question is not, upon how easy terms the privileges are to be obtained, as it is confessed the terms are easier in the Turkey Company, than in the East-India Company; but whether any terms at all are requisite: if any terms can be imposed upon it, then those are good; if none, then that will overthrow the Turkey trade, and all the trade of the nation. And surely if they can prevail in this question, the subjects for whose right they pretend so much to stand up, will have little cause to thank them for standing up for a right, as they call it, against the very interest of the nation. But to return to our argument:

The subject can have no such right to trade

with infidels without licence from the king; for they are looked upon as enemies, not in a spiritual sense, as they are of a contrary faith and religion, but they are so treated in law; and the resolutions of the law are such as we may see in Calvin's case, and the 12 H. 8, which is a book they cited and was quoted here before, upon the first argument of this case; where it is held, that a Pagan, though he be beaten, cannot have or maintain any action at all, because he is *perpetuus inimicus*: so an alien enemy can neither maintain a real or personal action, as it is said in the 1st Inst. 129. B. so a Jewess, though born here, and marrying a converted Jew, shall not be endowed; and so is the same book 32, so that they are looked upon no more than common aliens; for we see that though they are born here, yet they have not the capacities so much as of Denizens, for they shall not be endowed, as denizens may. And though my lord Coke, by the way, says, in that book, no alien can be endowed: yet I find in the parliament rolls a petition of the Commons, it is in 8 H. 5. m. 16, they pray that female aliens may be endowed; and the king's answer is, let it be as it is desired. But I mention that only by the by, for it is not at all relating to our question, but for that the other resolution goes to it, that an infidel is always to be treated as an enemy.

But, my lord, further, that all infidels are likewise aliens and enemies, in respect of their properties which they gain here; it is to be gathered from what I find in Rot. finium 50 H. 3. m. 5, the king releases a debt that was owing to a Jew; and in the same roll, 49 H. 3. Rot. finium, there are divers pardons of debts owing to Jews, some in recompence for service done, and others in compassion of the poor, that they have drawn in to be engaged for great sums to them.

Rot. Parl. 13 E. 1, m. 4, a Jew died, and the king granted away his goods, and his widow redeemed them for 1000*l.* and the king granted to the Jewess, that he would not discharge any debts, that were owing to her. This shews their properties were all at the king's mercy; and sometimes the king granted licence to them, and gave them leave to assign their debts, Rot. Parl. 3 E. 1, m. 6, which recites that it was provided by king H. 3. that no Jew should sell his goods without licence. The king grants a licence to Judeo Nostro to sell a debt of 20*l.* that was owing him from the bishop of Bath and Wells; and doubtless the reason of that law in Hen. 3d's time, was, that the king might prevent any mischief, that might follow upon an unlicensed commerce between his subjects and those infidels: and this appears plainly by considering, that by the ancient law of the land, no Jew could inhabit any where within the kingdom, but where by custom they were permitted to dwell; and so is Rot. Claus. 1 E. 1, m. 7. in dorso; they had gone and inhabited at Winchester; but they were removed thence, and the record tells you the reason why, *Amoti*, &c.

They had particular justices assigned over to them, to determine their causes, and that you see Rot. Chanc. 40 H. 3. m. 4, the king constitutes two justices *ad Custod. Judaeorum*, and gives them power to determine their pleas in the places where they were accustomed to inhabit.

And there is in Rot. Parl. 13 E. 1, m. 7, a very remarkable record to this purpose, *Rex dilecto, &c.*

My lord, I find another record like this in the patent rolls of that year; for we see what care the law took, that Christians should not be circumvented by the Jews; and the government had an eye upon them, that they should not have commerce one with another; that recognizances should be entered in the presence of Christians. That record is thus, *Rex omnibus, &c.*

We see a man here, that deals with a Jew, and buys things of him without licence, and the king grants that he would not trouble him, or proceed against him by law for that offence.

By the ancient law it appears, that if a Christian married to a Jew, it was felony, and the party offending was to be burnt; so in the 3d Inst. fol. 89, and there my lord Coke cites Fleta for his authority in it.

From all this it appears, that Infidels have no right to trade and traffic here, and surely then no subject has a right to trade with them in their country; for the restraint certainly must be mutual. And, my lord, for this I must remember you of a case that has been before cited in this case, and that is Michelborne's case in Brownlow, where my lord Coke declares the law to be as we say, and that he hath seen a licence in Edw. 3d's time; and that he says was for the safety of religion.

And surely, my lord, it is upon some such grounds as this, that the law provides that no excommunicate person shall bring an action, no *dot in auter droit*, because no person must converse with them; therefore, they cannot sue as executor to any person. Then if the law be cautious for the safety of religion, as to restrain converse in our country; *a fortiori* it may restrain the subjects liberty of trading in an infidel country, where they must be under the laws of the place; and the inconveniencies in the one case are sure much greater than in the other.

For we see in Calvin's case, if the king conquers an infidel country, their laws actually cease till the king gives them new ones. But 'tis otherwise of a Christian country, for there the laws remain till the king is pleased to alter them.

Another reason, my lord, is this, the king's prerogative in making leagues and truces, is sure as large and unlimited as the subjects right to trade; and yet in the case of infidels that is restrained, as to some sort of leagues that a Christian prince cannot make with them, &c. For that you may see in the 4th Inst. 155,

where my lord Coke says that the law of England is so, that the king cannot make 'Fœdus mutui auxilii aut amicitie,' with an infidel prince. And there he reckons up four sorts of leagues; three of which he says may be had with infidels, that is, 'Fœdus Pacis, Fœdus Congratulationis, et Fœdus Commercii;' but 'Fœdus mutui Auxilii,' he says, by law is not allowable: and herein these leagues are grounded upon the law of God.

Therefore, my lord, the law surely does not give the subject an unlimited freedom to trade, but it must depend upon such cautions and security, as nothing but such leagues can provide for; which leagues I am sure none but the king is capable of making.

This then, one would think, were enough to clear our patent from that objection, that it is a monopoly. But there are other things, that make it yet more evident it is not so. As first, in all the complaints that have been of monopolies, this patent was never counted to be one among them, nor thought to be illegal; if it ever had been thought so, the statute of 21 Jacobi, cap. 3, which is a statute made for regulating of trade, would never have been made.

In the next place, I say either the first patent for this trade was a monopoly, or this is none: the first was none, not only for the reasons I gave before, but because it was a new trade. Patents for new inventions are not made good by the statute of 21 of king James, but left as they were before; only they are restrained to a number of years, and were always good, because they were for the encouragement of trade, and of useful inventions to increase them.

A fortiori therefore in this case, what is of much greater consequence to the nation is a point of trade, than any little slight invention of a particular thing, must be allowed to be good; then I say, sure if the first patent be not a monopoly, then neither can this patent be a monopoly; for there is no law that hath declared how long such a trade as this is may be inclosed, as the statute of 21 king James has set limits for, as new inventions.

And again, this company is for the advantage and benefit of the nation, which a monopoly can never be: and that it is for the benefit of the nation, appears by the statute of the 14th of this king, cap. 24, which recites it to be of great advantage to the public, and for the encouragement of the public trade and navigation. Here then, my lord, is both the judgment of the parliament concerning companies of this kind, and an encouragement of this particular company by the whole parliament.

And again, they are taken notice of in another statute, made in the 29th of this king, ch. 1, where they are taxed 20s. for every 100*l.* capital stock in the company.

Another reason is this, because of the absolute necessity of a company to manage this trade, not only in respect of the Indians themselves, but also in respect of other foreign nations, who are rivals to us in this trade, and are ready to take all advantages against us

about it. But this part of the case is much more fit to be discoursed of by merchants and statesmen, than lawyers.

Yet thus far the law falls in to consider this matter, as they are a corporation under stipulations and leagues with other countries for the carrying on of their trade; and so are in the nature almost of foreign plantations, under a regulated and Christian government within themselves, whereby those mischiefs are prevented, that would have fallen upon an unlimited and unregulated trade with infidels, that are enemies to our religion and nation; which the law, as I have already shewn, takes so much care to prevent.

For other considerations, whether this trade be driven to the full extent of it, or may be more advantageous to be enlarged, as it is proper here to be discoursed of in a court of law, so the application for that must be made elsewhere; for I do not know any law that hath made the defendant a reformer among us.

My lord, in the next place, the next question is, whether this prerogative of the king is abridged, or restrained by any act of parliament, as is insisted on by the defendant's counsel? I think not. For,

First, In general, the chief trade of this nation consisted anciently most in wool, wool-fell and leather, and with our neighbouring nations only; and yet,

Secondly, Even that trade was restrained in the exercise of it; for none must buy and sell, but he must do it at the staple, as appears by 2 Ed. 3, chap. 9, that abrogates the staple, and afterwards it was erected again. And then in the

Third place, there was no such trade as this or any other ever established with infidels in those days, and so there was no occasion for such a law to restrain them.

The best rule therefore to interpret this act of parliament, will be to apply the remedy to the inconvenience and mischief that was before it. If then there was no such inconvenience as this complained of, the restriction of the trade with infidels; then all may reasonably conclude and insist upon it, there was no such remedy as the laying open of a trade, as they alledge, intended to be introduced. But if we consider the act itself, we shall see some particular reason for the making of it, either for the taking off some clogs, that were upon the trade then in use, or the providing some remedies which were introduced to obviate the present inconveniences and mischiefs.

First then, for Magna Charta, which hath been cited chap. 30, that gives liberty to merchants, 'Quod nisi publicè antea prohibiti fuerint, habeant saluum et securum conductum exire de Angliâ et venire in Angliam, et morari et ire per Angliam, tam per terram quam per aquam, ad emendum et vendendum sine omnibus malis tolnetis, &c. præterquam in tempore guerra.'

This helped merchant-strangers in this particular, because before that they could come

but at four times in the year, and must stay here but forty days at a time; as my lord Coke observes in his comment upon that statute, and cites the Mirror of Justice for it. And if this law proves any thing relating to this question, it is, that before that act, merchants could not go out of the kingdom, and still they may be prohibited publicly; which, though my lord Coke says must be by act of parliament, yet he cites no law for that opinion; and with submission, the word public doth not necessarily import that it should be by act of parliament. My lord, that law that comes nearest in words to this case here before you, is that of 1 E. 3, which is pleaded by the defendant, that is part of the act, the latter clause of it, that the sea be open to all manner of merchants, to pass with their merchandize whither they please.

This is part of that law; but, my lord, the meaning of this law is quite and clear another thing, as I shall shew with submission most plainly: and I will beg leave, my lord, a little to introduce it, by giving you a history of this law, how it comes to be made; for it is but a short one, and it is only the last clause of it that is pleaded by the defendant.

By the statute of the 11th of Edw. 3, it was made felony to transport wool, and this my lord Coke observes in his comment upon Magna Charta, upon chap. 30. King Edw. 3, took advantage of it, for exacting money of the merchants, for dispensations with the law, and for licences for transporting of wool. Hereupon several complaints were made in the parliament; and particularly in the 17th year of Edw. 3, Rot. Par. nu. 28, the Commons complain, that the grant of 40s. upon a sack of wool made by the merchants only, was not to bind the Commons, and therefore pray it may be revoked. The king answered, this cannot tend to charge the Commons; for that there was set a certain price upon wool in every county, which the king willed should stand; and that all wool sold under that price should be forfeited in the hands of the buyer.

This was in 17 E. 3, and this matter, my lord, among other things, was represented to the same parliament, by the same merchants, by way of advice, as a thing fit, 17 E. 3, in dorso nu. 58, of the parliament-rolls of that year. And they set forth, whereas they were summoned to Nottingham, to inform the price of wools, which they did not, regarding the times to come as they say, and that was abused; they pray liberty to buy wools as freely as other merchandizes, as they can agree between buyer and seller; and that all indictments and proceedings contrary to that law might be stayed; and further they add their advice, that the king would ordain the staple in some place in England, rather than beyond the seas.

Then comes the 18 E. 3, Rot. Parl. nu. 12, among other petitions of the Commons, there are these which refer to the first part of the act of parliament: that the prices set upon the sorts of wools in every county, which run more to

the damage than advantage of the people, might be ousted, and that every one may buy freely, as he can agree with the seller, and none be accused for doing the contrary.

This, my lord, explains the first part of that act of parliament; that the ordinances before this time made upon taking sorts of wool, which was imprinted in Rastall, and all the statute-books; (for the roll is, 'sur pris,') and defeated, and that every man, as well stranger as denizen, may henceforth buy wool as he can agree with the seller, as they were wont to do before the said ordinances.

Now, my lord, you shall see the latter part of the act, which is that they plead: among the Petitions of the Commons in the said roll, there the 5th Petition is, reciting, 'That whereas the king had granted to them of Flanders, that the staple for wool should be held at Bruges; at the time of which grant, all manner of merchants, that is, Lombards, Genoese, Catalonians, Spaniards, and others, who used to buy the greatest part of the wool, and carry them out of Flanders by land and sea, where they would, to the great profit and increase of the price of wool, thither coming: yet the towns of Bruges, Ghent, and Ipres, have of late ordained, that no wools coming to the staple, be sold to strangers, nor carried out of the said country of Flanders, as they used to be, to the damage of the merchants of England, and of all the commonalty; and therefore they pray remedy hereof.

This is granted by the king, that they may buy wool as they were wont to do; and that a writ should be sent to the sheriff to make proclamation accordingly. Then they pray that the effect of these answers may be put into writing, in the manner of a patent under the great-seal; and this is done, in which there is this very statute of 18 E. 3. *in terminis* as it is printed. And this plainly shews, that the sea being to be open, and merchants to pass wherever they please, was only in answer to that petition and representation, and to redress the mischief; that they might buy here, and go where they would, and not be necessitated to go and buy at the staple; which was so abused by those of Bruges: and this is likewise pursuant to the advice and petitions of merchants before the 17th E. 3. That the king would establish a staple somewhere in England, and not in parts beyond the seas.

My lord; for the rest of the acts of parliament that have been cited on the other side, I shall not enter upon them particularly; but this every body at the first sight may see, they carry their own answer along with them, and the occasion of their making does appear in themselves, though this did not, and very few of them come up to this question now before you, or any thing like it, as will appear plainly upon the bare reading of them.

The only question then, my lord, that remains, is, whether the action lies for the company? For I think I have made it out, that the king had such a prerogative at common law,

and no act of parliament hath taken it away. Then I say, the question is, whether an action lies for the company; that is, whether it be a bare licence, or coupled with an interest? And as to that point, I shall be very short, for to me it seems to be no question at all. For,

First, they are at a great charge and expence to support this trade, and therefore surely they ought to profit by it.

Secondly, They are looked upon by the parliament to have an interest in this trade, or else they had never been taxed so high as twenty shillings for every 100*l.* in their stock. Then if they have an interest in the trade, this trading of the defendant is an encroachment upon that interest, and then here is 'damnum et injuria;' which will entitle them to an action.

For so it is in other things: a fair, in some sense, is but a licence to hold a market at such a time, in such a place; but because of the profit that tends to that liberty, and the charge that the party is at in keeping of it, an action does lie against any man that sets up another fair, to the prejudice of him that had the first grant.

In the common case of patents for new inventions, an action lies for using the invention without licence, because of the interest conveyed by the grant, and the charge that the party that invents, is at. So that I think, my lord, with submission, we have here an interest in this trade; and an interest, I say, as well as a licence, well founded upon the king's letters patent; which the king had power to make by prerogative at the common law; and that power not restrained by any act of parliament. And therefore I humbly pray your Judgment for the Plaintiffs.

MR. POLLEXFEN, (AFTERWARDS LORD CHIEF JUSTICE)*.

De Term. Pasch. Anno Regni Regis Caroli Secundi xxxvi. Die Lunæ xxi. Aprilis, Anno Dom. 1684, Banco Regis. The East-India Company against Thomas Sandys.

Mr. Pollexfen. May it please your lordship, the Governor and Company of merchants

* The following is a fuller report of the opening of the Argument of Mr. Pollexfen, as given in the MS. of Owen Wynne, in the All Souls' Library, and already alluded to in the Note to p. 371.

POLLEXFEN,

For Sandys against the East-India Company, in an Action on the Case wherein the Petitioners declared,

That our lord the king by his letters patents of the 3rd April, 13, c. 2, reciting that the Company of Merchants trading to the East Indies have been long a corporation, and en-

of London, trading to the East-Indies, they are plaintiffs, and Thomas Sandys is the defendant. If your lordship please I will open a little more of the record than has yet been

joyed diverse liberties and privileges by grants from queen E. and king Jac.

That the king was informed that diverse inconveniences and disorders were committed to the prejudice of the Company.

That at the Petition of the Company the king grants, ratifies, and confirms, to the Governor and Company of Merchants of London trading to the East-Indies,

That they should for ever be a body politic by the name of 'Gubernatoris et Societatis Mercator' de London, in Orientalem Indiam 'negotiant', ac eos per nomen Gubernatoris et Societatis Mercator. in Oriental. Indiam negotiant: unum corpus corporatum et politicum in facto et nomine realiter in perpetuum 'fecit, ordinavit, constituit, stabilivit, et declaravit per literas patentes illas.' With power to purchase, sue and be sued, by the name of Governor and Society of Merchants of London.

And that they and all those that then were, or should be of the Company, and all their sons, at the age of twenty-one years or more, and all their apprentices, factors, and servants, who should be employed by the Company in the said trade to the East-Indies beyond the seas, might traffic and use the trade of merchandising by sea, by the passages and ways discovered to the East-Indies beyond the Cape de Bona Speranza unto the Streights of Magellan. In such order, manner and form, freedom and condition, as from time to time, at any public assembly or court holden by or for the said Governor and Company, by or betwixt them of the said Company or the greatest part of them present at such assembly or court shall be limited or agreed, and not otherwise, any diversity of religion notwithstanding, so as the trade be not with any Christian prince or state in league with our prince, who shall not accept of their commerce, but refused to accept the same.

And that the Company, their factors, and servants and assignees, in the trade of merchandise, shall for ever have the whole and sole trade and traffic, and the whole freedom, use, and privilege of trading and merchandising to and from the East-Indies, in such manner as before mentioned: and that the East-Indies, or isles and places thereof, shall not be used or haunted by any of the king's subjects against the true intent of the letters patents.

And by the same letters patents, the king commanded all his subjects that none of them should visit, frequent, or trade in the East-Indies, unless with the licence and agreement with the Company first had, under their common seal.

That by virtue of this patent, the plaintiffs have been and still are a corporation trading to the East-Indies with the inhabitants thereof; who, at the time of the letters patents granted,

opened; and the case upon the record stands thus:

These plaintiffs bring their actions against the defendant, and do declare, that the king by

were not nor yet are Christians, nor subjects of any Christian prince or state, but infidels, enemies, and adversaries of the Christian faith; and that their trade hath been to the profit of the whole kingdom, and increase of the king's customs; that this trade cannot be carried on but by a body politic. And that from the making the letters patents, they have had and ought to have the sole trade there. That the defendant Sandys being a subject of the king's, but no member of the Company, nor being son, factor, apprentice, servant or assignee, after the letters patents passed the 19th of January, 34 R'. nunc. to the East-Indies, beyond the Cape de Bona Speranza, and this side the Straits of Magellan, in certain places called Atheon, Macklapaton and Porto Novo, with a ship called the Expectation, hath traded and merchandised, and divers wares in the said ship to these places transported, there bargained and sold, and other merchandises there bought, and into this kingdom imported, without the licence and against the will of the Company. 'In eorum prejudicium et depauperationem manestam,' and against the term of the letters patents 'ad damnum' of the Company 1,000l.

The defendant demands Oyer of the Letters Patents, which are set forth *in hæc verba*. And thereby, after naming the governor, the twenty-four, and constituting a general court of assembly, and the powers of elections of their officers, that the king doth grant, as in the Declaration, so far as there mentioned. But then they leave out

"In the clause of grant of sole trade." At the end thereof, they have omitted this,

"And that the said Governor and Company, and every particular, and several person that now is, or hereafter shall be of the Company, shall have full and free liberty to licence, in form aforesaid, to and from the said East-Indies, according to the orders, ordinance, and agreements, hereafter to be made at their public court."

On the recital of the clause prohibiting others to trade without licence, under the common seal, they leave out a part of that clause which is this,

"Upon pain that every such person that shall trade to and from the East-Indies incur the forfeiture of his merchandize he shall bring into the king's dominions, contrary to the purport of this charter, which the Company shall find in the East-Indies where they traffic, and also of the ships wherein the merchandize are transported, one half to the king, the other to the Company, and imprisonment of the offender."

Then follows a clause or grant, that the Company for any consideration or benefit to be taken to their own use, may grant licence

his letters patent, in the 13th year of his reign did grant to them the sole trade, between the Cape of Good Hope and the straits of Magellan, in the East-Indies: and did also grant

to any merchant, stranger, or other, to trade to or from the Indies.

Then the king grants to the Company, that the king will not, without the consent of the Company, give licence to any to or from these places.

Then there is a clause, that none of the Company shall have a vote in the General Assembly, unless he have 500*l.* in the stock.

After Oyer, the defendant pleads the statute 18 E. 3. c. , whereby it is enacted, that the seas shall be open for all merchants to pass with their merchandize wherever they please; and that, by virtue thereof, did trade as in the Declaration alleged, ' prout ed bene licuit.'

The Plaintiff demurs.

Before I come to state the points and questions upon which the question truly depends, I desire to shew what are not the points or questions in this Case.

1. It is not the point or question, whether the king, by law, can restrain any of his subjects to go out of the kingdom.

For the king may do so, and this without distinction of Christian or Infidel country, &c. *sic et non*, as occasion may be.

2. It is not the question, whether the king, by law, can restrain any of the king's subjects to such a country or place.

It may be done upon any particular occasion, as of war or plague.

But from hence to argue, that the king can grant to you and your successors for ever, a sole trade to such a country or place, excluding all other his people, except with leave or licence.

Because he can restrain this or that subject, therefore he can grant a sole trade to the plaintiff, excluding all others but you and such as you licence for ever:

Because he can upon particular occasion, of war or plague, restrain or prohibit any subjects to go or trade to such a city or country:

That when there is neither war nor plague, the king should grant a sole trade to any particular person, whether bodies politic or natural, and restrain all others for ever.

Can this be by the law alone?

If this foundation will warrant it, though in this case this be with Infidels, and upon that ground some difference imagined betwixt an Infidel and a Christian country:

Yet, remember, your reason or foundation doth not distinguish or make a difference.

For,

If because the king hath power to restrain or prohibit subjects to go out of the kingdom, or by occasion of war or plague, all his subjects from trading to such a city or country:

Since this power (you must agree) extends, as well to Christians as Infidels, city or country,

unto them, that they, and nobody else, should come thither, nor trade there; and they do say, the defendant did come thither, and did trade; and that this is to the plaintiffs damage.

This defendant has prayed Oyer of the letters patent; and there are some things that are not mentioned in the declaration: but not being upon the record, and appearing upon the Oyer, I crave leave to open them, that I may make use of them in the discourse I am to make; and I desire your lordship would please to take notice of them.

In the letters patent, when they come to the prohibition and restraint, the prohibition and restraint is in this manner, which they have left out in their declaration. The letters patent do prohibit the trading without a licence, upon pain that every such person that shall trade to or from the East-Indies, shall incur the forfeiture of his merchandize, and also of the ship; one moiety to the king, and the other moiety to the East-India Company.

And then there follows another clause, which is omitted also out of the declaration; and that is a clause of grant to the company, that for any consideration of benefit to their own use, they may grant licence to strangers or others, to trade to and from the East-Indies.

And then there is another clause that is omitted also, and that is this, that the king grants to the company, that the king will not without consent of the company, give licence to any persons besides the company to trade thither.

the granting of sole trade to one subject or body politic, and restraining all others, is the same, whether it be to Christian or Infidel, city or country:

And when you cite Stat. 9 Jac. 6, that enacts the king's subjects shall freely trade to Spain or Portugal, notwithstanding the charter of incorporation granted to some merchants, and the prohibitions in those charters:

And from thence argue, that because there were prohibitions or restraints by Charters as to those countries which were Christian, therefore such a sole trade to an Infidel country, restraining others, is well granted:

You must have it admitted, that such a grant to these countries is good and legal; or else you argue from that which you grant not to be legal, to prove another like grant legal.

Or at least by the same arguments and reasons maintain such a grant of sole trade to be good, whether made to Christian or Infidel's country.

If then not being the point or question in this Case,

Whether the king can lawfully restrain his subjects to trade to a particular country or place, whether Christian or Infidel.

The questions plainly and shortly are:

1. Whether the grant of sole trade to the Plaintiff be good by grant or not?

2. Supposing that it should be, whether this action be maintainable or not? &c.

And there is likewise another clause which I would take notice of, that nobody of the Company should have a vote in the Company, unless he have a stock of 500*l*.

These clauses now being in the letters patent, and the letters patent being set forth upon the record, they are become parts of the cause.

The defendant has pleaded the statute of 18 E. 3. and thereupon there is a demurrer.

My lord, the questions that are in the cause are only these two:

First, Whether or no this grant of the sole trade to the plaintiffs, be a good grant or not? And next,

Secondly, Supposing it should be a good grant, whether or no the plaintiffs can maintain this action, as now it is brought?

My lord, in the argument of this case divers things have been said in which I shall differ from the other side; but only take notice how far they may be of force in point of argument, to make the questions that are in the case to turn, as to the law, one way or other.

My lord, it is no question but that the king, by law, can restrain any of his subjects from going out of the kingdom; for the king hath a particular interest in the services of his subjects; and therefore it is most reasonable and an undoubted rule, I think, in the law, that the king may restrain any particular subjects 'pro hic et hunc,' as the king takes it to be most necessary and convenient for his service to restrain.

Next, my lord, I do not deny, but think it also to be a law, That the king may restrain all his subjects from a trade to such a particular country or city, upon some reasons or occasions; as in times of war, and times of plague, that I reckon by law may be done very well.

But, my lord, that is not the question in our case; for the question in our case is a question concerning a sole trade granted to a particular person, or body politic, (which is but one particular person in consideration of law) with a restraint upon, and excluding all his other subjects. Now from what has been granted already, to argue that the king may grant such a sole trade, is no consequence at all from these positions that have been agreed, *i. e.* from the authority and power the king has to restrain his subjects from going out of the kingdom, or to restrain them from trading in such a place, For,

First, As to the power the king has by law to restrain his subjects from going out of the kingdom; though by law his power be such, yet first of all it is not a power universal to restrain all his people, but to restrain this or that man for his particular service, for this or that particular time. But to make a universal restraint, that none shall go out but you J. S. or you such a body politic, will go a great deal further, than ever it has been before, or can be conceived.

Next, my lord, That because the king can restrain trade in time of war, or in time of plague, that therefore he can restrain all his people, and for ever; except such and such

particular men, or a corporation: that must needs be further than ever any thing I have heard yet to be law, or could find any footsteps of.

So that I think there are no inferences can be drawn from these things; that can conclude any thing as to its particular point that now we are upon, *i. e.* That the king can grant a sole trade to any particular person and body politic, and their successors for ever; and restrain and exclude all his other subjects from that trade. My lord, that will not be, I think, a consequence that can be drawn from any of the positions that I have laid down.

And, my lord, further I would observe this in the arguing of this case, That when they lay down this as a general position, That the king can restrain his subjects; there is no distinction, nor is there any foundation in law for it, betwixt going to an infidel country, or going to a christian country. For it is as undoubted, the king may restrain any of his subjects, as the king's pleasure shall be, or as there shall be war or plague, and such other occasions as may require it, from going into a christian country, as well as he may from going into an infidel one; and therefore if the argument have weight in it in this point, it hath weight as well to affect christian countries, and the whole trade abroad with them, as infidel countries, and trading with them.

And there is no difference at all from this reason or foundation, that can be inferred, as I can make.

Next, my lord, when they argue and make use of the statute of 3 Jac. Cap. 6. which enacts, That the king's subjects shall freely trade to Spain and Portugal, notwithstanding the charters of incorporation granted to some merchants, and the prohibitions in those charters: If they will say that those charters of restraint were lawfully granted, then they do argue for a power in the king to restrain trade even to christian countries; which is a thing, under favour, that never was yet affirmed, as I remember, but rather the contrary admitted: and if they say, those charters that were granted for restraint of trade to Spain and Portugal were not lawful, because they were christian countries, then the statute makes nothing for them: for sure it is no argument, that because an unlawful charter was granted, therefore another unlawful charter may be granted; or because that was void, therefore the other should not be void; no, rather the contrary.

My lord, these things I have taken notice of, because they are matters that have been insisted on in the argument on the other side; and I would lay what is not necessary out of the case. And I now come to the great point of this case, and which indeed is a great point in the consequence of it.

First, Whether the grant of sole trade to the plaintiffs, be a good grant or not?

And I humbly conceive, such a grant of a sole trade to any particular person, or body politic, with a restraint to all others, is against the law of

the land, and by the common law void; and this I shall endeavour to prove from good authorities.

1. By the common law, trade is free and open for the king's subjects; and for that the books that I shall cite are these, 3 Inst. 181. 'Commercium Jure Gentium commune esse debet, et non in Monopolium et privatam pauculorum Quæstum convertendum; iuquam est alios permittere, alios inhibere Mercaturam.'

The next book, my lord, is Fitzh. Nat. Br. fo. 85. that says thus; 'Note, That by the course of common law, every man may at his pleasure go out of the realm for merchandise, or to travel, or other cause, as shall please him, without demanding licence of the king; and shall not be punished for it. And the Stat. of 5 R. II. c. 2. which prohibited all but the great men and merchants, to pass out of the realm without licence, has therein declared the law, when it excepted merchants, that they had a right to go without licence: but this statute is repealed afterwards by the statute of 4 Jac. cap. 1.

Then, my lord, there is Rolls, 1 Rep. fol. 4. the Taylor of Ipswich's case against Sherring. The words and sense of the books are, 'That no trade, mechanic, or merchant, can be hindered by the king's patent.' A patent to hinder trade at sea is a void patent; a patent that only a hundred persons shall use such a trade, is not good.

Dyer 165. 'That every one may at his pleasure go with his goods;' and cites F. N. B. for it. And F. N. B. 85. saith thus; 'Note, That by the common law, every man may at his pleasure go out of the realm for merchandise, or to travel, without demanding licence of the king.'

These, my lord, are the Books; and thus they speak generally at the common law: and I offer it to your lordship as a further reason, That the common law is such, notwithstanding all their arguments, in regard that the common law, as far as it is against ingrossing, is also against all sole trade. For, my lord, all sole trade is ingrossing, as I take it, with submission; appropriating trade and merchandise to a particular person or persons, or body politic, excluding others, is engrossing such trade. Now that ingrossing is against the common law, and against the very fundamentals and principles of the common law; that, I think I need not labour much to prove, nor shall I go about to cite many books to prove that.

That ingrossing any sort of merchandize is an offence at common law, *vide* 3 Inst. 196. And in the case *Dominus Rex vers. Crispe et al.* here was lately an agreement betwixt copperas makers and copperas-merchants, for the buying of all copperas: these copperas-makers should for three years make at so much a ton; and restrain them from selling to any others. It was here adjudged an ingrossing, upon an information.

And if a company of merchants shall buy up here, in like manner, all the merchandize of

Spain, or Portugal, or the Canaries, or other town or place, for three years to come; this, I think, would be an ingrossing, and the contract against law.

But then, my lord, to prove that sole trade is ingrossing, that the nature of the thing must speak; for whosoever has the sole trade of buying and selling of such a sort of commodity, or whosoever has the sole trade to any particular country or place, has thereby the sole ingrossing, and sole having of all the commodities of that place; so likewise has he the sole buying: and all the people that have to deal about the commodities that are to be vended and vented in that country or place, are at his will and pleasure; and thereby he makes all those his own, and he makes what price he pleases, and orders and disposes of them, both as to value and every thing else, as his own. And thereby, my lord, I take, it must be ingrossing; and every monopolizing of buying and selling, or of trade, is ingrossing. But that only ingrossing is by particular agreement and contracts between particular men, among one another, without the king's authority or help of his letters patent; but monopolizing is ingrossing under colour of authority, by help of those letters patent that create them: for the consequence of it must be, that they would sell at their own prices, and thereby exact upon the king's subjects: and their patent for the sole trade to the East-Indies, invests them in all the merchandizes of these countries, and ingrosseth all in their hands. Then if ingrossing by the common law be forbidden, and it is unlawful to do it, all letters patent to authorize and help men to ingross must needs be as void as that, which is the end of ingrossing; and that is monopolizing.

My lord, in the 3d Inst. 181. the case of John Peachy, in 50 E. 3. who was severely punished for procuring a grant or licence under the great seal, that he only might sell sweet wines in London, is a strong case for us. For, my lord, this was ingrossing by colour of the king's grant, and punished as a great offence: and the case of Monopolies, that are reported 11 Co. 84. Moor 673. and in Noy, do prove that monopolizing is ingrossing, and the same law that is against ingrossing is against monopolizing; and the same law that makes the one void, makes the other void.

In Darcy's case, where a grant by patent was made to him for the sole importing from beyond sea, and the selling of cards under a rent, and prohibiting all others to sell; there it was adjudged a void grant.

And the Stat. of 21 Jac. cap. 3. does declare all monopolies to be void at common law; so then if this grant be a grant to you, to ingross or monopolize, I think it will be easily concluded to be against the common law, and made void thereby.

Next, my lord, that this grant of the sole trade to the East-Indies is against the ancient statute laws of this land, I think is plain also. As for the statute of Monopolies, I shall crave leave to speak of it by itself, by-and-bye; but

I say it is against the ancient statutes of this kingdom. Magna Charta, 9 H. 3. cap. 30. all merchants, if they were not prohibited before, should have their sure and safe conduct to depart out of England, and come into England, and stay, and go through England, as well by land as by water, to buy and sell without any evil tolls, by the ancient and just custom, except in time of war. And my lord Coke says, That in this act, 'Nisi publice prohibiti fuerint,' is intended of a prohibition by the public council of the kingdom, by act of parliament. So that this act does in these words make our case: It says, 'They shall, if not openly prohibited, have safe and sure conduct: and if that open or public prohibition must be by act of parliament, so it is probably a declaration of the common law. Then here is no such in this case, no prohibition by act of parliament to restrain from going to the East-Indies, but the defendant may go thither if he please. The Stat. of 2 Ed. 3. cap. 9. 'That all merchants, strangers, &c. may go and come with their merchandize into England, after the tenor of the Great-Charter.'

The statute that is pleaded 18 E. 3. cap. 8. 'That all merchants, strangers, and denizens, and all other and every of them, of what estate and condition soever they be, shall sell their merchandizes from whencesoever they come, freely, without interruption; and shall have the sea open to them, to pass with their merchandize where they shall please, without interruption, excepting to the king's enemies; and that this act shall be observed and performed notwithstanding any charter to the contrary, and that charters to the contrary are of no force, but are to the king's damage, and to the oppression of the Commons.'

Stat. 14 E. 3. cap. 2. recites Magna Charta and enacts, 'That all merchants, aliens, and denizens, may without lett, safely come with their merchandize, safely tarry, and safely return.'

Now, if so be, all merchants, strangers, &c. shall sell their merchandize wherever they come, without interruption, and that enacting clause be large enough, as sure it is; then it has an express clause, That all charters and patents to the contrary are void, as being to the king's damage, and the oppression of the people; and therefore they are all by the parliament declared to be void.

The stat. of 25 E. 3. cap. 2, confirms the former stat. of 9 E. 3, and has the same clause in effect; 'If any proclamation or commission be to the contrary, it shall be void.' The statutes of 2 R. 2, cap. 1, and 11 R. 3, cap. 7, confirms the two former acts, and enacts, 'That all charters, letters patent, and commands to the contrary, shall be void.' So that, my lord, those many statutes, as most of the old ones, being penned in general (but short) words, and being in favour of trade, have been taken to extend generally, for the general and most large advantage of trade; though perhaps some particular

trades were by construction mostly concerned; as the statutes of the staple might be the occasion of making some part of them. But they do enact, as your lordship sees, in general words, 'That all grants and letters patent to the contrary shall be void;' and surely this would have never been put in, but that in all times grants have been made, which the king has been deceived in, and found them contrary to his real advantage, though they have both otherwise pretended, and were to the oppression of the people, and therefore void.

In the 2 Inst. 63, my lord Coke, in his observation upon the consideration of Magna Charta, and the several statutes that were after that made in reference to trade, says, That upon this chap. of Mag. Chart. (to wit) the 30th, this conclusion is necessarily gathered, 'That all monopolies concerning trade and traffic are against the liberty and freedom granted and declared by his great charter, and against divers other acts of parliament, which are good commentaries upon it.' So, that, my lord, I do not offer it only as my present thoughts, but what has been taken for law heretofore; that those acts are of general extent, and all charters made to the contrary, are *ipso facto* void, and of no force.

Obj. My lord, they say it is true, if we are a monopoly, then the law is against us; but we are no monopoly.

Resp. My lord, to prove they are a monopoly, that is the next thing, which, with your lordship's favour, I shall go about.

And for that I shall first take the description that is of a monopoly, made by my lord Coke, in his chap. of Monopolies, in the 3d Inst. 181, and if it is possible to exempt them out of that description, I confess then they have a stronger case than I do hope they have.

A Monopoly (says he) is an institution, or an allowance by the king, by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.

First, My lord, I think by their patent, they have the sole trade granted to them; that is, the sole buying and selling (for merchandizing consists in buying and selling), and therefore they have the sole buying and selling in the East-Indies; and they have consequently the sole selling of the commodities when they come home; for none else can bring them home but them, if their charter be good.

The sole using of any thing is a general word; and another part of this description, sole trading, is sole using of merchandizes, in a particular place to which they trade; and so they are within all the words sole selling, sole buying, sole using.

Secondly, They are also within the latter part; whereby any person is hindered or restrained from any freedom or liberty they had before, or in their lawful trade: For that it is

lawful for them; as I hope I shall make it appear, as I think, upon the patent granted to some the ships and goods of those that trade thither; and the bringing of this action is a sufficient proof that you were hinderers of this trade, and people's going thither to traffic. So I think, my lord, they come within every part of the description that is given in that book of a monopoly.

Next, my lord, I think that all the evils and mischiefs that are in the Books taken notice of to be in monopolies, are also in this case; and whatsoever hath the evils and mischiefs attending monopolies, it is a great and shrewd argument, that that which hath the effect, hath also the cause.

The evils and mischiefs that attend monopolies, are,

First, That the price of the commodities they sell shall be kept up, and raised higher than otherwise it would be: he that hath the sole sale will keep up the price as high as he please; this is one of the evils mentioned in the case of Monopolies, reported by my lord Coke, lib. 11, fo. 86, b. the truth whereof I think is evident enough in that company; for the price and value of things they bring from thence, are of their own setting, and at their own disposal. Nothing among men is more evident than that; and, indeed, it must be a most wonderful virtue, and a mighty contempt of riches, that a man, who hath the sole commodity in his hands, will not sell it for the most he can; or not keep up the price, and make the most of it; and in things that he buys, to be sure he will buy as cheap as he can; and in things that he sells, he will sell as dear as he can; and I think that he that has such a power must be a man of an extraordinary virtue, if he do not execute it.

Secondly, Another evil of monopoly is, that it is 'pro privato particularum questu,' which is likewise mentioned in the margin of the Book cited before, 3 Inst. 181. Now whether this trade be for particular private gain of a few or no, I think any man that knows any thing will be satisfied about it in his own mind, who considers the present state and condition of this company. It is not upon record indeed, but sure it is easily gathered as a consequence; and it will appear plainly by this reason to be 'pro privato pauculorum questu': for trade is not in its own nature fixed and stable, but varying and altering; sometimes better, sometimes worse, sometimes beneficial, sometimes detrimental, according as the times of war and peace, sickness, scarcity of this or that commodity in this or that country; or the modes and customs of the country, or the manners and habits of men do occasion it: and the merchants by their education and observation, are those that govern and manage this trade for the maintenance of themselves and their families, and the general good of men; and direct and employ their estates and traffic to this or that part of the world, as time and occasion shall give them best encouragement.

But a sole trade granted into this or that part of the world to one company, and of another part to another, sets up particular men that head that company, but destroys all other merchants and inferior people; all shipping must be subject to the prices these improPRIATORS of trade will allow them, or else he still and be destroyed, for none else must employ them, nor can do it; and so must all masters of ships, for it is necessary to them, in order for their livelihood, that they go such voyages, and these cannot go, except upon the terms that the company will allow of. So all mariners, artificers, factors, and all other persons, whose employments depend upon this trade, must be subject to their will and pleasure: and of how great consequence that may be to the kingdom, my lord, does deserve consideration.

Thirdly; A third evil and mischief in Monopolies is, that they are to the oppression of the king's people; and any body, I think, that has known any thing of late years about this company, that is, that knows their dealings with, and handling of their factors and servants, that get any thing in their service; and other people that they employ, will find instances enough of their oppression; and that will be enough to satisfy any man, what kind of people they are: for what a work is there, when they have any factor or servant, or any body else that has got any thing in their service? Those things indeed are not upon the record, but they are consequences that are visible to every body: and the truth of it is, in all patents for sole trade, so it will be. So that if the evils and mischiefs, which the common law forbids, and endeavours to prevent, by judging all monopolies, ingrossings and sole trade unlawful, be to be avoided, the evils and mischiefs attending their patent and sole trade are perhaps the greater, because their trade is the greatest that ever England knew.

My lord, in Fitzherbert's *Natura Brevium*, 222, there is this said, and I urge it for this reason; because if so be these are consequences of a sole trade, it cannot be denied but these are oppressions of all the king's people. Now, there it is said, that every grant of the king has a condition implied in it, 'Quod Patria per Donationem non magis solite eneretur seu gravetur;' so the Book of 15 H. 4, 14. Grant le Roy, to the charge or prejudice of the subjects, is void: and therefore the king is deceived in this grant; and the grant is as well by the common law, as all these ancient Statutes, void.

Obj. Ay, but say they, this is not a patent granted to the advantage of a few, or for the raising of the prices and monopolizing of commodities, but for good government and order, and the preservation of this trade, that otherwise would be destroyed: and say they, there have been such grants heretofore to Turkey, Barbary, and other places.

Rep. It is true, my lord, this is said; and that patent does say, that it is for good order

and government; and the advantage of trade. But I pray, my lord will also remember what our Books say concerning such Grants and Monopolies, in 2 Inst. 540, that new corporations trading into foreign parts and at home, though under the fair pretence of order and government, yet in conclusion tend to the hindrance of trade and traffic, and in the end produce monopolies. This is an old observation, for in the 11th Rep. 88. b. in the end of the case of Monopolies, there are these words: 'Privilegia quære vera sunt in Præjudicium, Reip. magis tamen speciosa habent Frontispicia, et boni publici prætextum, quam bonæ et legales Concessionis, sed prætextu licito non debent admitti illicitum.' Those are the words of that book; and there it is also taken notice of, that Darcy's patent had a most glorious and specious preamble; for there it is mentioned, that the subjects might exercise themselves in husbandry and lawful employments, and that cards-making had made cards-playing more frequent, and principally among servants and apprentices; and therefore the sole making, and trade of cards-selling, was granted to Darcy. Observe, says the Book, what a glorious pretext and preamble this odious monopoly had.

There is the Case of Horn and Ivy, Mich. 20 Car. 2. Rot. 403. A patent made three years after the patent given to the Company, and in imitation thereof, the patent is to the Canary Company; and recites, that the trade to the Canaries was of great advantage to the king's subjects at that time; and by reason of too much excess in trading of subjects there, our merchandizes were decreased in their value; so that the king's subjects were forced to carry silver there to get wines; and all this happened for want of regulation and good government, and thereupon the patent did constitute sir Arthur Ingram, and about sixty persons more by name. And all those that had been traders there within seven years for the value of 1,000*l.* a-year, should be a company and body politic and corporate by such a name; that there should be a governor, a deputy-governor, and twelve assistants, and names them, but to be continued by election, and should have the sole trade to these islands; that no other should haunt or visit these islands, and prohibits all others under pain of forfeiture and imprisonment, and indeed follows very much the frame of this patent, with a *non obstante* to the Statute of Monopolies. But notwithstanding this glorious preamble, this patent was soon afterwards condemned, both in this court, and afterwards in the parliament for the abuse of trade, and the regulation of it for the general good, which is the thing that is pretended; but few men can doubt what is really intended by that; and no one I think can doubt, what is the real intention of this patent under the name of regulation and government: to ingross all into the hands of ten or twelve men is most excellent regulation and government,

My lord, as to the other companies and charters that have been granted, supposing that all these grants were such as this, and used and practised as this is, it is no argument that they are legal, or that this was good. For, my lord, it is well known, both by the ancient Statutes that I have cited, and by common experience, that there have been in all ages and times patents granted, that were not by law grantable, but the king was deceived in them, and those patents were void and of no force; and therefore it is no argument, because there have been many such grants and patents in former times, that this should be good.

I agree, my lord, if ever this grant, or any grant like this, had come in question, and had received any judicial allowance to be good, it had been something; but otherwise it can be no inference at all, because there are others this is a good one.

But, my lord, to keep myself close to the point of Monopolies; Monopolies have been granted in the best of times; in queen Elizabeth's time, there was Darcy's patent granted then; and it appears there had been grants to divers others of the sole making and selling of cards, but when it was questioned, it was condemned. Statute 9 E. 3, cap. 1, and the other Statutes before-cited, the clauses that say, all patents granted or to be granted contrary to the freedom of trade in these Statutes mentioned, prove,

1. That such patents have been.
2. That they did foresee, and provided against, those that would be.

The proviso in the statute of 43 Eliz. cap. 1. sect. 9. shews also that monopolies were granted; but so far were they from receiving any allowance or approbation, that that statute that was made in the end of her reign, for confirmation of the queen's grants by a special proviso, does except and provide that it should not extend to make good any letters patent that did concern any licences, powers or privileges, commonly called monopolies.

The statute of Monopolies and this statute sufficiently shew, that there were such grants and that they were not allowed; so that even in queen Elizabeth's time, and during her reign, divers such grants it seems had been made. But, my lord, if so be there had never been any judicial allowance in times past for any sole trade, or sole buying or selling, though there have been in all times such grants made, yet that will be no argument that they were good, but on the contrary; and further the practices of these companies have been to the contrary, till within late years; no sole trade practised among them.

But, my lord, on the contrary, since that patents have been so granted, since that there is no judicial allowance of such; I would appeal to them to shew whether there has been any practice of these things. I do not suppose, but that in Turkey and Barbary, persons have traded that have not been licensed by the com-

panies, and that continually in all times; but yet I think no-body will find any judicial opinion that has been given against them for it, or that ever any such patent was of force to restrain the subjects freedom of trade in these places.

My lord, I am apt to think, that the grants to those Companies, that is, the Turkey-Company, the Barbary-Company, and the Russia-Company, are like to this of sole trade; but yet if it never has been practised to restrain others in this manner, it is rather an argument against them of the other side; but they have never dealt thus, nor used the clause of prohibition as these men do. For, my lord, whoever thinks to make any conclusion for the preservation of such a sole trade by a Company with a restraint of others, because such patents and charters have been granted to other Companies, will have but little reason so to do, if he consider what a difference there is between this Company and them: for, my lord, these Companies did never set up for a sole trade, though there be such words in the patents, they never used them, but have always used their trade quite contrary, and in another method in a commendable way, and I think in a legal way; but not so as to warrant any thing of this, that is here pretended. Therefore if your lordship please to give me leave, I would observe the difference betwixt the way of trading that those other Companies have, and the trade of the East-India Company. The Companies of Turkey, Barbary, Russia, Muscovy and Hamburgh, nor any other, till of late years, did ever trade with a joint-stock; but the members of the said Company, every man used his own trade, bought and sold his own commodity, used and employed his own factors and servants; and the Company took some care to send out a consul, or some one to be their agent, to preserve the trade, and by small imposts upon the commodities traded for, to provide for such officers: which imposts or assessments were made by by-laws and regulations among themselves. They take care the markets shall not be over-clogged by the commodities they send out, which they do also by their own orders and by-laws that are made among themselves; they only order what ships shall go, but leave the particular members of the Company, every man to send what he will upon his own account, and appoint who he will to be his factor, and to bring over what commodity he pleases: they trade not upon any joint-stock, or the stock of the body politic. If you deal with any of them, you know the particular person you have to deal with: no man is refused to be of their Company, that has a mind, paying some small sum of money for his freedom; and whoever is of the Company, has a vote in ordering the affairs of the Company. But now you of the East-India Company ingross the sole trade into the body-politic; you have a joint-stock, every man whether merchant or not, if he can buy such a share in their stock, is of their Com-

pany. The Committee manage, and the rest must submit to their pleasures and distribution: those few of them which have the most shares, have the disposal of the whole stock; no member trades, buys or sells, or has any thing that he calls his own, but only such a share in the stock: you suffer not the members to trade with their own money, at their own discretion, or to employ whom they please, this you do not do; you suffer no man to have a vote among you (and your letters patent have such a clause that none shall) but he who has 500*l.* stock; which 500*l.* no man can acquire, unless he pays 1*l.* or 15*l.* for it, two and half per cent. or some great sum. So that by the very foundation, they can have no more persons in their Company, than they that have 500*l.* shares; and these shares being engrossed into few hands, they have all, and call themselves the Company. So that man that will not be deceived by words, but distinguish things different one from another, will distinguish between one company and society, and another; who are ingrossers, monopolizers, and who not.

The Turkey Company and the rest like it, may be truly said to be managers, regulators, and improvers of trade. They have no joint-stock that they trade upon, they ingross not, they admit every man that will, to be free of their Company, to trade with his own money, his own credit, and buy and sell his own, and to employ whom he pleaseth; and none among them, under pretence of government, regulation and preservation of trade, makes unreasonable advantages.

But this invisible East-India merchant, the body-politic, covers and countenances some few men among them to ingross, buy and sell at their own rates, and that exclude all others for the great and excessive advantages of the few.

The other Companies, as the Turkey Company, &c. have not any sole buying or selling, nor exercising any sole trade or ingrossing. Every member of these Companies, which are a multitude, and every one that is not, may, if he will, be a member, and no man is excluded.

But this Company is quite contrary, and therefore (if ever any was) are great ingrossers and monopolizers of trade. I do not argue nor speak against Companies, nor regulating, nor managing trade, which was the true intent of the patent; such as I have mentioned, and is virtuously and commendably practised in the great Companies of Turkey, Muscovy, Hamburgh, and others; where the members of the Companies trade upon their own particular stock and estates, and no merchant hindered or denied to be a member, that desires it, paying its ordinary fees of admission: but against the invisible merchant, this politic capacity trading in joint-stock.

Suppose a like patent to any one, or two, or three men, farmers or partners in their private capacity of this sole trade; and they had the

management of it, and hereby possessors of such vast wealth and merchandise: What would this politic body (I mean the principal members, for the body cannot think or have sense) judge of this?

Perhaps yours is much worse; there a man should know with whom he dealt, who were his debtors, and how to come at them; but dealing with you is a kind of dealing with spirits, an invisible body, only subsisting in *Intellegentia Legis*. Therefore being so unlike the other Companies, and so contrary to them, you have no countenance from them; but though they are good and commendable, you are ingrossers and monopolizers.

This shews the great and vast difference between the one and the other; this shews that you, that are the East-India Company, have the sole trade as a Company; and whoever buys in many stocks, has as many votes as he has 500*l.* in the stock.

There is no such thing in any other Company, but quite otherwise in all these respects; but hereby it comes to pass, that he that has so many shares in the stock, has an absolute power, by having so many votes.

The invisible body or corporation perhaps trade for 1,000,000*l.* per ann. they get into their hands to sell 7 or 800,000*l.* worth of merchandise at a time; the three last sales they made come to 1,800,000*l.* nobody hath these commodities but they. Is this trading, and no ingrossing or monopolizing? It is their wonderful virtue then, hatred and contempt of riches, that makes them not to raise and increase values and prices, and be as rich as they please, if they do not do it. Never was there such an instance of so great trade in England, but none of your members buys or trades at all; any man among you, whether he be merchant or not merchant, citizen or gentleman, or what he will, if he has a stock, his stock goes by this joint-trade, but it is a few men that manage the whole as they see best; no man employs ships or workmen as he thinks most convenient; but you are one great trader in this vast trade, which is indeed one quarter part of the trade of the whole world.

My lord, this being then the great difference between this trade by a joint-stock, and in the Company as a body politic, which is but as one entire person, having the trade entire to himself, and the trade of particular members, under orderly regulations:

It is quite a different and distinct thing from any thing, in any of the other Companies, that they would be likened unto to obtain their own ends: nor is there any reason to make them like one another, for the whole matter is carried on distinct in both; the one is a sole trade by a body politic, the other dispersed through the members, according to their own discretion and occasion, under regulation. No man, if he comes into the East-India Company, can trade among you, or vote among you, unless he have 500*l.* stock; and if he do not come in, (since it is according to your constitution, that every

man should have as many votes as he has 500*l.*) his vote is like to do him little good, if some few men in the Company agree against it.

And besides this, my lord, in the Turkey Company, where they trade as distinct members, every man knows his creditor and his debtor, because they deal in their natural capacities; but you trading in capacity of a body politic, every man that trades with you has a creditor or a debtor, he knows not whom.

And it is a great mischief, when persons know not how to sue or how to deal with them; for take them all a-part, they are as just and as good people to deal with, as can be; but take them together as a body, what more hard to deal with than a corporation?

My lord, we have seen the instance of these things in this Company, in a few days they having so great power, that none could contend with them, and soon after so invisible, as well as low that no dun can find them. This we all know, very well, my lord; and I instance in this to show, that whereas they would be likened to other companies, which were created for the preservation and benefit of trade; and the members of it are under the regulation and government of the Company, but not as you are; they are traders, your members are none, you are only the body politic, the invisible merchant, that no one knows where to find; and a body politic, in judgment of law, has neither soul nor conscience, and yet forsooth are traders.

I only instance in these things, to shew that signifies nothing which you did insist upon, that there are other companies for trade; for I say, that they are good and regular, and not monopolizers, for they do not trade in such a manner by sole buying and selling, but every one trades as a particular merchant; but you are otherwise, your body politic is the sole merchant, and none of your members can trade, unless a particular servant, perhaps to save charges, you give him leave to buy or deal in some little things; but all others are quite excluded.

My lord, having thus shewed you the way of their trade in sole buying and sole selling, I shall now, in the next place, come to the Statute of Monopolies, which is the statute of 21 King James, chap. 3. and I hope I shall plainly shew you, that they are within the words and meaning of that statute.

By that statute, my lord, it is enacted, 'That all monopolies, commissions, grants, licences, charters and letters patent granted, or to be granted to any particular persons, bodies politic or corporate, of, or for the sole buying, selling, making, working, or using of any thing within this realm; and all proclamations, inhibitions, restraints, warrants of assistance; and all other matters and things whatsoever, tending to the instituting, erecting, strengthening, furthering, or countenancing the same contrary to the laws of this realm, are and shall be utterly void and of none effect.'

'And that all persons, bodies politic and corporate, which now are, or hereafter shall be, shall stand and be disabled to have, use, exercise, or put in use any monopoly, or such commission, grant, licence, charter, letters patent, proclamations, inhibitions, restraint or other matter, or thing tending as aforesaid; or any liberty, power or faculty, grounded or pretended to be grounded upon them.'

Then, my lord, there follows the clauses of forfeiture of treble damages to the party grieved, by the using of any such monopoly; then there is the clause about new inventions and some other things; then comes the Proviso concerning Corporations, of which some use being made in this case, I shall crave leave to consider it distinctly.

Provided also, and it is hereby enacted, 'That this act, or any thing therein contained, shall not in any wise extend or be prejudicial to the City of London, &c. or any corporation, company or fellowship of any art, trade, occupation or mystery, or to any companies or societies of merchants, within the realm, erected for the maintenance, enlarging, or ordering of any trade or merchandize; but that the same charters, corporations, companies, fellowships and societies, and their liberties, privileges, powers and immunities shall be and continue of like force and effect, as they were before the making of this act, and no other, any thing in this act to the contrary notwithstanding.'

The next Proviso extends to Patents granted, or to be granted for printing, making of salt-petre, and offices, which do not concern the case in question.

By the description of a Monopoly, which I have before, out of my lord Coke, stated and expressed, this sole trade granted to you, and the exclusion of all others, is a Monopoly within that description, as I have before shewn that their charter is directly contrary to this Act. My lord, first, That they are within the enacting clause of this Act; this, I think, by comparing what they claim with the enacting clause will plainly appear. I need not now stand so much upon the word Monopoly, whether by what I have said, I have proved them a Monopoly or no; but by the other words of the statute, supposing that word monopoly was out of the Act, yet they are within it: for the Act of Parliament having the words of sole selling, or sole buying, or sole using of any thing; if they have the sole buying or sole selling, or sole using of this trade, then they are most plainly, I think, within the enacting words of this act of parliament.

Now, my lord, that their Charter is directly contrary to the enacting words, I must also therein refer myself to the words of the charter, which has sole buying; for all others are prohibited so much as to come and go from and to the East-Indies without their licence. It has also sole selling; for all others are prohibited to import any commodity from thence into the realm; and they cannot sell them, except they

import them. They have likewise the sole using; for they have granted to them the sole trade, which includes all buying, selling, sole using, that appropriates all to themselves, and excludes all others.

How then, my lord, can any man read this act of parliament and their charter, and compare them together, but he must at the same time conclude, that their charter is contrary to what is enacted there? For the act of parliament does say, That all letters patent granted to any person, or body politic, for the sole buying, sole selling, or sole using any thing, and all proclamations, restraints and inhibitions to the contrary, and all other matters and things touching thereunto, are contrary to law, and utterly void, and of none effect; why, then, they have by their grant, the sole buying, sole selling, and sole using of this trade; therefore they are quite contrary to what is the enacting words of this act of parliament. Then, my lord, if they are contrary to the enacting clause of the act, then their hopes must be, that they are saved by the proviso.

My lord Coke, in his comment upon this act in 3 Inst. 182. does say this Act is forcibly and vehemently penned for the suppression of all monopolies; and the word 'sole using,' is there said to be so general, as no monopoly can be raised but will be within the reach of this statute.

The word, 'any thing,' shews also the general scope and intent, that nothing should be excluded that was a monopoly; for monopolies, in times past, were ever without law, but never without friends. And if it be so penned for the suppression of all, it ought to have a large and general construction.

Obj. But then let us see whether they are in the saving of this Proviso.

The Proviso excepts charters to Companies or societies of merchants within this realm, erected for the maintenance, enlargement, or ordering of trade or merchandize.

Resp. This Proviso extends not to this charter, or any letters patent that were not at the time of the making of this act; and that is the first thing that I offer, why they are not within the reach of the Proviso. Because this Proviso does not extend to any letters patent after the act of parliament made, but only the letters patent before. For the Proviso says, 'It shall not extend, or be prejudicial to any town corporate,' concerning any charter granted to them, &c. or customs used by them, or to societies erected for the maintenance, enlargement or ordering any trade or merchandize. This does extend to those that were granted or erected at the time of the making of the act; and there are no words of saving, for any that should hereafter be erected. And the word hereafter would as well have been in the clause of saving, as in the enacting clause, if it had been intended. But the following words, concluding this Proviso, shew it farther; for the Proviso goes on, and says, That the same charters, customs, corporations, fellowships and

societies, and their liberties, &c. shall be, and continue of such force and effect, as they were before the making of this act, and no other. This shews, that that which is within the Proviso, was that which was before the making of the act only; and this governs and concludes the whole Proviso. Now that only extending to those that then were, and to leave them as they were, to leave their Charters and Companies, their powers and privileges, in the same state and condition as they were before the act, can never have any reference to what should be after.

The beginning of the Proviso says, this act shall not prejudice them: the conclusion says, they shall be as they were before the act was made; therefore they must have had a being before the act, but no words herein extend to those that then had not a being.

And, my lord, the next Proviso for printing, salt-petre, offices, &c. that is to this, further shews this to be the meaning of this Proviso; for that expressly provides, That this act, or any thing therein contained, shall not extend to any grant or privilege heretofore made, or hereafter to be made, of, for, or concerning printing. If then, the former clause had intended to include any letters patent that were after to be granted, it would have had these words, 'To be granted as well here as in the clause that comes afterwards.'

But, my lord, suppose this not to be a sufficient answer to this Proviso, but that this Proviso shall be construed to extend to companies, charters, privileges, and immunities, granted after this act; yet the plaintiffs are not within this Proviso, nor the saving of it: for it extends only to companies that are for the maintenance, enlargement, or ordering of any trade or merchandize, and to their powers, &c. that they have to that end not two companies, that are erected to have a sole trade by a joint stock, or stock of the corporation, to exclude all others from having any thing to do in that trade. It does, and reasonably may be intended to extend to all companies that are for the maintenance, increase, and well-ordering of trade; as the Turkey company, the Muscovy company, the Russia company, and Hansborough company; and those that I have been speaking of, that trade not as bodies politic, or a joint stock, but every merchant that will, may be thereof a member, and every member thereof trades upon his own private stock and account as a merchant; but not to this company, who, instead of ordering the trade, endeavour to bring the sole trade unto themselves.

Therefore, my lord, these are the companies that are within the exception saved from the penalties of this act; but we must be as silly as the infidels they deal with in these matters not to distinguish betwixt these corporations, and their management and yours; they exclude none from trade, they trade not in a politic capacity, in a sole stock, but every man is a trader upon his own peculiar; but you take upon you in your politic capacity as you

have expressed it in your declaration, 'totum, integrum et solum Commercio et Negotiationem habere, uti et gaudere;' and to exclude not only all strangers, but all your own members, to have any distinct or separate trade upon his own account, except a little to pay and excuse you of charges, and thereby ingross all that vast quantity of merchandizes, the many hundred thousand pounds worth you bring in or carry out. In whom is the property? In the corporation. Who buys and sells all? The corporation. Who are the debtors for the money that buys and provides these merchandizes? The body politic, the corporation, the invisible body. Who shall be sued for all these debts? The body politic; sue them as you can, they will either be too great and too rich to contend with, or else in that condition as you know not how or where to have them.

An invisible body, subsisting only in *intellectu legis*, a body politic without soul or conscience, as the law says it to be.

We have seen them in a year's time, in both these qualifications, so great as scarce any man would contend with them, so invisible at another time, as a dog would scarce find them; this surely cannot be for the maintenance or enlargement of trade, to deal with I know not whom, where no security or person subsists.

It is, indeed, for the maintenance of the Company's trade, to enable some of them to get 10 or 20,000*l.* per annum by it, and to keep this vast trade in a few hands. But sure that is not of the trade the Proviso intends; restraining to the body politic, which is but one person, or many in partnership, is quite contrary to the enlargement of the Proviso mentioned. And therefore to say you are within the saving by this Proviso, a company erected for the maintenance and enlargement of trade, when you restrain all but yourselves to trade, seems to be a contradiction.

And for the following words in the Proviso, 'Or ordering of any trade or merchandize;' if you say you are saved within the extent of these words, then you must make a construction of these words in this sense:

That ordering trade or merchandize, is excluding all others, and taking the whole to ourselves. A most excellent ordering that is!

But the sense of these words in the Proviso is, to save to the corporations and fellowships of arts, trades, occupations and mysteries, and to companies of merchants, the powers and authorities that they had for the maintenance, enlargement, or ordering of trade;

By taking care that commodities were honestly and rightly made, without fraud or deceit, as to the goodness or excellency of the commodity, or deceit in their measures or quantity;

That the servants and younger sort were honestly and industriously educated in their trades and mysteries, by the masters and elder sort;

To place and keep good order and decorum

amongst those of the same mystery and trade;

For assembling and consulting for the common good and management of their respective trades and employments.

This is that which the Proviso excepts and provides for, not for a sole trade in a company, in a joint stock; excluding all others, as this is.

For the same exception is also for the manufactures that are mentioned just before, as new inventions, and the society of any crafter mystery; these also are under the exception, which does still expound them to be meant of that regular, due order and government in companies, for the due regulating of trades and mysteries, that is, by making By-laws to take care that their wares be well and substantially made, that the younger sort be obedient to the elder, and the elder instruct the younger, and not oppress them. These are the laws that they have power (and it is fit they should have) to make for the management and increase of trade. But to have a sole power over trade, and an interest in it by a joint stock, to ingross it into one man's hands, or into the hands of a body politic, which is but as one person in law, and in this manner to trade under the pretence of order or good government; this, under favour, was never meant or intended by this exception in this act. Therefore that which I have before expressed, is the sense and meaning of this Proviso, and not the having the sole trade excluding all others, as here is endeavoured and designed to have.

My lord, in the Taylor of Ipswich's Case, 11 Co. 54, that company of taylor's made a by-law to exclude taylor's from exercising or using their trade within the town of Ipswich, unless they present themselves to the master and wardens of the company, and three of them admit them to be sufficient workmen, and proved they have served seven years at least as apprentices, and then admitted by the master, and wardens, and company; and if any did offend in any part, they should forfeit so much to the company. In this case there seemed to be a good end and meaning to exclude insufficient workmen, and to encourage good ones; a good order one might think. Yet so zealous and careful were the judges then, lest under any pretence they should exclude men from their lawful trades, that they adjudged this a void by-law, as tending in the purview of it, to restrain men of their freedom in using their trades, and introducing oppression of the young tradesmen by the old and rich tradesmen, and to subvert the liberty the law gives. And in that very case it was adjudged, fo. 54. That ordinances for the good order and government of men, of trades and mysteries, are good; but not to restrain any in their lawful mystery. Norris and Stap's Case, Hob. 311, to the same purpose.

Therefore, my lord, this is the sense and meaning of that exception that is in the Statute of Monopolies, That it saves such as were for the ordering of men in their trades and good government, but not to enable a corporation to

have a sole trade, to hinder or exclude others from using it. That is the true sense of the Proviso: but for the other sense that they would have, it is the way to make it the most repugnant and contradictory act that can be: for, my lord, to shew that it is so, give me leave to compare them.

The sense they would have is, that it should save to bodies politic, the having the sole buying, selling, and using any merchandize or trade, as a corporation, that such should be excepted out of this act.

Now let us compare the Proviso with the enacting clause, and taking the Proviso in that sense they would have it, that a body politic may have the sole buying and selling, or using any merchandize or trade, as a corporation; then the enacting part, with the Proviso, will run thus, enacted, That letters patent to any person or body politic, for the sole buying, sole making or using of any thing within this realm, are contrary to law, and void; and no body politic shall be capable of having, using, or exercising of any such letters patent, inhibition or restraint, provided that bodies politic may have the sole buying, selling, and using of any trade or merchandize.

Is there any thing can be put in words and terms more contradictory than this is? and yet this it must be if their sense prevail: So that, my lord, there is not a more repugnant and contradictory thing can be made, than this Proviso to the body of the act, if you take it in the sense they would have it.

Suppose the statute of _____ that enacts, That no man shall use a trade that he has not served an apprenticeship to by the space of seven years, had a Proviso, That a man may use a trade that he had not served an apprenticeship to by the space of seven years; this had been a void repugnant Proviso. This is as plainly repugnant, that no body politic shall be capable of having a sole trade. Repugnant Provisos are in law void.

My lord, If so be a Proviso be repugnant and contradictory, then it will be void; and so are all our books, 1 Co. 46 Plowd. Com. 563. A statute gives the lands of J. S. to the king; and then a Proviso comes to save the right of all persons: this shall be construed, all persons besides J. S. not to destroy the premises.

Therefore when this act says, That all patents granted to a body politic, of the sole buying, selling, and using of any thing within the realm, shall be void; and a Proviso says, That it shall not extend or be prejudicial to any company of merchants erected for the ordering, maintenance, and increase of any trade or merchandize, if construed in their sense, to give the Company sole buying, selling, and using of any thing, is directly contradictory and void; then that cannot be the sense. But taking it in the other, which I apprehend to be the true sense, that order and government is provided for; that is the meaning of the Proviso, and nothing else: and this is the general practice of the societies and companies allowed in all times.

But a sole trade, under the pretence and colour of order and management, never, as I believe, had any judicial allowance: and then you are within the enacting clause of this act of parliament, and are a monopoly; or because, it may be, you do not like that word, you have the sole buying, and sole selling, and sole using of this trade, which is contrary to the express words of this act of parliament, and so your patent and charter is void.

But, my lord, they endeavour to answer this Objection with another sort of answer: they say the Proviso is, That the act shall not extend to companies of merchants erected for government and order of trade, but that their charters, privileges, and immunities, shall be of like force and effect as they were before the making this act; and therefore, say they, patents to companies of merchants for ordering of trade, if good before this act, shall be good still; and therefore, say they, this act cannot hurt us.

My lord, the objection is nice, as I apprehend, but so it is, if I take them right; this, under favour, is but the same thing again in other words; for the conclusion of this Proviso extends no further than the charter mentioned in the beginning of it; it extends but to the same charters (so are the very words) shall be of as good force, &c. Why then what charter or patent is it that shall remain as they were before the act? Why those that are excepted. What are excepted? Those that are for order and management, as I have before shewn; not those that are for a body politic, to use a sole trade, that is repugnant to the enacting clause; therefore these, as I have said, are not excepted, or within the Proviso, and so we come back again where we were. Are you excepted out of the act? If you are, I agree the act hurts you not; if you are not excepted, then you cannot be in the same condition as you were before, or as such charters were before the making the act; for the conclusion and latter part of the Proviso is to be taken in no larger sense than the words that went before in the beginning; nor can extend further than these words extend; so that I say it retorts just back again where it was. If they be excepted, they be not within the act; but then the Proviso will be repugnant, as I have said before, and contradictory; if they are not excepted, they have no benefit by the Proviso.

So, my lord, taking it upon what I have said, I do hope that the words of the act of parliament plainly do extend to bodies politic, and to inhibit the ingrossing sole trade by bodies politic. They say themselves, and it appears they are a body politic, and they have this sole trade; and so the enacting clause extends to them.

Next, I say, the Proviso extends to charters granted before, not to charters to be granted after the act of parliament: and as to those charters that are excepted, it leaves them just as they were before; but if their sense takes place, then it is, as I conceive, with submis-

sion, most palpably contradictory and repugnant to the act; and then it is as lawful at this day to grant to any corporation any sole trade or manufacture, yea, downright to grant them a monopoly, as it is to make any other grant; and so this would be rather a countenance, than an act made against them.

But then, my lord, they come to another thing; this is an infidel country, this is a sole trade with infidels, and such a trade the subjects never had any right to have without the king's licence; and now being so, that differences the cause: and to prove it, they cite Michelborn's case, in 2 Brownl. 296. wherein Mr. Brownlow being prothonotary, recites what my lord Coke said in that case, That no subject might trade into infidel countries without the king's licence; and his reason was, because he might relinquish the catholic faith, and adhere to infidelism: and that he had seen a licence in the time of Ed. III. wherein the king recites the confidence that he had in his subject that he would not decline his religion, and licenced him; and that this did arise upon the recital of a licence made to trade to the East-Indies.

And they do cite Calvin's Case, in Co. 7, Rep. fo. 17, wherein it is said, That infidels are, in law, 'perpetui inimici,' and between them and Christians there is perpetual hostility, there can be no peace; and 12 H. 8, fol. 4, where it is holden, that a Pagan cannot have or maintain any action at all, nor have any thing within this realm; and to prove this, Register 282, and 12 H. 8, fol. 4, are there cited.

My lord, I have the more fully recited what this is, because I hope I shall give very full answers to all: but, my lord, before I do answer those Books; First, Let us see what the consequence of it will be: supposing the law to be as these books say, and as these gentlemen would have it; and the consequence will be, that the plaintiffs cannot maintain their action, but the charters granted to them will be void.

First, Upon the reasons given in these Books; for if the books are of authority, the reasons there given must be of authority (says that book of Brownlow's). The king has the care and preservation of religion, by the law vested and reposed in him, that the subject should not trade with infidels without licence, that they may not renounce their faith; and the king will take care to give licence to traffic, to such only as he can have confidence will never waver from their profession.

Supposing this to be true, then their patent must be nought; for then it is only grantable to persons in whom such confidence may be. My lord, then see how this will stand with their charter. Their corporation and body politic is indefinite, as to persons; and the members changed continually; some sell their stocks, and go out, or die; others buy their stocks, and come in that way to be members of the Company, or as executors to those that

do, and many new members are every year. I doubt they do not much examine, or take care to be satisfied, how fixed those are in their religion they daily take in; and how then can there be confidence in a body politic, which the law says has neither soul nor conscience? What confidence can be reposed in such a person about religion?

Secondly, Besides, it is not only the members of the Company, that at the time of the incorporation were incorporated, and their successors, that are thus privileged; but their sons and apprentices, their factors and servants, have licence by this patent to trade there: and what security can there be, that such may not (by conversing with infidels) change their religion? If this licence be a trust and prerogative in the king, to be given to such persons in whom the king can have confidence, that they will not, by converse with infidels, change or prejudice their religion, &c. this cannot be granted to a body politic and their successors, which may have continuance for ever; and to their sons, factors, apprentices and servants, persons altogether unknown, not born, nor *in rerum natura* when these letters patent were made.

Suppose such a licence to you, to trade with enemies, and supposing that the law has established such a power and prerogative in the king, in the preservation of religion, to license; the king cannot grant this prerogative to you of the East-India Company, that you should have a power to grant licences to whom you will: yet all this is done by your patent; for you have thereby power granted you for your sons, apprentices, factors and servants, which are persons that you yourselves nominate and appoint at your discretions, and undoubtedly very religious, and others that you bring into your Company.

Next, besides this power that you have expressed for those that are your apprentices, &c. which are at your discretion, to make whom you please; there is another express clause, that the Company for any consideration, or benefit to themselves, may grant licence to any servant, stranger or other, to use this trade. So the patent expresses what the meaning was of the word consideration, by adding the words, 'or benefit to themselves;' and that the king, without consent of the Company, will not grant licence to any other to trade there.

Can this then be a good grant? Can the king grant from himself his kingly care, and the trust in him reposed for the care of religion to you, to manage it as you will, and that he will not use it himself without your consent? Surely, you cannot say so. So that supposing by law there is such a trust reposed in the king for preservation of religion, as you would have, to give licence to his subjects to trade with infidels; and that none without his licence can do it: yet this grant to you will be void in itself, and then you have no more right than we, and can maintain no action against us.

But then a little to consider the Authorities

upon which this great matter relies, to prove this religious point or piece of law.

First, That book of Brownlow's is a book that was printed in the late times, and not licensed by any judge or person whatsoever; but truly I have got a copy, and a note of the Roll of the Case there reported; and it is this, Mich. 7 Jac. B. C. Rot. 3107. Michelborn against Bathurst; it is in a prohibition, setting forth, That the king had granted to the plaintiff his commission to go with the ship *Tyger* to the Indies, to spoil and suppress the Infidels, and to take from them what he could; that the plaintiff, in the prohibition, having this commission from the king, did enter into articles with the defendant, to give him a share of what he should get in the adventure: and thereupon there was a suit in the admiralty by the defendant, against the plaintiff, and he comes and moves for a prohibition, suggesting that the articles were made upon the land, and not upon the high sea, and so the court had no jurisdiction. Now upon the debate of this case, it did appear, there was a kind of letters of mart, a commission from the king, in a warlike manner to spoil the infidels, and get what he could from them. But now, how this would come in debate to make a Resolution about the business of trade, I do not know; probably it might be as is there related; but what is in the book is only an occasional saying of my lord Coke's, upon the motion for this prohibition. So that a man that will lay any great stress upon such an authority, must be mighty willing; for it is only an occasional saying, and nothing relating to what was there brought in judgment, which was about a commission to take away goods, perhaps from enemies, by letters of mart, not about trade; and so I hope there is no great matter in that report.

The next case, my lord, is that of *Calvin*, where it is said, that an infidel is '*perpetuus inimicus*,' can maintain no action, or have any thing; and that there is perpetual hostilities between Christians and such, and no peace can be made with them.

My lord, 'tis true, that this is said in *Calvin's* case.* But I must also say, as there was no occasion in the former report for saying of that, no more is there in *Calvin's* case for saying of this; for it made nothing to the matter in question about the *Post-nati*, or were they any wise led to it, in the debate of that case; there was nothing there in judgment that gave occasion for it, so that I cannot think it was much considered of before it was spoken.

The books that are there cited, I have looked upon, to see if they would prove any such thing as they are there cited for, and I think they do it not by any means.

There is first the *Register* 289, and all that I find there is, that in a writ of protection

* See the Case of the *Post-nati*, vol. 2. p. 559, of this Collection.

granted to the prior and brethren of the Hospital of St. John at Jerusalem, and their agents, it is said, That that hospital was founded in defence of holy church, against the enemies of Christ and Christians: but truly how to conclude out of that book this, that infidels should not have any property in trade, or be *perpetui inimici*, with whom no peace can be had, I know not, or that can maintain no action.

Then fo. 12 H. 8. 4, they also cited, that is only this, The original case in an action of trespass for beating his servant, taking away his dog, called a blood-hound: And there it is said, If a lord beat his vellein, or an husband beat his wife, or a man beat one out-lawed, or a traitor, or a Pagan; they shall have no action, because they are not able to sue an action. I must confess, my lord, this comes in very oddly, from a dog to a Pagan, and there is nothing to lead to it in all that case, that I can see; and yet this is all the authority that is cited in Calvin's case, to prove that they can have no action. So that all that a man can make of this is only discourse, and sudden thoughts and opinions, and sayings of counsel; nothing of debate or judgment in the case.

It is true, my lord, the Christian religion and Paganism, are so contrary to one another, that it is impossible they should be reconciled any more than contradictions can be reconciled; but because the religious cannot be reconciled, that therefore there should be a partition-wall between us, as to property and commerce, perhaps is a doctrine as irreligious as can be, and does destroy all means of coming to convince and reduce them to the faith. But now, besides these extrajudicial and occasional sayings in these books cited, which are of little authority, I cannot find any books or cases, much less judgment or authority, for such opinions in so great a point as this is: but on the other side, if a man considers the general cause and practice of trade and commerce, and legal proceedings in all times and ages, one would think my lord Coke could not be in earnest in what he has said in Calvin's case about infidels. Let a man consider what a great part of the world we have commerce with, are infidels, at this day, as the Turks, the Persians, the Moors; and other places in Spain and Portugal were possessed by the Moors, who were infidels, till about 200 years since: for till the year 1474, the Moors had possession of both these countries for the space of near 700 years before, and have we not always had trading with all those? Have we not leagues and treaties with the princes of infidel countries? Do we not receive ambassadors from them, and send ambassadors to them, and ministers residing with them? Have we not, from time to time, and this in all times and ages, and that in Queen Elizabeth's time, in the best and most religious time, for many hundred years? Have we not likewise war and peace with them, in like manner as with Christian kings and countries?

And let a man consider the consequences of

this doctrine. If they are *perpetui inimici*, then we may justify killing of them, as those we are in hostility with, wheresoever we meet them, and justify the taking away what they have from them, as 17 E. 4. fo. 13, 14, it is adjudged, that a man may seize and take to his own use the goods of an alien enemy, wherever he can find them; for it is the price of his adventure to take them, and of his victory over his enemy, if he have taken him. And 2 H. 7. 15, if an infidel be an alien enemy, then any man may take away the goods of an infidel, and have them to his own use; and this would be a good trade, if this be so; any man may kill and beat him, if this be so.

Mr. Solicitor, in his Argument, was pleased to use many ancient rolls and records out of H. 3. and Ed. 4. and about those times, concerning these princes dealing with and handling of the Jews; and I believe he might have cited many more.

Mr. Prynne, in his book which he calls 'The second Part of a short Demurrer to the Jews, discontinued and barred Remitter into England,' printed in the year 1656, has a long treatise, in which I believe an hundred records and histories are cited to this purpose, That the Jews did exact and enrich themselves by usury, to the great impoverishing of the people; and that the princes of those times polled them, taxed them, and took away the estates of the Jews from time to time; and thereby a man might think that these kings used them but as sponges, to make them gripe what they could from others, and then-squeezed it from them into their own treasury: and it must in all probability be so. The story is true, my lord, as he relates it, and in the rolls there are a multitude of them cited to that purpose.

But besides Mr. Prynne, there is a statute of Morton, ch. 5. made 20 H. 3, my lord Coke in the 2d Inst. 89 says, was principally designed against the usurious Jews. The statute de Judaismo, 18 E. 1, relates, that the king's people had been disinherited, much injured and impoverished by the usury of the Jews, and enacts, 'That no Jew thereafter should take usury upon lands, rents, or other things.' And in the 2d Inst. 507. my lord Coke, in his comment upon that statute, says, That 15,060 Jews thereupon went out of the realm.

So that, my lord, we do not dispute but that the fact alledged may be true; that the Jews were extorlive, and the king took away their estates: but the matter is the use and application of that fact.

For, first, I think if it be known law, and taken to be according to any known law which we have, that they were as alien enemies, then as the king might take away their estates so the subjects may take them away too; so there is no such use to be made of it as the other side would have, as I perceive. They say as infidels the king would take away their estates, because they are '*perpetui inimici*'; and I say if they were alien enemies, then the subjects

might take them away too; for so the book says.

But next, my lord, I do use it another way; that all these dealings with Jews shew, that they were not alien enemies, but treated as alien amies, so long as the king pleased. For, my lord, if they were alien enemies, and the books they cite are true, as Calvin's case mentions them, all their contracts and dealings were all absolutely void, they could never have any property. How could they then be guilty of usury? How could any man living be extorted upon by them, to pay any money due to them upon contracts, or bargains, unless these men were treated as alien amies? How could they have the benefit of their contracts as other alien amies have? So that I take it, that is a strong evidence that they were treated as alien amies; otherwise it is impossible that which you say could be true, that they could hurt the king's people by extortion and usurious contracts; when, according to your law, they were not able to make any contracts, or have any property at all: is it possible the king could take away their estates that had none? And they had none, if your doctrine be true. If any man owed them money, they could not recover it, because they could not bring any action; and the king could not have it, because it was a void contract made with one not capable of making a contract. So that, my lord, the instances they make use of, are, I hope, instruments and strong arguments against them, not for them. They were taken notice of as alien amies, capable of making contracts, which the king's subjects were never bound to perform, unless they were legal, and they obliged by them by law. As for these ancient records in general, time had hidden the knowledge of the laws, and transactions of those times. It is not possible to know what the laws and transactions of those times were, or rightly to distinguish between legal and violent acts.

And so being references from thence to conclude in judgment now, is 'notum per ignem;' or like dependencies, which unless latter times have occurred or agreed with, are only fit to make disorder and confusion.

Secondly, But that which is deducible from hence, is not, as I conceive, what has been endeavoured;

That they had no property, because the princes of those times took from them their estates when they pleased, and taxed them how or in what manner they pleased.

But perhaps the reason was, that these people being under the curse, and being a vagrant people, without head, prince, governor or country, it was no difficulty to tax or take from them at pleasure, being hated of the people where they lived.

But, it could not be as they would have it, that they should be amongst us alien enemies, for an alien enemy can neither make bargain nor contract, nor be capable of property;

But the subject may, at will and pleasure, fall upon and take all that he has to his own

use, as upon the king's enemy; and what he can take from him is his own acquisition, as the price of his adventure, and conquest over his enemy.

The Books cited 17 E. 4. 2, and 7. prove this.

But by what is admitted by them, that they were great usurers, and had great estates, it is evident, that they were here treated as alien amies: how could they else in such multitudes live amongst us? How could they be usurers and get estates, if they could not make contracts? How is it possible they could preserve their bodies or estates against the king's subjects, unless they had the king's protection and were treated as alien amies? And of latter times, how many of them have lived amongst us, driven great trades, have had, and have at this time, considerable estates?

Let it now be adjudged, that any man that will, may take away their estates: that they can have no remedy or action for their debts owing to them, but instead thereof may be beaten or imprisoned as enemies to the king;

And we shall probably see, what the success of such a judgment will be.

My lord, that they are taken notice of and handled as other aliens, without any distinction between alien enemy and alien infidel, I would offer this as an argument. The question, I confess, is new, and so there is not much that I can find in our books about it; but the Act of Navigation made in the 12th year of this king, a year before this charter now in judgment before you, concerning trade, shews that infidels have the same liberty of trade as christians; that act being made for increase of shipping and navigation (it is ch. 18.) prohibiting goods to be imported by any foreign ships, except ships of that same country where the goods do grow; and distinguishes not between infidel and christian countries, but expressly says, 'That no currants, nor commodities of the growth, product or manufacture of any of the countries, islands, dominions or territories in the Ottoman or Turkish Empire:' and does enact, 'That no goods shall be imported from that country, but in our ships, or ships of the country, of which the goods are; and those ships to be sailed by a master, and three-fourths of the same country.' This must be an admittance and an allowance, that the masters and mariners of that country have the same freedom and privilege of trade that other foreign aliens have; and shews plainly, that the infidels of the Turkish empire have liberty of trade here.

My lord, the act for Tonnage and Poundage has general rates and impositions set upon the commodities of all infidel countries, without saying, brought in by, or with any manner of distinction. So that I think, that this opinion of a difference between alien infidels and alien christians, was not taken notice of, nor known, nor thought of, till now: For, my lord, if it had, it is unlikely the Act of Navigation should provide and give allowance, for the

masters and mariners of infidel countries to come hither with goods, when by law they could never come in, but were enemies, and to be knocked on the head if they did.

My lord, pray let us consider of late times what a number of Jews have lived among us; should we declare this for law at this day, that the people ought to use them as alien enemies, strip them, plunder them, knock them on the head, kill them and slay them, what would be the consequence! What work would this make! For if this be true, what they assert that they are perpetual enemies, then we can have no peace with them; whoever owes a Jew any thing may play the Jew with him, never pay him; whoever has a mind to any thing he has, may take it away from him; if he has a mind to beat him, and knock him on the head, he may, there is no protection for him, nor peace with him.

My lord, I do believe that it is true, that the Jews being under the curse, and having been a vagrant people for so long a time, and having no prince to defend them, it is probable, they have been made havock of, and our kings and princes have made bold to do with them according to their own pleasures; though what is recorded of it, is so long ago, that it is hard to know the whole truth: But I think they are no precedents to be followed now, unless they had been followed by a succession of practice and authority in our books of law: for otherwise many times a man might argue of old books from dark things to darker, as long as he will, and never make any thing clear. In the case of Southern and How, there was occasion for this to be taken notice of, if this opinion had been true law. It is reported in 2 Cro. fb. 469. A man employed another to sell jewels in Barbary for him, and the other person did sell them as true jewels, when indeed they were counterfeit, and not above 100*l.* value, to the king of Barbary for 800*l.* and thereupon the king finding himself cheated, imprisoned the plaintiff that sold them to him, till he repayed him his money; and he brought an action against the person that employed him to sell them. It would have been of use in this case, if the contract and sale, and the lawfulness of conversing in trade by Christians with infidels had been questionable, for the defendant in that action to have urged against the plaintiff, What reason had he to sue him? For what had he to do to go amongst the king's enemies? and he ought not to recover damages for any such thing. I say it would have been of use, if any such point of law had at that time been thought of.

In that case, it was of all sides admitted, and not so much as objected, that this contract was void, because the king of Barbary was an infidel.

So that this opinion, that infidels are perpetual enemies and in perpetual hostility, can maintain no action, nor have any property amongst us, has no authority for its foundation, but only some extrajudicial sayings, without

debate or consideration; and it is against the continual practices of princes and people at all times.

Perhaps it is no small part of religion, that men should speak, and deal plainly and uprightly one with another.

We know that religion too often has been made a cloak and veil for other ends and purposes. It should not be so, and I hope will not be so used in this case.

My lord, the statutes that I have cited, they have made no manner of distinction between infidels and christians in matter of trade; and it is hardly to be thought, especially as to some of the latter ones, but that there was trade with infidels then: For it is scarce to be thought that our princes should go thither only with swords in their hands, to make war upon them, and afterwards to make peace with them, and no notice be taken of the law about trade concerning infidels.

The statutes I have cited of Magna Charta, cap. 9, E. 3. 25 E. 3. 2 and 11 R. 2. all declare and enact the freedom of trade, in all general words, except only such as are in war with the king: In none of them is there any exception of trade with infidels.

Can it be imagined that in those days we had no trade with Turkey or Barbary? Our kings went with armies to the holy land, and Richard hath made war and peace with the Turks: Had we no trade there but with our swords?

But to look nearer home, Spain and Portugal were infidels, and in the hands of the Moors, in the year 1494, which was 14 E. 4. Can it be thought that in all these times between Magna Charta, H. 3. and E. 4. we had no trade with Spain and Portugal?

Stat. 12 H. 7. cap. 6. was made in the year 1497, which was but 23 years after the Moors were driven out; and in that statute it is recited, that the merchant adventurers, dwelling in divers parts of England, out of London, did shew, 'That whereas they had their free passage, course and recourse, with their goods, wares and merchandizes, in divers coasts and parts beyond the seas, as well into Spain, Portugal, Venice, Dantzic, Lapland, and Friesland, and divers and many other regions and countries, in league and amity with the king; that they were imposed upon by a company of merchants in London, and forced to pay duties.'

I only make use of the recital, to prove the free passage, here mentioned to Spain and Portugal, and to other regions and countries. There is no distinction of infidel countries from Christian countries, though Spain and Portugal had been so lately infidels. It is most probable the trade they had then was with Turkey and Barbary, as well as with Venice: The words "other regions and countries," seem to imply as much, and the freedom equal. So that, I think, as to this objection, That infidels are perpetual enemies, that we can have no peace with them, nor they maintain any action, or have any property by our law; I think the

authority to maintain it none at all. The constant practice, as well by princes as people, is constantly against it.

The charters that they have cited to Barbary and other places, some of them are before the last of these statutes, that is the statute of king James; and yet there is no difference taken notice of there between Christian and Infidel countries; so that, my lord, taking all together the light, or at least the weak authority of these sayings and occasional discourses; for this distinction of infidel or Christian, in point of trade, will signify but little; and the constant practice of all our time, wherein we have any sort of trade; and the arguments drawn from the records that have been cited of the Jews having property and allowance to live amongst us, and our dealings with foreign nations taken notice of in our acts of parliament, without such distinction, seems to be a practice so quite contrary to those sayings, that are perhaps taken out of some zealous catholic authors of those superstitious times, rather than consonant to the rules of law, that they can be no foundation for this distinction; especially considering that Spain and Portugal, as I said, until the middle of Edward 4th's time were possessed by Infidels: and yet I cannot but think they must be traded with, and no man can find any thing of the distinction but only out of these occasional sayings in Calvin's case.

But be that point of trading with or without licence (which I mentioned before) how it will, yet I conceive that point will never be sufficient to ground this same sole trade, or to found a monopoly upon; that cannot warrant a grant of a sole trade, sole buying and sole selling, to be granted to you and your successors, your sons, servants, apprentices, factors, and such as you shall licence for ever: There is a licence and grant in perpetuity, not only to those that then were, but to their sons and successors, and those whom they shall licence; and this into a very great part of the world.

And by the same reason all Turkey and Barbary, a great part of the West-Indies, and other places of the world, may be monopolized; and perhaps all Christian countries.

The statute of monopolies has no allowance or exception for monopolies to infidel countries; that is, against all sole buying, sole selling, or sole using of any thing.

And the Turkey trade was used long before that time, as by charter, granted 23 Eliz. So was the Bourbon trade, as by the charter thereof; and I believe to the East-Indies also.

And the statute of monopolies being so general (the Proviso not reasonably construable to except this Company out of the extent of that statute, unless all patents that may be granted to Companies of monopolies, are by that exception or proviso out of the statute) and deserv'g for the suppressing so great evils as monopolies are, and always have been accounted.

I hope it will not be avoided upon any irregularity.

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inary difference in law, betwixt infidel and Christian countries to monopolize thereby the trade, perhaps of the greater part of the world, as Turkey, Persia, Barbary, East and West-Indies, for the West-Indies, I think, the greater part are Pagans.

My lord, I have looked over the cases that were here, and the Debates that have been printed in 3d and 4th of king Charles 1, about the king's power of imposing rates and subsidies, and impositions upon merchandizes, in Bates's Case in the exchequer, 4 Car. 1. 2 Inst. 63, and Mr. Rushworth's account of the Debates in parliament at that time about that matter: many things are there said concerning the king's power of restraining and prohibiting of trade, and the writ *Ne exeat Regnum*. And from these reasons, they that argued for the king, urge reasonableness of impositions upon merchandize. That case arose from an imposition upon currants, and methinks if there had been known any such distinction, as they would here insinuate, it had beep of great use in that case as well as this; but throughout the arguments and reasons there debated, they did never make any distinction between infidel and christian, but native and foreign commodities; and did endeavour to have a prerogative to impose rates upon them: and the reasons were these, and all the arguments run thus: The king can prohibit and restrain any merchant to go out of the country by writ, *Ne Exeat Regnum*; the king can prohibit any foreign commodities to be imported; then none can go out without licence, nor import without licence, and consequently it is a legal thing, when this licence is granted upon the payment of such a duty or imposition, or under such a rate as can be agreed on between the king and the merchant; and therefore such an imposition or farm is lawful.

These were the arguments in that case, and in these arguments it appears that a restraint in consequence does import a tax, rate or farm, for a dispensation with that restraint.

For if licences be requisite, it is worth consideration, whether that will not introduce the imposing of rates without parliament, or otherwise than in a parliamentary way. This, I say, is worthy consideration. Suppose it true; there have been licences to go into infidel countries to trade; so there have been to go beyond the seas, and have been to other trade besides this: yet it does not follow as a true consequence, that it is unlawful to go or trade without licences; much less does it follow from thence, that such a patent as this to any one or few subjects, or to such a corporation, to have the whole and sole trade into any place, and power of licensing others, can be warranted by it.

I do not question but the king may restrain the passage of merchants and merchandize in some cases, and to embargo ships in some cases.

But these are upon special reasons; as,
1. In the case of war.

2 G

2. In the case of such merchandizes as are necessary for the defence or safety of the kingdom, to restrain their exportation.

3. In case of a plague from particular places to import.

But then these prohibitions are general, and their particular reasons and grounds are apparent.

But if under any pretence any sole trade to some one person, body politic or natural, be granted, excluding all others; that grant, I conceive, is in deceit of the king, and to the prejudice of his subjects, and void.

Never has such a grant hitherto had any judicial allowance; nay, so far from that, that as far as I could observe, no opinion has been till within four or five years, that such grants were good to exclude others, nor any action or suit ever adventured before now, to be brought upon any such ground.

So that, my lord, as to this great point, both the old common law, and the old statute law and the statute of monopolies, with submission are against this grant of the sole trade; and the distinction between infidel countries and christian, is so thin, and upon so weak a bottom, that I hope it will never be strong enough to bear the weight of so great a consequence as this is. For though at present infidels be distinguished from christians; yet from their arguments and kind of reasoning about restraint of going beyond sea and trading, Spain and Portugal may be brought in, and France, too; and so the argument will run from infidel to christian at length, and I know not where it will stop.

So I humbly leave that point to your lordship's judgment, whether such a grant of a sole trade appears to be such a grant, as is good according to law; and whether or no notwithstanding what they have said, it does not appear by the old common law, and the old statute law, and by all our late acts of parliament, to be in law a void grant?

The next thing, my lord, I come unto, is the second point, which I shall be but short in: about the first, I have taken up most of your time, and I beg your lordship's pardon for it; because, if I mistake not, it is a most weighty point in the consequence of it. But then supposing and admitting their grant to be a good grant, whether or no, can you maintain this action? If the law should be so, that the defendant ought not to have traded there without licence, then he may be punishable at the king's suit, by fine and imprisonment; but that you should maintain an action against him, what cause of action, what damage or loss to you, have you laid in your declaration? You say in your declaration, that the defendant Sandys, not being a member of your company, nor a son, factor or servant, nor assign of your company; traded into the East-Indies in the places within the limits of your charter; and has there bought wares, and bargained and sold merchandizes, and imported and sold them in England, against the will of the Company, and

to their prejudice and impoverishment, against the form of their charter, and to the Company's damage 1000*l*.

First, You have not alledged in all your declaration, whether or no he had a licence from the king, and that is nought: for I think though the king is pleased to say in his letters patent, he will not grant licences without leave of the Company, yet he may do so, if he please, notwithstanding that grant.

Secondly, Then you have not shown any loss or damage you have had by his trading thither: did he buy so much of the merchandize of the country, as not to leave there sufficient for you to furnish your ships withal, so that they came home empty? No such thing is alledged. Did he hence export to sell there so much merchandize, as not sufficient left for you here to buy? Or, did he bring home here so much, as that there were not buyers sufficient for his goods and yours also? There are no such things alledged; or is the truth so, as that hereby your imposing your prices upon your commodities, selling at your own prices, and exacting what you thought fit, was hindered; and for this you would maintain an action.

I think it will be the first time, that ever a man recovered damages for being hindered from imposing and exacting his own prices, or having the advantage of his monopoly, or for another's having an earlier or a quicker trade, and under-selling his own commodities and merchandizes lower than the plaintiffs can afford them.

You agree by your own declaration that there are many others that are concerned as well as you: you say, you have the sole trade to yourselves; your factors, your servants and your sons, as soon as they come to twenty-one; all that are of your Company, all that you grant licences to, all that you shall assign your trade to; all those have an interest, if you can maintain an action. Other people have trade there as well as you, can they maintain an action.

A commoner may bring an action upon the case against a stranger, for putting his cattle into the common, provided that the common thereby be impaired, and the commoner have not sufficient common as before, and have a damage, otherwise he can maintain no action.

In Robert Mary's case, 9 Co. 113. it is there resolved, That for every feeding of the beasts of a stranger in a common, the commoner shall not have an assize or action upon the case; but an action does lie, if the feeding be such, that the commoner cannot have common pasture for his own beasts; and then it is the consequence, the loss of his common, that gives him cause of action.

It is not alledged in the declaration, that your trade was any thing the worse. No damage appears to you by it: what reason, that you should recover damages, where you have not sustained any loss? and you have alledged none in your declaration; how can you

declaration be good? it then contains no cause of action.

You should now, if you would have made a declaration, that should have intitled you to a cause of action, have shown how you suffered by Sandys, a stranger trading to the East-Indies; that he bought up all, and you could have nothing; for if he left enough for you, what hurt have you? what reason is there you should recover damage, if you have not sustained any loss? and if you alledge none in your declaration: how is your declaration, that shews no cause of action, maintainable?

In the case of Monopolies 11 Co. 88. b. Rolls Abr. 1st part. fol. 106. The last point in that case is a full authority in this point: that admitting the patent to be good, for the sole making and selling of cards, that was granted to Darcy for 12 years, yet no action would lie in that case, though the defendant did, contrary to this patent, sell cards. Adjudged that it was a monopoly, and patent void: that if the patent had been good, yet no action would have lain against the defendant upon it.

My lord, If that be so as it is declared to be in that case, in the last point resolved by the judges, if that action would not lie there, this will not lie; supposing his charter to be never so good, and the defendant has done contrary to it.

My lord, there is only one other reason for which the action will not lie; and that is grounded upon the letters patent, as they are granted to you. For by the letters patent, it is not absolutely, but *sub modo* granted, that you shall have the sole trade; and that no other person shall trade there, under pain of forfeiting ship and goods; one half to the king, another half to the company. So that, my lord, the words of restraint are not absolute, but only under such a penalty and forfeiture.

Now, my lord, if I should suppose this patent to have all the force and strength that they can desire; supposing that this patent were in an act of parliament, penned in this manner, that did restrain all persons from trading to the East-Indies, except the Company, under pain of forfeiture of ship and goods; under favour, you that will have advantage of this restraint, must take it in that manner as the act does give it; you shall not have any other penalty or punishment, but what the act gives. For when any new law is made, you must take it as it is, and so otherwise, till another new law be made. And so is the rule in 7 Co. 37. 11. Co. 56, and 52, Plowd. Com. 306. It cannot be altered without a new law.

And I would not suppose upon the statute of Edw. 6, that gives the owner of tithes treble damages against him that sets them not forth; a man brings an action upon the case, would that be well? No, he must take the law as it is; such an action never was brought, nor if brought, could be maintained; yet here the damages are given to the party.

The like of all other penal statutes, a man may only forfeit the penalty the statute in-

flicts; so that this action cannot, as I conceive, be maintained. So that, my lord, taking all together, admitting, (though I hope it is not so) that this patent is a good patent; yet you are not the sole persons interested, there are others besides you, your grantees, factors and servants, and sons are to trade there. You have not laid any particular damage; therefore you cannot, by the reason of the case of monopolies, maintain any such action as this.

And if you will take advantage of this grant, it is reasonable you should take it as the grant gives it, proceed for the forfeiture of ship and goods; but for the action of the case, your charter does not give it; nor, if an act of parliament had been penned after this manner, would such an action have lain.

So that to conclude:

First, That that which this Company claims in this case by this patent, to have the sole trade to the East-Indies in their politic capacity, excluding others, is a Monopoly, and ingrossing, against the common law, and the antient statutes, and the Statute of Monopolies, 21 Jacobi, and therefore they have no right to have what they claim.

Secondly, That what the defendant has done in this case, he has lawfully done, and therefore not to be punished.

Thirdly, That though the Company had a lawful claim to the trade in such manner, as in their declaration is set forth, and the defendant done what he ought not, yet they cannot maintain this action.

And upon the whole matter, whether best for the Company to have judgment for them or against them, may deserve their thoughts.

But this being so great in the consequence, as the whole trade of the kingdom depending upon it, I have laboured the more.

The antient laws, the antient ways, is what I endeavour, and against new ways upon any pretence whatsoever.

And therefore, my lord, I humbly beg your judgment for the defendant.

Lord Chief Justice. Do you intend to have another Argument in it, gentlemen?

Solicitor General. What your lordship pleases.

Lord Chief Justice. It is a case of great weight and consequence, perhaps, as ever any case, that has come into Westminster-hall. I must needs say, it has been extraordinary well argued on both sides; and it must be necessarily taken notice of as a point of great consequence, wherein the king's prerogative, and the privileges of the East-India Company, and this joint-trade, are concerned on the one side; and the benefit of particular persons, and the liberty of free, uncontrollable trading is concerned on the other: and it is fit there should be all the consideration, and all the deliberation upon a matter of this great moment, that possibly can be. I cannot be so wonderfully captivated with the differences, that have been made between the charter to the East-India

Company, and those to the Turkey Company and the others; and though I have heard much in the defence of Charters and Corporations, I am of opinion there is no such great matter of commendation due to them: but I take the Common law to be the best law in the world. For that Charter, that you Mr. Pollexfen defended here so strongly after judgment given against it; the corporation became as invisible within a few days, as you say this was, no duns could see it; though there were duns that went to wait upon that corporation, but came away as empty as they went: and I wish the duns were like to be as well satisfied from the one, as they are from the other; and therefore there can be no great matter in that. But there is another thing that very much deserves consideration, it is a question wherein trade is mightily concerned: we know we have a potent neighbour, who has both experience and industry, and are our rival in this trade; I wish we had as much industry, and were as diligent as they; they have found by long experience, that a Joint-stock is the only way to carry on their trade, I mean Holland. And it is very well known, if it had not been for a joint-stock, the trade had never been so beneficial as it is. And Mr. Sandys would not have had such a desire to the trade, for it would not have been so well settled and fixed; and therefore, I take it to be a wonderful thing, and to carry a great consequence in it upon that account, that we should consider how this trade comes to be so great, and so desirable. Now that by the joint-stock, and industry, and expence of the Company, the thing is become facile and valuable; for particular persons to come and sweep away the advantage of it, that ought to be well considered. Mr. Sandys and his partners are very zealous now to reap the fruits of the Company's labours. But suppose this question should be asked, Will you be contented to come in and pay your proportion of all the charge these people have been at, to put the trade into this capacity it is in? But is it fair, after they have reduced it into so good a condition, at a vast expence and trouble, for other particular persons to come and say, Let us have the benefit of it, that have had nothing of the burthen and charge? And then there is another consequence of great concern; peace and war, no one doubts, are actually in the power of that prince and people with whom the trade is. I would desire to know, supposing an injury should be committed by any particular person to the infidels, and the ship get away; will not all the rest of the Company's stock, being of the same nation, be in danger of suffering by it? Certainly it would; and therefore since they are likely to answer for the wrong, is it not fit they should have the management of it? So we may, if we come to argue by consequences, easily find out a great many inconveniencies on both sides; but they are not to over-rule the law one way or the other; they are specious pretences by way of argument, but the law is a certain rule, and

consequences are not one way or other to over-rule it. The main point truly is a point of great consideration and weight; perhaps as considerable as ever any that has come in debate here; and therefore it is fit, that all due deliberation be taken to have it debated.

Mr. Just. *Withins*. Mr. Pollexfen, you seem to argue that the king's grant to them is a void grant, and against common law, as being a monopoly in granting them the sole trade; then that does not come to the point in *Michellbourne's* case, about trading without licence with infidels; and therefore you go upon another ground, than what Mr. Solicitor did.

Mr. *Pollexfen*. I go upon the particular case here before you.

Mr. Just. *Withins*. And you have not given any answer to the Petition of the Commons, cited by Mr. Solicitor.

Mr. *Pollexfen*. Truly, Sir, I think, it does not need any answer; for I go chiefly against this grant, which is against law, and void.

Lord-Chief-Justice. Truly, Mr. Pollexfen, I am not much in love neither with your other point about the action; for what became, pray, of all the actions that have been brought upon that statute of monopolies, by the patentees of new inventions, as there has been multitudes in my lord Hale's time, and at all times?

Mr. *Pollexfen*. In that case, there's nobody but the particular grantee, that has that invention; and he brings the action. But here, of your own shewing, you have intitled others to the trade, as the servants, and factors, and children; and therefore you can never have such an action.

L. C. J. When will you have it argued again?

Mr. *Pollexfen*. We shall be ready for the defendant next term.

L. C. J. That is a little too soon, there is but a very short vacation, and that is but a short term; I think you had best have another argument in Michaelmas-term.

Sol. Gen. Yes, if your lordship please.

Mr. *Pollexfen*. What your lordship pleases; we shall be ready, if your lordship pleases to hear us next term.

L. C. J. I know Mr. Sandys is in very great haste; but the zeal and transport of any particular person must not think to oblige us to go hand over head in a case of this great weight and moment; there is great consideration to be had of the length of time that this Company has continued; there has been an East-India Company in king James's time, in the late king's time, and in this king's time.

Just. *Holloway*. And here is a great trade settled, we must not destroy it presently.

L. C. J. We must not gratify the zeal and transport of Mr. Sandys, by being over-hasty in this matter.

Mr. *Pollexfen*. My lord, we shall be well content to stay till Michaelmas Term.

L. C. J. Ay, I know the counsel will; but whether your client will or no, I cannot well tell, nor do not much care. Well, we will

consider of it, and hear another argument in Michaelmas-Term.

MR. ATTORNEY GENERAL,
(SIR ROBERT SAWYER.)
HIS ARGUMENT.

The Governor and Company of Merchants of London, trading to the East-Indies, Plaintiffs. Thomas Sandys, Defendant.

De termino S. Michaelis, Anno Regni Regis.
36 Car. 2. xxxi. A. D. 1684.

In an action upon the case brought by the Company against the Defendant, for trading into the East-Indies contrary to their grant, in prejudice of their trade, and to their damage of 1,000*l.*

It comes before the court upon the Plaintiffs' demurrer to the defendant's plea of the Statute of 15 E. 3.

The record having been so often opened at large, I shall only put it as a case upon the record.

The king by his letters patent, 3tio Aprilis, 15 Car. 2, reciting that the Company had long been a company, and enjoyed divers liberties and privileges under the charters of queen Elizabeth and king James, grants the Company the sole trade and traffic to the East-Indies, being an Infidel country; with a prohibition to all others of his subjects to trade thither, without the leave and licence of the Company.

The Defendant not qualified as the charter directs, without the leave of the Company, and against their wills, trades to the East-Indies, to the prejudice and damage of the Company's trade.

Upon this case, the points which have been moved and argued, are two.

1. Whether the letters patent giving licence to the Company to trade into the East-Indies, and to exercise the sole trade there, with prohibition to other subjects to trade there, be good in law?

2. Whether admitting the patent good, this action will lie for the Company?

In debating of the first point, I shall not go about to maintain the validity of these letters patent, or any such of like nature, to bind up the king from granting licence to other of his subjects as he shall please; but shall content myself, to shew that all the subjects not licensed by the king, nor authorized by the Company (as the defendant is not) are bound by these letters patent.

Where the question will be between the king's prerogative (and that in one of the highest points thereof, which concerns the defence and protection of his kingdom), and the intercourse with foreign nations, on the one side; and the general liberty of trade, which is a tender point, and merely concerns the interest of his subjects, on the other side.

It therefore being a question of great consequence, and of greater consequence than diffi-

culty, as I hope to shew; I shall, in examining into the point, use the utmost caution, by asserting the king's just prerogative in this matter, and not to depress the subjects true liberty of trade.

The subject matter of this question, only relating to a foreign trade with Infidels, not in amity with the king of England, doth not necessarily oblige me to enter into the consideration of any other trade, or of the king's prerogative, or the subjects liberty in relation thereto.

Which would much shorten my task in supporting these letters patent, and the trouble the court is like to receive thereby.

But because the great force of the arguments, made use of on the other side against these letters patent, have been drawn from principles and precedents of law, which concern as well the inland trade and traffic of this kingdom, as with other Christian nations in amity with the king of England, with whom leagues of commerce have been made by our kings; or to whom a common trade hath been laid open by several particular laws:

It is made necessary for me, from the other side, a little to consider these trades, and how far the subjects liberty or the king's prerogative be concerned in them.

Whereby it will appear, that the arguments and authorities produced by the defendant's counsel, will be of no great force to impeach these letters patent for the management of a foreign trade with Infidels.

I shall therefore briefly consider the inland or native trade within the kingdom, and then the foreign trade with other nations.

The inland trade is either for manufactures or merchandize.

Under the trade of manufactures falls in the husbandman, and all sorts of artificers; who have full right by the common law, to exercise what, and as many trades as they please; so as no annoyance happen to the neighbourhood: and with these the king's prerogative is little concerned, it cannot restrain them, it being their livelihood.

Nor is the public weal otherwise concerned therein, than that all its members should live by their honest labour and industry. As to the trade of merchandize, or inland commerce, every man (generally speaking) might buy of any man, whether native or foreign, and as many kinds or sorts of merchandize as he pleaseth, which I take to have been the common law before 37 Ed. 3, cap. 5, whereby all trading merchants were restrained to one sort of merchandize.

But that act continued not long, being repealed 38 Ed. 3, cap. 2.

Yet this trade of inland merchandize lay under several restrictions at common law. 1. Notwithstanding such general liberty of buying and selling, no man could ingross any one commodity. 2. The ancient common law confined this sort of trade to certain places, as towns, cities, or other public places appointed

by the king, Co. 8 Inst. fo. 196, in the Chap. Forestalling.

It was punishable to buy above the value of twenty-pence elsewhere, or to anticipate merchandizes before they arrived at these places.

3. No assemblies could be held for the traffic of buying or selling, without the king's licence; for though some markets and fairs are held by prescription, (the original grants not appearing) yet these were derived from the crown, by some royal licence before time of memory: they all depend upon the same crown, and may be forfeited to the crown.

This is so frequent in our books, I need not cite the authorities.

And here the prerogative of the crown had a great stroke.

The inland traders, in buying and selling, might buy and sell in private places, and could not be restrained: but they could not hold assemblies for trade without the king's leave and licence; marts, fairs and markets, in their true notion, being no other than royal licences to assemble for trade and traffic.

And these, when granted, cannot be resumed without cause of forfeiture: for I do admit, that a licence to trade or traffic carries an interest with it, being a matter of profit.

And I take the law to be the same, whether the fair or market be erected only, and not granted to any one; and where it is granted to a subject, all the king's subjects have a liberty and right of trafficking there, and cannot be prohibited by the lord of the fair or market.

The reason of these restrictions of the inland trade of merchandize, and the king's prerogative therein, is from the concern the public peace and justice of the kingdom hath in this sort of trade, more than in the former of the manufactures, viz. to prevent all manner of cheats by false weights and measures, corrupt merchandizes, and too great enhancing of the prices, and breaches of the peace, occasioned by public concourses, though under colour of trade and traffic.

And upon this ground the common law provides, That to all such licences for public marts, which the king may grant when and where he pleases, being not to the damage of others before granted, a court of justice is incident of common right, for preservation of the public peace and correction of such deceits which generally attend the trade of merchandizing.

Fourthly, There was another restriction upon the inland merchandize taken notice of in our books, which was more particular, and to certain places, viz.

The claim of foreign bought and foreign sold, by several cities, towns and ports, some by custom, and others by charters; and there is no great question to be made, but before 9 E. 3, c. 1, the charters as well as customs did prevail for that liberty, but both were taken away by the Statute, and divers subsequent laws taken notice of in the case of the city of London, Co. 8, fol. 128.

And between that and 9 H. 4, there were great strugglings in parliament between the foreign merchants and the city of London, and other towns, about that custom.

'Till at length, London prevailed for a private act of parliament for establishing of the customs, which they have enjoyed ever since 9 H. 4, 30.

By an ancient record of Henry 3. it appears that the abbots, and others the religious of the county of Lincoln, under colour of selling their wool, which arose upon their demesne lands, turned merchants, and bought up wools, and sold them with their own wools: they were prohibited to do it by a writ out of the chancery.

And upon the complaint of the merchants of Lincoln, in the time of Edward 1, the like writ of prohibition issued, Pla. Parl. in the Appendix 609. By all which it appears, that the inland traffic of the kingdom, which was within the care and cognizance of the common law, was not unlimited, nor the subjects liberty therein never so large as it is now insisted upon, to all foreign parts whatsoever.

And that the managery of the principal part of the home traffic, which consists in the marts, fairs, and markets of the kingdom, depends upon the king's prerogative, and is managed under it, the law having entrusted the king with that power for the benefit of his people, and the peace of the kingdom.

In the next place, I will take a view of the foreign trade.

The common law, and our law books, take notice of but two sorts of foreigners, alien friends, and alien enemies; Calvin's Case, Co. 7. 17.

Neither can there be any other sort of foreigners generally speaking: for if the question arise whether alien friend or alien enemy, it must be tried by the leagues with the prince, whose subject he is; which is, or ought to be enrolled in Chancery. And though there be not actual war or fighting between the two princes and their subjects, yet they are 'in statu belli,' and may assume arms when they please, and seize the goods and persons of each other's subjects.

I shall first consider what the common law determined as to the subjects trade and traffic with alien friends beyond the seas, and upon what foot trade stands; and then particularly consider how it determines in case of commerce with alien enemies, and incidently of infidels.

I conceive the common-law hath made no express provision, nor given any absolute right for the subjects to trade with any foreigners beyond the seas.

It will be of little use to discourse how far the law of nations interposes in this matter: whether every nation be obliged to entertain trade and commerce with another nation.

And antecedent to all leagues and treaties for commerce, little will be found besides the laws of hospitality, which do not give any demandable right.

Bohusius; in his book de *Repub.* lib. 1. cap. 6, 7. says 'Quis tametsi jure gentium esse videtur prohiberi, tamen sæpe a principibus videtur.'

And in his book de *Repub.* lib. 1. cap. 6. holds, 'That it is lawful to forbid foreigners from entering the borders, not only if a war be on foot, but in time of peace, that the manners of the inhabitants may not be corrupted by converse with strangers.'

And in his book de *Repub.* lib. 1. cap. 6, 7. 'That the laws of commerce are contained in the particular compacts and agreements of people and princes.'

What *Bohusius* declares to be the law of nations, exactly agrees with the laws of this kingdom; for all strangers came thither under safe conducts, which contained both the king's licence and protection of them.

The king might inhibit foreigners from coming into the realm; and might remand them when here.

Magna Charta, cap. 30. which is a general safe-conduct to merchants-strangers, reserves this prerogative to the king, 'nisi publice prohiberi.'

My lord *Coke*, in his comment upon this chapter, 2 *Inst.* 5. 7. admits they might have been prohibited before this statute, but construes the saving of this prohibition by act of parliament.

Which construction, as it is without any former precedent or authority, so it is against the constant stream of precedents and practice ever since.

Rot. Claus. 24 H. 3. dorso, which was after this statute, the king sent his writs to several mayors, commanding that all the merchants, 'ultra montem,' should depart the kingdom within a month.

And in the same roll, dorso, there is another writ to the mayor of London, giving leave to *Roman*, *Florentine* and some other merchants, to stay till the feast of *St. Martin* in the year following.

And the constant practice in every king's reign since, hath been both by proclamation and orders of council, to command foreigners to depart the realm.

Besides, the construction my lord *Coke* puts upon it, makes the clause idle and elusory.

That one act of parliament should provide for a saving by a subsequent act which of itself would be repealed by the former.

So where an act of parliament prohibited foreigners to come in, the king by his safe conducts might licence them.

The Commons in parliament 1 H. 5. pray, That the statute made by *Henry 4.* for avoiding of strangers out of the realm, might be put in execution. The king grants it, saving his prerogative to license whom he pleases. The Commons replied, 'Their intention was no otherwise, nor ever should be by the grace of God.' 1 H. 5. No. 15. *Rolls Prerogative*, 180.

This might further appear by the several statutes made for the inviolable observation of

the king's safe-conducts, which are in express words mentioned to extend to alien enemies, as well as alien friends; 2 H. 5, cap. 6. and 20 H. 6, cap. 1.

It is held in *Horn and Ivy's case*, *FIN.* 21 and 22 *Car. Secundi*, *Banco Regis*, *Syderfin*. That at common law the king might prohibit the importation of foreign commodities, before the statutes therefore made.

So then as the case stood at common law, foreign princes and nations might prohibit the subjects of England to trade with them, as the king might prohibit foreigners to trade here.

The king might inhibit any of his subjects from going beyond sea: and this might have been by particular writ or general proclamation.

Our books and precedents are so full in this point, that it was admitted on the other side; for there could not be produced any authority that renders it the least questionable, but ritual-titudes are for it.

Rot. Claus. 7 Ed. 2, mem. 10. A writ to the sheriff of *York*, to seize the bodies and lands of such as had gone beyond sea, contrary to the king's inhibition.

Rot. Claus. 41 Ed. 3, mem. 24, dorso, writs to all the maritime towns to take care that a proclamation prohibiting all his subjects (except noted merchants, and those unmarried) be put in execution.

Hereby it is evident, that it was penal to go beyond sea, contrary to the king's inhibition, before the statute of 5 R. 2, cap. 2.

All that that statute adds to strengthen the king's inhibition, is only a point of further penalty, viz. A forfeiture of the goods of the passenger, and of the vessel of the master exporting: and though there be three sorts of persons excepted out of that statute, viz. Lords and other great men, true and notable merchants, and the king's soldiers; yet that law gave those persons no other liberty than they had before, only leaves them out of the penalty provided by that statute.

That before this statute, noblemen and other great men might be prohibited, appears by my lord *Coke's* opinion, 3 *Inst.* 179, in the case of fugitives; and the records there mentioned, especially that of the 25th of Ed. 3, *Rot. Claus.* memb. 15, dorso, where the king, by his proclamation, prohibits, that 'Nequis Comes, Baro, Miles religiosus sagittarius aut operarius, extra Regnum se transferret, sub pena Arrestationis, et Incarcerationis.'

And for the king's soldiers, it is plain they could not depart the realm without the king's leave: but his raising of them for his foreign service, was a sufficient licence for them to depart the realm with their several capitains.

And for the true and notable merchants excepted in the statute, they are the same with the noted merchants excepted in the proclamation of 41 E. 3, who were the merchants of the staple, who were admitted and sworn to observe the laws of the staple; and were

bound to repair thither, and not elsewhere, without the king's special licence, as I shall afterwards shew.

By the statute of 27 Ed. 3, which settled the laws of the staple, cap. 23, all merchants, as well aliens as denizens, repairing to the staple, are required to be sworn before the mayor and constable of the staple. After the staple was at Calais, as it was 41 E. 3, and 5 R. 2, the same laws of the staple continued; and these merchants are in many records taken notice of.

37 H. 8, cap. 15. All persons are prohibited to buy wool in Kent, and some other counties, except the merchants of the staple.

And 1 Eliz. cap. 13, provides, It shall be lawful for the merchants, called merchant-adventurers, and merchants of the staple, out of the river of Thames only, and twice in the year at most, to ship out and in foreign bottoms.

Now 41 E. 3, and 5 R. 2, the staple was at Calais, and all the merchants of the staple were bound to repair thither only, and had a general licence so to do, without taking of passports, as the form of the statute of 5 R. 2, directed.

But these notable merchants were restrained to trade to any other place than the staple, as I shall after shew.

As the king may inhibit any of his subjects going beyond sea, so he may at any time recall any of his subjects, under penalty of forfeiture of goods and lands, during life, Dyer 12, 8 parag. 10, and 276, and 375, 3 Inst. 179, in the chapter of fugitives, and 25 and 26 Eliz. Cater's case in the Exchequer Chamber, Leon. fo. 9.

Upon these grounds it is evident, that the common law did not give any absolute right to the subjects to trade beyond sea with foreigners; for no man can have a full right by law to any thing which others have a right by the same law to hinder him of, or to obstruct him in the using or enjoyment of it.

And Mr. Pollexfen did rightly observe, that this fundamental right of the king, of prohibiting his subjects from going beyond sea, equally respects the trade with Christian nations as with infidels; for both have a right to debar the English from trading with them, as the king of England had a right, at common law, to restrain his subjects within the realm from passing over the sea to trade with them.

Which is founded upon the king's right of protecting his kingdom, which could not be discharged if the subjects had such general right as is pretended, of withdrawing their persons and estates as well to infidel as Christian countries.

And if such general right were by the common law, it is marvellous; and that no record or book-case can be found, where it was ever so resolved.

Notwithstanding great occasion has been given in all times, by prohibition, for the subject to have asserted such right;

The only authority produced is the opinion of Fitzherbert in Nat. Brev. fo. 85, where the words of Fitzherbert are, 'That by the course of the common law, every man may go out of the realm for merchandize, or travel, or any other cause, as he pleases, without demanding licence of the king, and shall not be punished for it.'

By this opinion, the liberty the subject had to travel, or to go for any other cause beyond sea, is the same as to trade.

And this opinion imports no more than a bare impunity, that the common law made no express provision against it, so as to punish it as an offence at common law, but left it to the discretion of the king to prohibit, or permit, as he should see cause.

That this was the meaning of Fitzherbert, and that he did not intend any right the common law gave the subjects to go beyond sea, but only that the common law was silent therein, and left it as a thing indifferent, antecedent to the king's inhibition; is evident both by Fitzherbert, in the same place, and the co-temporary opinions of the sages of that time.

For immediately Fitzherbert explains his opinions, that because every subject is bound to defend the king and the realm, the king at his pleasure may command the subject not to go out of the realm without his licence; and if they do contrary thereto, they shall be fined for their disobedience.

Here, by Fitzherbert, that liberty which he had asserted for the subject to trade or travel, as it was equal, so it might be equally restrained by the king at his pleasure.

All the Judges at that time were of the same opinion.

Mich. 1 Eliz. Dyer 165, in an assembly of the judges and others, the question is fully stated, whether a subject generally might withdraw his person out of the kingdom, for merchandize, travel, or other cause, by the sole licence or permission of the common law?

The question is not put upon any right the subject had to go, but upon a bare permission at common law.

For all the judges agreed with Fitzherbert, that the king might prohibit them.

And Fitzherbert's opinion for such permission only is urged; and at that time left with a quere upon it, without any allowance of such permission from the judges, but seemingly to the contrary.

But afterwards Mich. 12 and 13 Eliz. Dyer 296, a particular case of a merchant that went beyond sea to live, and not for merchandize, without the king's licence, came before the judges; and it was debated before the judges of both benches, and the chief baron, upon this point,

Whether it were an offence punishable at common law?

Two of the judges held it to be an offence, and that the common law did prohibit it.

The rest of the judges concurred with Fitz-

libert, and held, that before an express prohibition by the king, by proclamation or writ, it was not an offence of contempt, but left by the common law as a thing indifferent, which imports no right, but a bare impunity.

But all the judges, after a prohibition, held it an offence and contempt punishable at common law; whereby that point is settled by the opinion of Fitzherbert and the judges of that time, that at the common law licence was but a bare permission, importing only impunity, in that the law was silent before an express prohibition of the king, which is the lowest degree of permission taken notice of in books of law.

Grotius, in his book *De Jure Belli et Pacis*, lib. 2. c. 3. No. 9, defines permission, properly so called, 'Permissio autem proprie, non actio est Legis, sed actionis negatio, nisi quatenus aliud ab eo, cui permittitur obligat, ne Impedimentum ponat.'

But this permission of the common law goes not so far as to oblige or debar others from obstructing the action, which may be impeded both by the king and other nations, as I have shewn.

It carries only impunity with it, and this liberty of haunting or visiting strangers in amity, something resembles that liberty which the common law allows one subject towards another, viz. a free passage to his house, to speak or treat with him, which sounds only in excuse of trespass, and may be prohibited by the owner.

9 Ed. 4, fo. 4, par. 15. In trespass for breaking his house, the defendant pleaded a licence from the plaintiff; who replied, that after the licence he prohibited the defendant to come.

For be the licence express from the party, or implied by the law, the owner might determine it by an express prohibition.

But though the common law did not expressly prohibit the going beyond sea without licence, so as to punish it as an offence criminally, yet it did discountenance all going beyond sea without the king's licence, in adjudging their issue born there, after such a departure, aliens, and not inheritable to the English laws; as was resolved inter *Hide & Hill*. *Hillar*. 25 Eliz. B. Rs.

3 Cro. 3. That if Baron and Feme go beyond sea with licence, and tarry there after the time limited by the licence, and have issue born, they shall be aliens, and not inheritable.

Besides those powers or prerogatives where-with the common law entrusts the king for the defence of the realm, viz. to prohibit and remove aliens, to restrain them from going, and to recall his own subjects when gone beyond sea;

The law rests the sole power of making leagues with foreigners in the king alone,

Which is the first step towards a foreign trade,

The common law admitting of no trade with enemies, enemies are made friends only by public leagues to be made capable of being traded with.

And as the making of all leagues, so the modelling and limiting of such leagues are by the king alone.

As it is to be observed, that no leagues were ever yet made for an unlimited and universal trade, but in all leagues the particular, municipal laws of each country are excepted; as for example, salt cannot be imported into France; and most French commodities are restrained from being imported hither:

So it was resolved. Pasch. 36. Eliz. (4 Inst. 5.) 3 Inst. Henry de Vale and Tomlinson, upon a seizure of French goods, and a complaint to the council upon it, That the laws of either kingdom were excepted in the league.

Much less doth the king in any league conclude or build up his own prerogative towards his own subjects, in granting them licences to trade, or in restraining of them from going beyond sea, though in order to trade.

Moreover, the rules of the common law are not adapted to determine matters of foreign trade, neither can foreigners be presumed to have cognizance of the municipal laws of this kingdom.

The principal part of foreign trade is transacted beyond sea, where the common law can have no cognizance, but is confined within the compass of the four seas.

The law was so strict, that an obligation bearing date at a certain place beyond sea, could not be tried in England, 21 E. 4: fol. 74.

Service of a privy seal upon a subject beyond sea, commanding him to return, when certified into Chancery, and sent by *Mittimus* into the Exchequer for seizing of goods and lands, is not traversable, because not triable in England, 2 Eliz. Dyer 176.

In the case of the king and *Cusack*, 17 Jacobi, Rolls rep. 2 part. fol. 112. *Serjeant Davies* argues that the municipal laws of any realm are not sufficient for ordering the affairs and traffic of merchants.

And upon this ground, when the staple was removed from beyond sea to several towns in England, by the statute of 27 E. 3. it is provided, That the trade should be governed by the same laws it was before.

And by 7 Chap. it is enacted, 'That all merchants coming to the staple, shall be ruled by the law-merchant of all things touching the staple, and not by the common law of the land.'

Whereby, in negative words, the common law was excluded from intermeddling in the affairs of merchants; as not proper to decide those controversies, and whereof foreigners could have no cognizance.

By all which it appears, that the common law made no provision for foreign trade.

The common law therefore having given no right to the subjects to trade beyond the seas with foreigners, nor prescribed any rules for the managing of that trade, but left that matter solely to the king, for the best profit of his people:

It may be proper to consider upon what foundations the foreign trade stands.

The foundations are two.

1. Leagues made by the kings of England with foreign princes and states.

2. Royal licences, which are either solely by grant, or by act of parliament.

For all acts of parliament in matters of prerogative, and which move only from the king, are by the king's grants in parliament ratified into law.

By leagues, foreigners are bound by public compact to admit the king's subjects to a freedom to trade with foreigners beyond sea.

I have already spoken of leagues, as the necessary preparatory to all foreign trade, and without which no foreign trade could be enterprized by the subject.

What I shall add, is only concerning the necessary dependance of that trade upon leagues, in its continuance and regulation; if the league be broken, let the subjects right be what it will, to trade either singly by grant, or by act of parliament, it is suspended, and after proclamation made, becomes unlawful and punishable, as trading with enemies.

The leagues and treaties with foreign princes for trade and commerce, whereof the sole power is in the king, to bind the subjects of England.

They are the only laws betwixt nation and nation to direct their trade and commerce by.

And by the said leagues, trade may be limited to certain places and commodities, or other restrictions, as the two princes shall agree upon, who are the only masters of their leagues.

A clear and full instance of this, is in the leagues for trade with Flanders and the low-countries, between the kings of England and the dukes of Burgundy; whereby the staple was settled at Bruges; and that no wools should be sold in Flanders, but what came out of England; and that no English cloth should be sold in Flanders, on pain of forfeiture.

21 E. 3. Complaint was made in parliament by the merchants of several abuses committed by the men of Bruges, in restraining our merchants from selling their wools to whom they pleased at Bruges; and prayed remedy.

The king's answer was that the ordinance of the staple should be viewed, and that Thomas Michelborne with whom the patent touching that ordinance was, be called to bring the same with him, and some of the merchants of the country, who best understood this matter; and the king by advice of his council would provide remedy; Rot. Parl. 21 E. 3. nu. 10.

22 E. 3. Another complaint is made in parliament against the men of Bruges, for prohibiting the merchants to buy staple wares here, and pray redress.

The king answers that he will speak with the Flemish ambassador about it, 22 E. 3. nu. 13. 6 H. 5. A grievous complaint made in par-

liament against the men of Flanders; that though English merchants observed the ancient leagues, that no wools but English should be sold in Flanders, and no English cloth sold there; yet they permitted the wools of Scotland, Catalonia, Arragon and Spain, to be sold there, and pray remedy.

The king answers, that search shall be made for the alliance.

And upon the like complaint, 9 H. 5. the commons pray, the king would please to treat with the duke of Burgundy, that no other than English wools should be manufactured there, or that the English might sell their cloth there.

The king answers, he would treat that the English cloths might be there sold. Rolls Prerogative, 1 fo. 14 title, League.

But this treaty came to little purpose, till after the acts of parliament were made, 27 H. 6. cap. 1. (20 H. 6. cap. 4) 4 E. 4. cap. 5. for excluding all the commodities of Flanders, until the duke of Burgundy recalled his proclamation for banishing cloths out of his dominions.

Those statutes produced a firm league between the kings and the duke of Burgundy; who in the record is called the duke of Haas, or of the Styll-yard, from the merchants his subjects, who had long in England obtained those names,

By that league a free trade for cloth was agreed upon for the English merchants in Flanders to continue for ever; and the king confirmed to the subjects of the duke, as well the liberties granted by Edw. 1. to merchants-strangers in general, by his Charta Mercatoria; as those granted by Edw. 2. to the merchants of the Styll-yard in particular: which league was confirmed in parliament, 13 E. 4. nu. 2.

These leagues may suffice to shew the dependance foreign trade hath upon leagues, as to its continuance and regulation.

By this league the staple at Bruges was taken off, and liberty granted to the English merchants to sell their cloths in any part of the duke's dominions.

Who these English merchants were, I shall in this place only make a short remark; that they were the company of merchant-adventurers, erected and licenced for the better regulation of trade for wool and cloth, beyond the seas, by letters patent, 1 Feb. 8 H. 4. and confirmed by other letters patent, 1 Oct. 1 H. 5. which I shall speak more largely to, when I come to shew the constant possession the crown hath had of licensing corporations for foreign trade, exclusive to others.

The other foundation, upon which all foreign trade stands, are royal licences.

I before shewed that the licence, which the common law gave to trade with foreigners, was no sure foundation of trade; because it might by law be interrupted by the king, and did in its nature import no more than a bare impunity.

But where the king grants licences to his

subjects to trade with foreigners, they gain a right or interest to trade according to such licences;

Which are either by grant only, or by act of parliament. I will first consider those that are singly by the king's grants.

That as the king may at common law prohibit any of his subjects to go beyond sea, so that he may licence them to go for trade or otherwise, is unquestionable.

The writ of *Ne erant Regnum*, and several forms of licences in the Register, fol. 190. and multitudines of other authorities make it out.

The king may grant such licences, not only where himself may prohibit, but where the common law, and acts of parliament do prohibit.

Alien enemies are prohibited by the common law to come within the realm; yet the king may licence them to come by his safe-conduct, as fully appears by the statutes made for the observation of safe-conducts.

And it is observable, that such safe-conducts put the alien enemy into the condition of an alien amy, as fully under the king's protection during the continuance of his safe-conducts.

No subject could seize his goods or injure his person, but he was punishable for it, both at the suit of the king, and of the party.

For before the statutes made, conservators for traces and safe-conducts were appointed, appears by a record of this court, Pasch. 13 E. 3. Banco Regis, Rot. 12. which I shall have occasion to make use of to another purpose.

And that such an alien enemy may bring his personal action for debt, or any injury, appears by the case of John Douglas, a Scotchman, 20 E. 4. fol. 6. Pl. 6. and Moore, 431.

The king may licence his subjects to trade with enemies prohibited by common law.

And for licences to come, go and trade both within and without the realm, against express acts of parliaments, the instances are infinite.

But for the better methodizing of these, I shall make use of precedents and authorities, to make out the exercise of the king's prerogative in all times, as to matters relating to foreign trade.

I shall reduce what I have to offer under these heads;

First, That the staples, which were the public marts, for all merchants to resort to, were at first settled only by the kings of this realm, antecedent to any act of parliament.

Secondly, That after the staple was established at Calais by act of parliament; the king gave licence to trade to other places, which no subject could do without such licence.

Thirdly, That the regulation and managery of foreign trade in all cases, where acts of parliament have not particularly interposed, have been guided and governed by the king's prerogative, both in point of licence and inhibition.

First head: As to settling the staple in the

dominions of foreign princes, as in the instance of Bruges: that must be done by leagues, nor can it otherwise be.

But the appointing of the staples in England, or in the foreign dominions of the king, was at first by the king alone.

This is expressly so declared in the recital of the statute, 2 E. 3. cap. 9, whereby merchants-strangers, &c. have liberty granted them to trade in England, according to the form of the great charter.

By merchants-privy, distinguished from merchants-strangers, in this law, are plainly intended the merchants of the king's foreign dominions.

The Irish, who by *Ordinatio pro Statute Hibernie*, 17 E. 1, had liberty granted them to traffic into England, so as they gave security not to go unto, nor commerce with Scotland, nor other the king's enemies.

And the Gascoigners, and other the king's subjects in France, who had divers liberties of trade granted them by the king; as appears by a difference between them and the Londoners, decided judicially in parliament, 20 E. 1, parl. fol. 180, and 130.

That by merchants-privy is to be understood of the king's foreign subjects, I collect from the reference this law hath to *Magna Charta*, which concerned only foreign merchants; whereby the king's power to restrain them was reserved, and consequently was reserved by this law; as is taken notice of by an act not printed, 8 E. 3, num. 20, that the staple was during the king's pleasure, and the king revoked the staple, giving merchant-strangers liberty to buy any staple-wares, 1 E. 3. Parl. Rot. pars 2 and 3. Mem. 24.

A commission issues to the mayor of London to put in execution the orders made by E. 2. for establishing the staple in several counties of England, and for the rule and government of merchants.

By 27 E. 3. cap. 1, the staple was settled in several towns in England.

But that law had no words to bind the king's prerogative to remove it: and of that opinion was the parliament, 38 E. 3, where the Commons pray that the staple may always continue in England.

The king answers, it shall continue till the next parliament.

The first of March in the same year, the king remised it to Calais; but 43 E. 3. cap. 1. because of a war that broke out with France, it is brought back: the act recites, that it had been removed to Calais by the king, for the profit of the realm and ease of the merchants of England.

47 E. 3. nu. 17. The Commons pray that the staple may be only kept at Calais, and that no grant be made to the contrary.

The king answers, that he will appoint the staple, as by the council he shall think best.

1 R. 2. nu. 98. The Commons pray to know where the staple shall be, if Calais haply be besieged.

The king answers, in such places as were last used.

By the constitution of these staples, merchants were not only licenced, but obliged to repair thither, and restrained to export their staple-wares to any other place.

And although many statutes were made to fortify and strengthen the staple, by creating a forfeiture of all staple-wares, if carried to any other place; yet by the records I have produced, it is manifest that the sole appointment and ordering of the staples was in the king, and that by the acknowledgment of several parliaments.

2 H. 5. cap. 6. provides, that merchandizes of the staple shall not be exported to any other place without the king's licence, before brought to the staple, on pain of forfeiture.

2 H. 6. cap. 4. provides, that all staple-wares shall be carried to Calais, so long as the staple is there.

And 8 H. 6. cap. 17. provides, that if merchants export the merchandizes of the staple to any other place, the merchandizes shall be forfeited; except the merchants of Jeane and Venice. And cap. 27. several licences granted by the king to export to other places are revoked.

What these staple-wares were, is fit to be known, they comprehending the greatest part of the native commodities of this realm, that were merchandizable in foreign parts.

By the statute of the staple, 27 E. 3. the staple-wares are, wools, leather, woollfells and lead; to these are added, by a statute made 50 E. 3. tin, worsted, butter, cheese, feathers, and many other commodities.

This statute, though it be not printed, yet is taken notice of as a statute and a law of the staple, by the statute of 3 H. 6. cap. 4. whereby butter and cheese are recited to have been made staple-wares by this law.

The record is 50 E. 3. nu. 20. (or 200.) where the Commons of the town of Calais pray that the staple may be holden only there:

Which the king grants, that it shall be holden only there, and no where else beyond sea; as well of all ancient staple-wares, as of tin, worsted, butter, cheese, feathers, &c.

The staple was several times removed by R. 2, but from 21 R. 2. it continued at Calais, till that town was taken by the French.

By all which it is manifest, upon what slender grounds the statute of 15 E. 3. cap. 3, that the seas be open to all merchants to pass where they please, was urged and insisted upon to be a law in force, or to have any influence upon this case.

For besides what Mr. Solicitor truly observed, that it was made for a special purpose, to take off the present staple; to which all merchants, as well foreign as English, were confined to carry their goods, and was of the same purport, as the statute of 8 E. 3. nu. 20. I before mentioned, which opened the then present staple.

For by the several laws I have mentioned

for fixing and strengthening of the staples, the statutes of 18 E. 3. was absolutely repealed and set aside.

As to all English, Welsh and Irish, by the statute of 27 E. 3. for settling the staple in England, by chap. 1. whereof all Englishmen, Irishmen, and Welshmen are expressly prohibited to export any staple-wares; and liberty given only to merchants-strangers to do it.

And by 3 Chap. it is made felony for the English, Irish, or Welsh to export.

And when the staple was returned to Calais, it was a forfeiture, as I have shewn, to export those wares to any other place without express licence; for that the *Mare Liberum*, by the statute 15 E. 3. became *Mure Clausum* long since by many subsequent laws, and not to be opened but by a royal licence.

1 H. 5. nu. 40. The Commons pray all merchants may export to any place beyond the seas, or import any goods except goods of the staple.

The king answers, he will advise with his council.

The parliament did not insist upon any right by 15 E. 3, but prayed it as an act of grace, and were modest in their request, that the general licence desired might be restrained to merchandizes, which were not staple commodities, yet it was denied by the king.

17 R. 2, nu. 15. Several towns in the West prayed they might carry their wool into Normandy.

The king answers, let them repair to Calais as is appointed.

18 H. 6. nu. 50. The Commons pray that every merchant may lawfully transport all manner of hides, calves, skins, coney fells and tallow, to what place him liketh, other than to Calais. Which is denied by the king.

By 18 H. 6, cap. 6. Liberty is given to export butter and cheese to any other place besides the staple, in amity with the king, provided the king may restrain the same when it shall please him.

Where was the force of 15 E. 3, if so minute a thing as butter and cheese could not be freely exported without an express statute?

And that it is obtained upon such urgent reasons as are mentioned in the statute, and granted too but conditionally, with a saving of the king's right to restrain.

This may suffice for making out the first head, that the staples to which all merchants are obliged to repair, were principally instituted and appointed by the king alone; and that the statute of 15 E. 3, is wholly repealed by the laws for settling the staples.

Second head; in the next place I shall offer some authority to make out the king's undoubted right to grant liberty of trade to other places, after the staple was fixed at Calais.

My lord Coke in 4 Inst. 282. is much in the right, in affirming the staple was continued at Calais above 200 years, though he be mistaken in another assertion, as I have fully shewed.

That it could not be removed but by act of parliament.

But I will admit the staple at last fixed at Calais, by 21 R. 2, and strengthened and fenced under the penalty of forfeiture the of goods, by the statutes, 2 H. 5, and 8 H. 6.

Yet the kings, by the prerogative, did and might lawfully grant licences to trade to other places.

I will not here trouble you with the general learning of dispensation with penal laws, though our books are full of it, and determine in favour of the crown.

But I shall confine myself to instances of foreign trade, wherein it will appear, by what I have already said, and shall farther offer that the crown had a peculiar prerogative not disputed, or drawn into question in any times till of late.

The men of Berwick and Newcastle have had such licences granted them, which being found detrimental to the king's revenue, arising at the staple, were revoked by act of parliament 8 H. 6, cap. 31.

20 H. 6, cap. 4. Denizens, who shall take licences to export to any place but the staple, shall pay alien duties.

Here the king's right to grant such licences is acknowledged by the parliament; 27 H. 6, cap. 1. upon complaint of the king's officers in parliament, that by the multitude of licences to export elsewhere than the staple, the revenue of the staple was sunk from 68,000*l.* per ann. to 12,000*l.* per ann. all licences before granted are vacated.

In the year-book, 2 R. 2, fol. 12. parl. 16. and 1 H. 7, fol. 3. A licence granted to the town of Waterford, to carry goods of the staple where they pleased, is allowed; the Irish being bound to the staple as well as the English.

1 H. 5, n. 15. which I before mentioned, the Commons allowed of the king's prerogative to license strangers to come into England, tho' prohibited by act of parliament.

Where the statute 15 H. cap. 3. prescribed a form of safe conduct, yet it was resolved the king might grant them, as before at common law: Ed. 4. fol. 33. l. 340. and 13 E. 4, fol. 9.

Where by 1 E. 3, cap. 20. the exportation of all sorts of corn was prohibited, except to Calais and Gascoign.

Several indictments were preferred, 36 Edw. 3, against John Lamb, Andrew Taverner, and several other merchants, for exporting great quantities of corn and grain. They severally pleaded the king's licences, mentioning the quantities, and in some of them the certain places to which the corn was to be carried; but in others generally, 'ad quascunque partes' 'exteras, præter illas quæ de Munia Regis existunt.'

Which are allowed, Treasury, Int. Pl. Coronæ et Totum, 36 E. 3.

Whereas 5 Eliz. prohibited the exportation of sheep-skins.

Hillary, 3 Jac. 1, Shaw brings his action against Hawes upon that Statute.

The defendant pleads a licence, 19th May, 31 Eliz. to Gilbert Lee, his factors, executors, deputies and assignees, to export sheep-skins for ten years, not exceeding 200,000 in any one year; if it happened by any restraint, or any other cause, they should not export that number; and pleads that Lee assigned to, and nominated Scot to execute the letters patent, with the contingent clauses: And,

That Scot assigns to the defendant, without any express mention of the contingent clause, and pleads he was hindered during the term; and justifies for the exportation afterwards.

All the court held, that this was a dispensation the king might grant to Lee, the first patentee.

But judgment was given against Hawes the defendant upon these reasons:

First, Because being a dispensation, it is not assignable.

Secondly, That though Scot might have the benefit thereof, as nominated, yet he could not nominate over.

Thirdly, The advantage of the future contingent is not assignable, Hillar. 3, et Pasch. 4 Jac. Banco Regis, Ro. 128. Hale's Common Place, tit. Monop. cu. 3.

Third Head; In the last place I shall shew, that the regulation and managery of the foreign trade, in all cases where acts of parliament had not particularly interposed, hath been guided and governed by the prerogative of the crown, both in point of licence and prohibition.

That the foreign trade was at first transacted and carried on by foreigners, is most evident from Magna Charta, which, as to this trade, provides only for foreign merchants.

And if any English had at that time exercised such craft, or had had the least pretence thereto; no doubt can be, but the Great Charter of their liberties would have made some provision for them, as well as foreigners; which it doth not.

The Statute of Acton Burnell, 13 E. 1, introduced the Statute-Merchant for the benefit of merchant-strangers, for the more speedy recovery of their debts.

For the only mischief the Statute takes notice of, was, that the merchants withdrew themselves from coming into the realm with their merchandize, because there was no speedy law provided for recovery of their debts.

I have not met with any footsteps of any record to make it out, that in the reigns of E. 1, or E. 2, or before, any English merchants ever enterprized the foreign trade.

But in those kings' reigns, the foreign trade was managed by the king's charters to foreigners; for though Magna Charta gave a general safe-conduct to merchant-strangers, yet the king might prohibit them, and after such prohibition might license, as I have shewn he did.

And therefore the foreign merchants had a recourse to the king's charters, viz. Charta Mercatoria, by E. 1, and the charter to the

merchants of the Hans, or the Still-yard, which I have mentioned.

And 6 E. 2, the Gascoigners founded themselves in their difference with the city of London, 20 E. 1, upon their privileges granted them by the kings of England.

Indeed the men of Guernsey, 32 H. 3, obtained a licence from the king to them and their heirs, freely to fish and to sell their fish in any of the king's dominions thrice in the week, between the feasts of Michaelmas and Easter; Par. Roll. 32 H. 3. mem.

The earliest attempt towards a foreign trade, I find enterprized by the English, is the fishing trade upon the seas, 11 E. 3.

At which time the king granted licences to the men of Yarmouth, Scarborough, Whitby and Dunwich, to them and others repairing to those towns to fish, to fish in the sea with vessels of thirty tuns, 'Quibuscunque inhibition' seu Mandatis, MS. in contrarium factis non obstantibus; Rol. Clauso, 11 E. 3, pars secunda, Membr. 35.

Though these licences were intended only to extend to the narrow seas, whereof the dominion was in the king;

Yet by colour of these licences, the English, about the latter end of H. 4's reign, made fishing voyages to Iceland.

Whereupon H. 5, at the instance of the subjects of the king of Denmark, prohibited the English to fish there.

And thereupon the parliament, 3 H. 5, prayed that it might be enacted, that the English might freely fish there.

Which was denied by the king, 3 H. 5, nu. 33. Rolls Prerog. 170, whereby it is evident, they had no right to do it; but that the king might prohibit them, it being a foreign traffic, wherein no act of parliament had made any provision.

Afterwards the same king, in the 5th year of his reign, granted licences to Geoffrey Pamping and John Hastings, of Yarmouth; John Statvill and Richard Pais, of Winterton; William James and William Marriot, of Cornwall; to go *versus Partes externas* to take fish. And,

That every one of them might employ two ships called doggers, to take fish and bring it into England by themselves, attornies or servants. Par. Rot. 5 H. 5. membr. 34.

E. 1. before any Statute made therefore by proclamation, prohibited the exportation of horses, arms, money, gold and silver vessels. Some men of Dartmouth were proceeded against by information in the King's-Bench, for exporting money contrary to the proclamation: Hill. 1 Eliz. 2, Rot. 38, amongst the records in the treasury.

The crime in the information is said to be 'contra pacem Domini Regis, Contemptum et Inobedientiam Coronae suae pl. iudicium et Pacis, sive perturbationem manifestam.'

To which, those of the defendants that were taken, pleaded not guilty, of whom one afterwards died, and another was employed by the

king into Scotland. So the record ends with a continuance of the issue.

Rot. Clauso, 41 E. 3, membr. 25. A writ issued to the mayor of Hull, that he permit no alien ship to be freighted there, till the ships of the town were freighted.

It is evident upon what I produced under the other head from the Records of Parliament, 1 H. 5, nu. 41, and 18 H. 6, nu. 50, that the English merchants had not then any right or general liberty to export to what places they pleased any sort of merchandizes, though not staple-wares.

But such petitions were denied in both these kings reigns; yet at that time there was a company of merchants-adventurers licensed to trade into Holland, Zealand, Brabant, Flanders, and other parts beyond the seas, erected for the rule and government of all English merchants trading into those parts; and all who should trade there, enjoined to be obedient to the rules of the Company.

But it was not objected to those kings, that some were licensed, and others, unless they would be subject to the rules of the Company, were restrained.

The Company was erected by letters patent, 5 Feb. 8 Hen. 4, and confirmed by H. 5, 1 Oct. 1 H. 5, and confirmed by H. 6, July, 8 H. 6.

That the merchant-adventurers enjoyed their privileges, and permitted none to trade within their limits, who submitted not to the rule of the company, and who should not be contributors to their public charges, is evident from the Stat. 12 H. 7, cap. 6, insisted on by Mr. Pollexfen; but was made use of by him, only for the historical part of it contained in the petition presented by the merchants to the parliament for their liberty of trade; which by what I have already shewed, could not be true as to the staple wares, unless they have licences from the king (which in all probability they had) to certain places.

And what is it they pretend to in their petition? Only freedom to repair to, and trade at the four general marts, which being annually held and proclaimed, was an invitation to all neighbouring nations to repair thither; and all English merchants, as well as others, if they had lain under no restraint from the Company's charter, or other prohibition of the king, might have repaired thither with their cloth or other wares, not being staple wares, without offence, as I before admitted.

In case there had been such a right to a free trade to all nations in amity, as the petition suggests (for as yet the merchants retain some modesty, not to pretend to a free trade with aliens, not in amity, much less with infidels, whom the laws of all Christian countries adjudge alien enemies):

This had been the proper time for the parliament to have asserted that right, and adjudged the patent illegal, as parliaments have frequently done with patents which have been against law: but the parliament knew no such

right, and therefore by the enacting clause, allowance is given to the charter; only their immoderate demands of admittance-fines are restrained, and the fine limited to 10 marks. And accordingly in their charter afterwards renewed by H. 7, they are obliged to take no more of any person admitted into their company than 10 marks.

Ph. and Mary. 26 Feb. 1 and 2 P. and M. erected a corporation of merchant adventurers to Russia, and parts adjacent, with licence to trade: and prohibition to others, upon pain of forfeiture of ship and goods.

That this forfeiture might be effected, the charter is confirmed by parliament, 8 Eliz.

This act takes notice, that several persons, after the trade was found beneficial at the cost of the company, for their peculiar gain, utterly to decay the trade of the company, contrary to the tenor of the letters patent, in great disorder traded into those parts, to the great detriment of the commonwealth.

Here is a full description (*mutato nomine*) of the defendant and his interloping companions.

By the judgment of the parliament then, a limited trade, under the order and rule of a company, as settled by the crown, was thought most beneficial to the king.

And those that traded contrary to the tenor of the letters patent, are reckoned disorderly traders, in prejudice of the commonwealth.

So far was the parliament from thinking all the subjects had a right to trade there.

After the taking of Calais, in the latter end of Q. Mary's reign, Q. Elizabeth and the English merchants were no doubt in great straits what to do.

For by the stat. 2 H. 6, all merchandizes of the staple were to be carried to Calais, while the staple was there, which ceased by the taking of Calais.

But by 2 H. 5, no merchandizes of the staple could be exported without the king's licence, till brought to the staple.

The queen had no place convenient left for erecting the staple at, beyond the seas. And though in R. 2's time, when the parliament demanded where the staple should be, if Calais were besieged? The king's answer was ready (*viz.*) 'At such places in England it was last at.'

Yet now when Calais was taken, such answer would not serve the turn; but the placing of it in England would be useless and ineffectual, and destructive to the queen's revenues in her customs.

For by several laws made by E. 4, R. 3, and H. 7, most foreign manufactures were prohibited, and great discouragements put upon all foreign merchants coming into England, but those of the Hans and Stylyard.

And few foreign merchants would repair into England to fetch our commodities, when they can bring little to barter with but ready money.

And to have granted to every merchant a several licence, as it would be chargeable to the subject, so it might prove mischievous to

the kingdom, the subjects trading severally, without any rule or government, in foreign parts, upon the account of the general law of reprisals, which obtains in all nations.

Whereby every subject and his goods are liable for the injuries and wrongs committed by any one; which, in the more barbarous countries, is executed with great barbarity.

And therefore Q. Elizabeth in the direction of foreign trade, instead of staples, for the rule, order and government of merchants, at certain places, followed the precedents of the merchants-adventurers and Russia companies, by erecting corporations of merchants for the rule and government of the foreign trade.

Which companies, as they are presumed to have a better state to answer for injuries done in foreign parts, than any single person can be presumed to have:

So in their very constitution are more responsible to the law for their misdemeanor, by Quo Warrantos, whereby they may lose their liberty of trade.

It is very doubtful whether licences granted for trade to single persons, may be forfeited, they passing an interest, if the licence to go beyond sea, to trade or otherwise, be for a certain time, as most licences were. It is held by the judges, 2 Eliz. Dyer, 176, in the case of Mr. Barnes and the duchess of Somerset, that the licence is not revocable.

The queen, in her reign, erected many corporations for foreign trade: I shall mention only some, which have been publicly taken notice of, and received allowance.

17 June, 2 Eliz. The queen, by letters patent, incorporated several merchants of Exeter, and gave them licence to trade into France; and that no artificer should be admitted of the companies.

The prohibition was not general to her other subjects, but only to the men of Exeter.

The company enjoyed their liberties all the queen's reign, and flourished under them till 3 Jac.

When by act of parliament the trade was opened, and general licences given to trade with France, Spain and Portugal, and the dominions thereof.

Whereupon a question arose, whether their charter was not set aside by the general words of 3 Jac. and therefore 4 Jac. cap. 9, it is enacted, and declared, 'That the said general act doth not nor shall dissolve, annihilate, or impeach the said charter, or the said company in any of their privileges, liberties or immunities, granted to them by the said charter; any thing in the said general act to the contrary notwithstanding.'

This act added no new force to the charter, but enacted and declared it to be out of the provision of 3 Jac. for general licence to trade into those countries.

Where, by the judgment of the parliament, the queen's power to grant such charters is admitted. For if the patent had been void in law, before 3 Jac. to make an act of parliament

only to declare it out of the provision of that law, were idle and illusory.

The queen's subjects, for their licence to fish at Iceland, paid the queen a quantity of fish, called composition-fish; by the act of parliament made 5 Eliz. cap. 5.

Whereby, for the encouragement of the fishing trade, the purveyors are prohibited to take purveyance of sea-fish; the composition-fish, payable by the queen's subjects travelling to Iceland, are excepted.

The patent of the Greenland company to fish there, was held good, Rolls, 1 pt. fo. 5, in the case of the taylors of Ipswich.

This trade, notwithstanding the privileges granted to the company, was almost lost.

And thereupon 25 Car. 2, cap. 7, that trade is opened, not only to the English, but to all foreigners residing in England.

The East-India Company was erected by queen Elizabeth, 31 Dec. 43 Eliz. and renewed to them and successors, 13 May, 7 Jac. with prohibition to all others to trade there, and confirmed to them by this king, 3 Apr. 13 Car. 2, upon which patent the question ariseth about a foreign trade, which hath been enjoyed by the company above 80 years.

And its consequence concerned the prerogative of the crown, in all the charters for foreign trade which have been granted.

Whereas I have shewn, the most considerable part of the foreign trade hath in all times been managed under grants from the crown, in appointing the staples for merchants to repair to, in licencing trade to other places, notwithstanding those staples; and in licencing and prohibiting foreign trade in such cases where acts of parliament had not made special provision.

I now proceed to consider of royal licences by act of parliament.

It will be infinite to take notice of the several statutes made relating to foreign trade.

And therefore I shall at this time offer some general observations upon them.

Observ. 1. Upon examining into the antient laws for foreign trade, it will be found that there are far more laws for restraining the exercise of foreign trade, by Englishmen, than there are for opening of it.

So much, that for a long time whilst the staple was in England, they were prohibited, under severe penalties, not to export any staple ware; and when the staple was removed beyond sea, they were confined to Calais, and such liberty of trade to other places as the kings from time to time had granted to corporations; and single persons were frequently taken off, though the king's prerogative to grant them was never yet impeached by any statute.

The great discouragement to them by foreigners first began in the reigns of Ed. 4. R. 3. and H. 7. But in those kings reigns, the English were strictly held to the staple, unless licenced by the kings.

This observation is made out of the several

laws I have touched upon, and many others, which are in the statutes at large that are printed.

Observ. 2. There was never yet any statute made, that gave a general liberty of trade to Englishmen to or with all nations; but what were made, were special and particular.

The only law that had any resemblance to any such purpose, was 15 Ed. 3. so much insisted on, which has been sufficiently already shewn to import no such thing; and the several attempts in parliament to have introduced a greater liberty of trade with foreign nations in amity, and the particular laws that have been made for licensing some trades, do fully argue that the law was never understood to intend any such matter, as a general licence to trade every where.

Observ. 3. The several special statutes that have been made for liberty of foreign trade to particular countries, or for particular commodities, are introductive of a new law, and not declaratory; and do plainly argue the king's right before to prohibit some of them in express terms, others by necessary implication.

I shall instance in some of them, the Stat. 17 Ed. 1. *Ordinatio pro Statu, &c. Hibernie*, opens the trade from Ireland to England and Wales, for the Irish commodities.

Whereby all merchants have liberty granted them to import their merchandize into England, but so that they give good security, that they shall not go unto, nor commerce with our enemies of Scotland, nor others of our enemies.

This law restrained the subject of no liberty he had before; and therefore, if the merchant had before such general liberty or right to import those commodities, his right of trading would have excused his giving any security; which is not imposed by law, otherwise than as a precedent condition to a right conferred by the statute.

This law opened the trade from Ireland to England; as well to foreigners as Englishmen; but it is extended only to Irish commodities: for the exporting of English commodities into Ireland, continued to be managed under the king's licences till Edward 3.

And if any did to the contrary, he was subject to fine and ransom for his contempt, as appeared by 34 Ed. 3. cap. 17. whereby the trade is opened for English and other commodities into Ireland.

By that law it is accorded, That all merchants, as well aliens as denizens, may come into Ireland with their merchandize, and from thence freely to return without fine or ransom.

This law extended not to the English merchants, but only to the aliens and denizens.

In the next chapter, cap. 13. the English are provided for, who had not so large a liberty granted them as the aliens and denizens had. The 18 chap. provides, That the people of England who have heritage and possessions in Ireland, may bring their corn, beasts, and victuals, to the said land of Ireland, and from thence to re-carry their goods and merchandize

does into England freely, without impeachment.

The liberty of exporting into Ireland, granted to the English, is restrained both to such English who had lands in Ireland, as also in the sorts of the commodities, viz. corn, beasts, and victuals only.

But the liberty to export from Ireland is larger, extending to all commodities, according to the latitude of *Ordinatio Hiberniæ*, which took in all Irish commodities.

38 E. 3. cap. 11. The king wills of his grace and sufferance, 'That all merchants, denizens, that be not artificers, shall pass into Gascoign to fetch wines; and that the Gascoigners, and other aliens, may import; always saved to the king, that it may be lawful to him, whensoever it is advised by his council, to ordain of this article, as best shall seem to him for the profit of him and his commons.'

This is expressed to be an act of grace, and contains a saving of the king's ancient prerogative, 18 H. 6. cap. 8. which I before mentioned: for liberty of exportation of butter and cheese, expressly saves the king's right, provided the king may restrain the same when it shall please him.

To pass by many ancient statutes of like nature, the act of tonnage and poundage, 12 C. 2. which gives liberty of exporting divers commodities, which the kings of England might in all times prohibit, as to gunpowder, arms and ammunition, expressly saves the king's right, to prohibit by proclamation.

3 J. cap. 6. which is the largest licence for foreign trade that was ever given to any Englishmen in parliament, by opening of the trade to Spain, Portugal, and France, and the dominions thereof, fully proves the king's prerogative in this matter, both in the title and body of the act.

The title of the act is, 'An Act to enable all his majesty's loving subjects of England and Wales, to trade freely into the dominions of Spain, Portugal, and France.' A very improper title, if so be the king's subjects were before enabled to do it, and had a right to do it by the common law, as is pretended; and would not be restrained from it by the king. And no doubt can be made, if such right had been, but the parliament would have seen it, being very inquisitive at this time into all the subjects rights, and very jealous lest any of the ancient rights of Englishmen should be invaded by K. James coming from another nation, and would not have complimented the king with the title of an enabling law.

The reasons from the body of the act are strong; and the reasons offered for such general liberty are only politic, none drawn from the right or any ancient usage the English could pretend to.

The act in its recital admits, 'That by the letters patent for incorporating the Company to trade into Spain and Portugal, his majesty's other subjects were disabled and de-

barred from the free enlargement of common traffic into those dominions.'

Which were not true, if the other subjects had before a right to trade there, but the patent would have been void against them.

3. There are no declarative words of any former right; but only of enacting, and provisional for a future liberty, viz. 'That it shall, and may be lawful from henceforth.'

4. The act, in express words, provides only against the mischief and inconveniences which may grow or redound upon the patent, and to redress any injury done by the patent.

5. The liberty granted, is restrained to be in such sort, and in as free a manner, as was at any time accustomed since the beginning of the king's reign, and before the late charter of incorporation.

Whereby it appears, that the usage to trade freely into these countries without licences, was but from the entrance of king James;

The statute referring to no other free usage: And therefore this act did not over-reach any charter granted by queen Elizabeth, as was afterwards declared in the next parliaments, 4 J. cap. 9. in the case of the charter to the merchants of Exeter, for the French trade granted 2 Eliz. which I before mentioned.

Observ. 4. That all acts of parliament which grant licence of trade, do suppose the other foundation of foreign trade to have continuance, viz. according to leagues with foreign princes.

For no act of parliament ever gave licence to trade with aliens, not in amity; and if the leave be determined, the liberty is suspended, though granted by parliament till the leave be renewed.

Observ. 5. The last thing I shall observe upon the laws that give licence of trade, is, that where liberty of trade is given by act of parliament, without any reservation to the king of his ancient right, the king in such case hath so bound up himself, that he cannot generally prohibit or restrain that trade wherein he hath granted his subjects an interest by a law.

For a general prohibition or restraint would amount to a repeal of a law, which the king cannot do without an act of parliament.

The law will be the same here as in the cases where acts of parliament do generally prohibit, where general licences would be void, because they tend to repeal a law.

Upon this ground the licence in Darcy's case, for that part which concerned the importation of foreign cards, was judged void in law, because too general, not limited to any certainty.

But the king may in particular, and certainly, dispense and licence against prohibiting statutes.

And so he may in particular restrain the persons of his subjects from going beyond the seas, notwithstanding any of the laws which give licence of trade:

But cannot grant a restraint of prohibition generally, where acts of parliament have given

a general license, unless it be in special cases; and for a time, where the interest of the public requires it; as of the plague, and furnishing out of the king's navies, in time of war with any prince. And therefore I shall admit, that if any public law can be produced, which gives liberty of trade for all the king's subjects, to the judges, that this patent will be void, as a restraint of that liberty against law.

Upon this ground the Canary Patent was held void, because against the express liberty granted by 3 Jac. and therein saved; or of the common law monopoly, by restraining the right of others against an express law, for the benefit of a few.

Upon the same reason, the grant of Philip and Mary, that all sweet wines should be landed at Southampton, was against several express statutes, and the rights of several free ports, before granted by the crown to the city of London, and others, as 27 Ed. 3. cap. 6. whereby merchants-strangers had liberty granted to bring their wines to what port they pleased; and 43 Ed. 3. whereby the English, Irish, and Welsh, had liberty granted to fetch their wines and bring them to any parts of England, Ireland, and Wales.

And therefore was repealed in parliament of 5 Eliz. Rolls 2. Rep. 112. whereby it appears, that the parliament in the queen's time, were vigilant enough to take notice of patents against law.

The like in the case of John Peachy, for the sole selling of sweet wines by retail 50 Ed. 3. the parliament set it aside, as against law: Upon that grant an inhibition under the Great Seal issued, prohibiting all the citizens of London to sell sweet wines in London. The inhibition was revoked, 50 Ed. 3. No. 15, and Peachy punished for extortion, by colour of the grant, 50 Ed. 3. N. 33.

This grant was not only against many express statutes, some whereof have been cited in the arguments in this case, which gave the merchant-importers liberty to sell their wines and merchandize to whom they pleased; and many express grants to the citizens of London, some whereof were confirmed in parliament; but was against the rules of the common law, being a restraint and monopoly of an inland trade, as selling of wines in London and other parts of England, undoubtedly then was.

For when foreign merchandizes are brought hither to trade or traffic with, they fall under the rules and government of the common law, and the retailing of them here becomes an inland trade.

In Lambard, 43 Ed. 3. lib. ass. fol. 276. Pl. 38 it was ruled, That when foreign merchandizes are brought in, a conspiracy to enhance their prices is punishable.

At common law in like manner, as a design by false rumours, or otherwise to debase the prices of our inland commodities.

The reasons of these cases, which were the principal pillars to support the arguments of the other side, prove nothing to our case,

till they can produce some clearer statute than 15 Ed. 3. for giving liberty of trade to the East-Indies.

Having considered of foreign trade with aliens in amity, and how it hath been managed in all times, I proceed in the last place to consider what the law determines of trade and commerce with alien enemies, and consequently with infidels. Here the consideration is far different from what it was in the former; in that, the common law was silent, until an express prohibition by the king.

But here the common law is a prohibition of itself, and is at open war with alien enemies.

Whether the commerce with alien enemies without licence, be within the extent of aiding and comforting the king's enemies beyond the seas, within 25 Ed. 3, I shall not at this time argue. But it may be worth while for the interlopers who traffic into foreign nations, not in amity with the king of England, without licence, well to consider that point; but before the statute at common law, it was criminal.

Pasc. 13 Ed. 2. Rot. 13. B. Rs. in the treasury, In an information against three persons for trading into Scotland, then in enmity with the king of England; the defendants pleaded a licence from *Custodes Trengie*, in the marches of Scotland; which was held nought, none could licence but the king: thereupon they obtained and pleaded the king's pardon. Rolls Prerogative, tit. Gaver reffo. 173. Pl. 3.

I need not labour to clear a point which was not opposed by the defendant's counsel, but their endeavour was to exempt infidels from being enemies; wherein they have a difficult task, in rowing against the stream of the laws of all christian countries.

In the great instance of the Jews, who have been expelled, and their estates seized, as of enemies almost in every christian country;

They call for authorities, but offer none themselves; not so much as the opinion of any one learned man, to give countenance to the least amity between the English laws and infidels. I will not distrust the memory of the court to repeat the authorities which have been produced to assert the enmity between infidels and the laws of this realm; which are more than sufficient, after such solemn proceedings against the Jews in Edward the 1st's reign.

All which have received a very short answer, That these records are obscure.

That time hath hid the law from us, so that we cannot distinguish whether they were acts of law, or acts of violence.

And that the reason why princes were induced to use them so, might be, is because they are under no government to vindicate them.

But why the records should be so darkened, and the proceedings, in so eminent a case as that of the Jews, so obscure, since Edward I. more than the common law, in the division of the right and properties of others, I could not hear any good reason given.

For I take it, the principles of law upon

which the Jews were proceeded against, are as clearly laid down in our law books, as any point of law we have.

For the case of the Jews stood thus: they came over as merchant-strangers, of several countries in amity, both by special licences of several kings, and under the general safe-conduct of Magna Charta whereby they were under the king's protection, and enabled to contract and sue, as any other merchant-strangers under safe-conduct; which the king might grant, as I have shewn, to an alien enemy. While here, many of them were indenzed, others born here, and had great possession of lands, as well as leases and personal estates.

Then they are banished by proclamation, as well those that were never indenzed upon the account of their religion; as infidels and enemies to the christian religion.

To whom then will their lands, leases for years, credits, and such personal estates as they had not liberty to carry out, belong?

The law adjudged it all to the king. And the controversies that arose about their estates, did not fall out between the king and the defenceless Jews, (as the defendants counsel terms them) for they were gone; but the king and several doctors of the Jews, who well knew the law, and were able to defend their right.

To the dark records (as they were stiled) I will add a case solemnly adjudged between the king and a potent subject, the archbishop of York, 21 Edw. 1. where the case was;

The prior of Pidlington was indebted to a Jew in 300*l.* After the banishment of the Jews, the Jew met with the archbishop in France, and prevailed with him to help him to the money; that archbishop persuaded the prior, that he was bound in conscience to pay the money to the Jew's attorney; who did it accordingly.

And all this was after a proclamation issued for discovery of the Jew's debts.

For this concealment and trespass, the archbishop was sued by the king, before the council in parliament, and laid it to his damage of 1000*l.* To which the archbishop appeared and pleaded, and to avoid a trial by a country jury, as the record mentions, he was put upon his allegiance to tell the truth.

Whereupon he confessed the information, and judgment was given against him, and the taxing the fine referred to the king.

The reasons of the judgment fully declare what the law was; '*Quia idem Episcopus bene cognoscit quod post exilium Judæorum a predicto Judæo intellexit, quod pecunia predicta sibi in regno debebatur, et post eorum exilium omnia quæ sua fuerunt, et in regno remanserunt, tam debita quam alia bona quæcumque, ipsi Domino Regi remanserunt, et castella sua fuerant.*'

That he did not only conceal, but contrary to his faith, wherein he was bound to the king, persuaded the prior and convent, for saving of their souls, to pay. Pla. Parl. 173.

The archbishop did not doubt of the law,

though the defendant's counsel do, but a recourse to conscience against law, in deceit of the king, against his faith and allegiance.

This I hope will be allowed to be a judgment, and a judgment that declares the law as plainly as ever judgment did, and of a higher nature than any judgment in Westminster-hall.

In the same year several mean lords petition the king in council for the arrearages, in rent and services, of the hands the Jews held of them before their banishment.

The council answered; That for the time Jews held it, it was their fault not to collect them; for so long as the king held them, he would pay them; for the time they were in any grantees hands, they should have recourse to his grantees. Pla. Parl. Riley, fol. 129.

Here the king's title to the real and personal estates of the Jews in England, is asserted by judgment of the highest court of judicature in England.

The principles of law, upon which the judgment past against the Jews, are frequently laid down in our book.

If an alien amy or enemy purchase lands, the king shall have them and may seize them at any time; and though the alien died seized upon office found, the king shall have them, and not the lord, by escheat.

This my lord Coke reports to have been resolved by all the judges, Pasch. 29 Eliz. in *sir* James Croft's case, 1 Inst. fol. 2.

There it was also held indeed, that if a denizen died seized without heir, the lord, by escheat should have the land, and not the king; but that is in case of a completed denization where the issue of the denizen is capable of inheriting. But in case of Jews or infidels, the denization was void, being made to them as strangers, without taking notice of their enmity to the christian religion; and so the king deceived in the grant.

And an infidel, though born in England, is not inheritable to the laws of the land; if he should, the land might soon be over-run with Jews and infidels, and no redress to be had: so that neither denization nor birth did alter the state of the Jews as to inheritances within England, but they remained aliens under safe-conduct only.

If an alien enemy had a lease of lands, or of a house for habitation, the king should have it, within the same resolution in *sir* James Croft's case, and not any subject that should enter upon him.

Nay, if an alien friend, who should take a house for habitation, should die, or leave the lands, the king should have the lease.

But then, how stands the law for the goods of an alien enemy without the realm?

Mr. Pollexfen, to argue infidels to be no alien enemies, urged from the mischief that might ensue, that then every man might seize the persons or estates of Jews and infidels; because by law every person might seize the persons and goods of alien enemies: and for that cited

the authority of 7 E. 4, fol. 13. Co. 2 H. 7, fol. 15, b. which are but the same case, the authority of 7 E. 4, being only mentioned in course; argument in the book of H. 7. The authority of 7 E. 4, is good law, but misapplied in not observing the difference between the times of the enemy's, or his goods coming into the realm.

After open war proclaimed, whereby all the subjects have notice whom the king hath declared his enemies, and against whom they are to join in defence of themselves and the kingdom; if the persons or goods of such enemies come into the kingdom, any subject may seize them, and gain a property in the goods, as a prize taken in open war, according to the authority of 7 E. 4. And indeed the laws of all nations; and that not only of enemies goods, but of Englishmen's goods taken by the enemies; (whereby the property was left) and brought hither by the same authority of 7 E. 4.

Which plainly shews the meaning of the book, to be of goods taken in open war; whereby the property of the goods rest in the captor as lawful prize.

But when the persons or goods of aliens are in or come into England under safe-conduct; and the safe-conduct be not determined by the king, either by proclamation of open war or otherwise, no subject can seize the person or goods of such alien enemies.

Upon this difference the law was settled, 36 H. 8, by the judges, Bro. Property, 38, in the abridgment of the case, 7 E. 4.

That where a Frenchman inhabited in England, and a war was afterwards proclaimed, no subject could seize his goods, because they were here before.

But if he came after the war, any man may seize his person and goods, and shall have a property in them, and in such case the king shall not have them.

And so was it put in practice, saith the book, between the English and the Scots.

And when Bulloign was taken by the king's subjects, 19 Ed. 4, fol. 6, pl. 4. where a debt was owing by a subject of the king of Denmark's, and a war breaks out, the subject shall not retain the debt, but the king shall have it.

22 or 2 E. 4, fol. 4, 5, pl. 9. In false imprisonment the defendant justifies under the king's commission for apprehending a Scotchman; there being a war between the king of England, and the king of Scotland.

I before shewed, that an alien enemy, which came over by the king's safe conduct, was as much under the protection of the laws, as any alien amy whatsoever; and no subject could seize or molest his person or goods.

And the determining the safe-conduct by the king, left the alien enemy in the same condition as other alien enemies, after war proclaimed, who were here before under the general safe-conduct of the laws.

In which case the subjects had no liberty to seize either the persons or goods of alien ene-

mies; but that power was reserved by law expressly to the king.

Which besides the authorities I have produced, expressly appears by Magna Charta, chap. 30. which provides, that if the merchant-strangers be of a land which makes a war against us, and be found in our realm at the beginning of the war, they shall be attached, without harm of body or goods until it be known to us or our chief-justice how our merchants be intreated there.

So that the disposal of their persons and goods was wholly in the king. And the liberty the subjects had to intermeddle with foreign enemies, extended only to such who came here after a war proclaimed.

By all which, the king's title to the lands, debts and personal estates of the Jews, after the king had determined their safe-conduct, by banishing them out of the realm as infidels, evidently appears; and those dark records refined in some measure from their obscurity, by the constant tenor of the common law, practised ever since.

But doth not the making leagues with, and sending of ambassadors to some infidel countries, argue that infidels are not alien enemies? No, certainly.

But the practice of the kings of England, and other Christian princes, fully argues the contrary; for the making such treaties, in order to trade, proves that no trade could be managed with them, before the treaty concluded.

My lord Coke (who was of opinion that an infidel is 'perpetuus inimicus') yet agrees with other learned men, that a league of peace (which is only a cessation of all hostility) and a league of commerce (which amounts to no more than a reciprocal and general safe-conduct to each other's subjects) may be made with an infidel prince, 4 Inst. fol. 153.

But he is called 'perpetuus inimicus,' from the practice of the kings of England, and other kings and princes, not to make any leagues of friendship or alliance with infidel princes; whether restrained from making such leagues by the municipal laws of the several Christian countries, or the general rights of Christianity, is not to my purpose to determine.

But either a cessation of open hostility, or a general safe-conduct, by a treaty of commerce, binds up the subjects hands from intermeddling with the goods or persons of infidels.

And therefore the Act of Navigation, that mentions the goods of the Ottoman country, makes nothing to the case.

For by the treaty of commerce with the Ottoman empire, they might be brought in, and by his subjects before, under a general safe-conduct. But as to the Mogul and other Indian princes, there is no league of peace or commerce between them and the king of England.

Which makes the case of the East-India Company stronger yet, than that of the Turkey Company.

Though I conceive, that upon these principles I have laid down law strong enough.

And herein the case of the East-India Company is particular, for the king hath made no league for them.

But by the letters patent, hath given them special power to make war or peace with any infidel prince for the benefit and better advantage of their trade.

So that all other subjects are merely pre-cations, and have no pretence of taking any advantage of any peace made by the Company.

So as to them, the Indians remain to all purposes alien enemies.

Having now shewn, that all foreign trade depends upon, and hath been managed by leagues and royal licences, either by letters patent, or special acts of parliament; and

That the king may prohibit generally, where no act of parliament hath intervened to the contrary; and the common law prohibits trade with infidels, and no act of parliament has provided for it.

So that trade cannot be managed but by the king's licence, in some such manner as is directed by these letters patent to the Company.

That the answers to all the authorities and arguments made use of by the defendant's counsel, which I have not answered, lie open for the authority of the Taylors of Ipswich Case; and the several other authorities of mechanic trades, and of inland merchandize, to which the subjects have a right by common law, make nothing against our case of foreign trade, and to an infidel country, to which I have argued the subjects have no right, but were prohibited.

The opinion of the Taylors in Ipswich Case, that a patent to hinder trade at sea is void; that generally to hinder all trade at sea, is no doubt good law: because many licences then in being, and several acts of parliament in many cases had granted liberty of trade.

But in the same case the restraining of trade to a particular country, for which no act of parliament had made provision, is allowed of in the case of the Greenland Patent.

There was no authority produced, and I believe cannot be, that gives the least countenance for liberty of trade with infidels, or to impeach the king's prerogative of prohibiting trade to foreign countries, whereto licence for trade had not been granted by the king's letters patent, or by acts of parliament.

The arguments drawn from the reason of the common law were two:

First, From the liberty the subject had to go and trade into all foreign parts, for which were cited Fitzherbert and Dyer.

That liberty, and those authorities, I have already examined, and shewed that the subject had no liberty, but was prohibited by the common law to trade with infidel countries.

And the liberty to trade with foreigners in amity, was but a bare permission, till the king prohibited.

Secondly, The other ground insisted on was, that all ingrossing of merchandize was unlawful at common law: and therefore a patent leading to authorize an unlawful ingrossing is void, as a monopoly at common law, and declared so by 21 Jac.

Here I will join issue with Mr. Pollexfen, and do admit, that if it be an unlawful ingrossing, whether by the common law, or any statute in force, the patent will be void.

And he must admit unto me, that if it be no unlawful ingrossing, it is no monopoly at common law.

As he did in his argument ingeniously admit, that if it were no monopoly at common law, it is not within the statute 21 Jacobi; so that the question between us will turn upon this single point:

Whether the ingrossing the foreign merchandize of India be unlawful?

Upon what I have already said, it appears it is not. For I have shewn that the common law regarded, and made provision only for, merchandizes within the land; and though when foreign merchandizes came thither, they fell under the rules of the common law; yet the ingrossing, or sole buying of foreign commodities beyond the seas, and selling in gross, or by the merchant-importer, was no offence at common law.

Neither is there any statute that makes it an offence at this day.

It is true, the statute of 37 E. 3. cap. 5. prohibited English merchants to ingross merchandizes.

But the merchant-stranger was not bound by that law: and that statute was the next year repealed, as to the English merchants, 38 E. 3. cap. 2. And that at present the law is, that any merchant may buy in gross, and sell in gross, appears by the resolution of all the judges, Mich. 39 & 40 Eliz. Co. 3 Inst. 196. in the chapter of ingrossing.

And the resolution goes a step further than the merchant-importer.

That any person may buy in gross of the merchant-importer, and sell by retail.

And it follows by a clear consequence, that if English merchants in such places, where by law they have a right to trade, may ingross the commodity of the place without offence; the ingrossing foreign commodities of any place, where the subject cannot trade without licence, can be no argument to invalidate such licence.

Because ingrossing of foreign merchandize, by any merchant-importer, is no crime, but lawful for every trader.

And then the consequence of all ingrossing will be the raising of the price of the commodity.

Yet it being a commodity of foreign growth, and not such as the law hath any where determined necessary for the support of life, as victuals and such like;

The common law hath no regard to the price, but leaves the merchant free to make his advantage of the dangerous adventure.

The advantages that some subjects may receive by the trade, and others may be debarred from, which are alike hazardous, and depend upon a multitude of accidents, are no measures of right or wrong, to pass a legal judgment upon.

But if the company have a right to trade, and others have not, as I have argued, whatever their advantage may be, which cannot be estimated till they have wound up their bottom :

The ingrossing of the Indian commodities cannot be infected with the taint of a monopoly, which always supposes something done against common right, which is altogether inconsistent with having a right due to the king.

For it is of the essence of a monopoly, according to the definition thereof proposed by Mr. Pollexfen, and taken out of my lord Coke, viz. that it tends to restrain such liberty and freedom the subject had before, or to hinder him in his lawful trade.

So that every sole buying and selling a commodity, if it be lawful, can be no monopoly, in the legal sense of the word : which is evident in several land commodities, where the sole buying and selling is coupled with a right.

The king may grant to farm his pre-emption of tin, whereby the grantee hath the sole buying and selling, if he pleaseth, of the whole commodity.

Such a grant to Tidman a foreigner was complained of in parliament, 21 E. 3. and prayed by the commons, that no such merchandize be sold, but to the commonalty of merchants.

The king answers, that it was a profit belonging to the prince, and every lord may make his profit of his own ; 21 E. 3. nu. 29.

That this sole right of buying and selling was ever enjoyed, appears by the case of the Stannaries, 4 J. Co. 12. fol. 10 & 11.

So of all gold and silver dug within the realm, and of all royal fishes taken ; the king and his grantees shall have the sole disposal, or right of selling them.

It is no just answer to these instances, that they are inheritances and rights vested in the dukes of Cornwall and the crown :

Which they may dispose to whom they please. So is his prerogative of licensing foreign trade. And as to the question of a monopoly, which implies a wrong in restraining the rights of others ; there is no difference between having a right existing, which may be granted, and having a power or prerogative to confer a right on others.

For it is the having the right to do the thing that makes it no monopoly.

And therefore, if the king have a right to license some of his subjects to do a thing, which other of his subjects cannot do, or are rightfully prohibited to do ; whether the thing granted were before *in esse* or *de novo* constituted, it is all as one to the validity of the grant. This is proved by the instance of fairs and markets.

Whether anciently in the crown, or *de novo*

erected and granted to any subject, the case will be the same, as to the subjects sole right of holding the fair and market exclusive of others.

And rights conferred by the king's prerogative, are every whit as strong as any right granted out of the crown, which was before *in esse* there.

So that the pretence of an unlawful ingrossment and monopoly being removed, by Mr. Pollexfen's admittance, it is not within 21 Jacobi.

And it is plain, it is not within the words of the enacting part of the statute, without the aid of the proviso : for it is expressly limited to grants made, or to be made, for the sole buying and selling, or using of any thing within the realm. So that it was only the liberty of the inland trade and traffic, to which the subjects had right before, that was fenced and secured by this statute. And this patent is not for the sole buying of any thing within the realm ; and though the selling be here, yet such sole selling was, and is lawful, notwithstanding any law or statute made, as I have shewn.

And the proviso was only added, to manifest the plain intention of the parliament, not to in-meddle with any just prerogative of the king, which he might, and lawfully had exercised and used for the benefit of his subjects.

Besides, to put it past all scruples, this company is within the express words of the proviso.

It was a company in the reign of queen Elizabeth and king James, as is recited in the declaration.

And by their charter 7 Jac. had the sole trade granted, with the exclusive clauses to others.

And if the parliament had not adjudged this Company to be for the maintenance and enlargement, or ordering of that trade, as well as the other Companies, they would undoubtedly have made a difference between them, upon that charter of 7 Jac.

For this very parliament was inquisitive into all illegal patents, which in the least tended towards a monopoly.

And if they had thought that charter such, they would not have been tender of the point at that time.

The objection made from the different managery, by joint and separate stocks, is of no great weight, because it touches not the question of right ; whether a Company may have a sole trade granted, exclusive to others.

For every Company draws a charge with it, which those not of the Company are not liable to.

And if the subject have a right to trade without being of the Company, he can be no more compelled to be of the Company, which manages and trades upon separate stocks, than of one which trades upon a joint-stock.

And the objection, that ordering of trade within the statute cannot be intended of licensing of some, with exclusion of others, is of no

greater force; for it could not be intended of any others.

All the patents for foreign trade before that time, and then in being, were patents of exclusion of others than the Company.

And if it be well considered, all the authorities that allow there may be Companies erected for well-governing and ordering foreign trade, do admit, they may be exclusive to others;

It not being possible that a foreign trade can be under any rule or government, by any letters patent whatsoever, if carried on by persons not subject to that rule and government.

And it is evident, that no rule of any Company binds farther than those of the Company; and if every man, not of the Company, may trade, such trade will not be under any rules, made for the Company, or by the Company.

So that such patent will be only for keeping some few persons within rule and government, but not at all of the foreign trade.

Which of necessity must produce the ruin of the Company, and in all probability of the trade itself.

For if others trade without limitation, discharged of all the rules of the Company, and not be liable to the charges and expenses, whereby the trade must be supported; they may and will both undersell the Company, and forestall and anticipate the markets, than which nothing can tend more effectually towards the destruction of a trade, of great concern both to king and kingdom.

Besides, the factories and stock of the Company in foreign parts are obnoxious and liable for all injuries committed, either to the natives or government of the place, by an interloper trading without rule, by the general law of reprisals.

I will not further pursue the arguments of convenience or inconvenience, but do rest upon the right, which I have endeavoured to make out by these steps.

1. That the subject had no right to this trade at common law as a foreign trade, but might be prohibited.

2. That no league or royal licence hath introduced or given such general right.

3. That foreign trade hath in all times been licensed and managed by the undoubted prerogative of the crown, in licensing some, and prohibiting others. And that in all cases not provided for by act of parliament. And that such grants and licences have received allowance in several parliaments.

4. That no act of parliament ever gave a general liberty of trade, much less to trade with infidels.

5. That the common law prohibits this trade with infidels, as with alien enemies.

6. In the last place, I have applied answers to principal authorities and arguments made use of to impeach the Company's patent.

Upon all which, I conclude the chief point of the case;

1. That the grant to the Company, of the sole trade to India, exclusive to others, is good in law.

2. As to the second point, whether the action will lie admitting the Company have a right to the sole trade there, by these letters patent?

I shall spend but a little of your time about it.

Because if the Company have by law the sole right to the trade, the law will give them a remedy to redress injuries done to their trade, for recovery of their damages.

Which is properly by an action of the case, they having no other remedy to redress themselves. For a prosecution for a contempt to the king cannot be in satisfaction of the Company's damage.

I shall therefore rest that point upon the authorities already produced by the plaintiff's counsel.

I shall only apply answers to the objections made by Mr. Pollexfen.

Obj. 1. 'Tis not alledged the defendant had no licence from the king.

Ans. The complainant's case is sufficiently set forth, that they had the sole trade to the Indies granted to them; and that the defendant had notice thereof, and yet traded contrary to their grant.

If the defendant had had the king's licence to come on his part by plea, then the validity thereof, as against the plaintiff, would have come into question; but he rests upon the licence, by statute of 15 E. 3.

Obj. 2. They have shewn no special loss or damage.

Ans. Neither need any be shewn, no more than in all other actions of the case, where the right of any person is injured, 18 Rep. 113, Mary's case of a commoner who hath no estate in the land, nor the sole right in the profit apprender, comes not to the case; the law denies such commoner liberty of bringing his action, without a special damage, to prevent a multiplicity of actions, which upon the same ground every commoner would be entitled to. But otherwise it is, where any hath the sole piscary or profit apprender; after setting forth the special case, and wherein his right is invaded, a general declaration to his damage is sufficient, and the examination of the particulars will belong to the jury.

Obj. 3. That the action is grounded upon the restraint in the letters patent; and that restraint is not absolute, but upon pain of forfeiture of ships and goods.

Ans. The first part is mistaken; for the action is grounded upon the grant of the whole, entire and only trade and traffic to the Indies, inforced with the king's covenant, not to grant licence to any others.

And besides this clause of the prohibition, there is a distinct clause of grant, that none of these countries or places shall be visited, frequented or haunted by any of the king's subjects, during the continuance of this patent, which hath no penalty annexed to it.

Upon these grants the action is grounded; and if there were no clause of prohibition, the trading to these infidels by others without licence from the king, is enterprizing a trade not only against the prohibition of the common law, but the king's express prohibition.

But the action is not founded upon this clause, but upon other clauses of conferring a right to the sole trade.

The authority cited by Mr. Pollexfen, as an authority in point, against the action out of 11 Rep. 88. and Rolls Abridgment, fol. 106. nu. 6. in Darcy's case, that admitting the grant or dispensation to Darcy were good, for importing foreign cards contrary to the statute of Ed. 4. yet the action will not lie, reacheth not our case of a right conferred by the king's prerogative, and not of any dispensation from a penal law.

Before the statute of Edw. 6. every subject might import foreign cards; the statute restrains that liberty under penalty of forfeiture.

The dispensation of one subject from the law, works no interest but a bare exemption from the penalty;

Which in the case of Shaw and Hawes, was held could not be assigned over; and therefore grants that are merely dispensations, convey no interest against any other subject, who is no otherwise restrained from doing the thing, than by the statute under a penalty.

But where the king by his prerogative may grant the sole use of a thing, (as in case of new inventions) the grantee hath an interest sufficient to support an action upon the case, as Rolls is of opinion. The next paragraph, fol. 106. nu. 17. That if the king grant that none shall use such a thing (whereof the king hath power to grant,) but the grantee reserving a rent, if another use it, an action upon the case will lie;

Which is a stronger authority in point for the action, than that of Darcy's case of a mere dispensation, is against it.

And therefore having proved the grant of the sole trade to be good, the action is well brought for damages; And pray Judgment for the Plaintiffs.

MR. WILLIAMS'S ARGUMENT.

De termino S. Michaelis, Anno Regni Regis Car. Secundi xxvi. Annoq; Domini. 1684.

The East-India Company v. Thomas Sandys.

The questions in this case are two.

1. Whether this grant of sole trading to this Company, excluding all others his majesty's subjects who are not members of this Company, or within the qualifications of this grant, be a legal grant?

2. Admitting it a legal grant, if this action be maintainable by the company against the defendant?

That this grant is legal in all its parts, I do not find that the counsel that argued for it, have endeavoured to maintain.

Mr. Attorney hath admitted in his argument, it is not.

That some parts of it are against law, is manifest, viz. it inflicts illegal penalties upon persons offending against it, by creating a forfeiture of their goods and merchandize, which shall be brought into the realm, or any of the dominions thereof, contrary to this grant.

It also creates a forfeiture of the ships, with the furniture thereof, wherein such goods shall be imported or found; the one half to the king, the other half to the company.

It grants, That the offenders against it shall be imprisoned during the king's pleasure, and not to be delivered out of prison until the offenders become bound to the governor in the sum of 1000*l.* at least that such person shall not at any time after sail or traffic into any places mentioned in the grant.

It gives the company liberty to license persons to trade within the limits of this grant; and that the king, his heirs and successors, shall not, during these letters patent, license any person to sail or trade there.

In these things the property and liberty of the subjects, are put into the power of the company; and they are to dispose of the liberty and property to serve their own Company, and not the public.

If this Company may seize goods and ships; and imprison the king's subjects, according to their grant they will have a greater prerogative over the subject than his majesty hath; they have power to seize goods, and imprison persons, without trial, without legal proceeding, which the king cannot do; and I humbly conceive, cannot grant to any subject or corporation.

The judgment upon the Canary patent, which I shall have occasion to mention more largely herein, by the opinion of all the judges, damns the penalties of that, agreeing in substance with these. The substance of this was admitted, at least not defended, by Mr. Attorney General.

This grant does not only give this Company dominion over the properties and liberties of the subject, and invest the Company with the prerogative of the crown to license men and ships to trade in these limits, but it doth divest the crown, the king, his heirs and successors, of a high prerogative; That the king shall not license, as I take it, the king shall not trade in these limits without the licence of this Company. For as this great and mighty charter is penned, it doth not only invest the Company, but divest the king of his prerogative.

Mr. Attorney and the king's counsel could not argue for the Company in this matter, without arguing against the prerogative of the king. They are of the king's counsel that argued for this grant, but it is not to be believed they were of the king's counsel, or friends, that drew it or advised it.

We that argue for Mr. Sandys, argue for the king's prerogative: That the king, notwithstanding this grant to this Company, may

license Mr. Sandys, or any other subject, to trade in these limits; and it doth not appear upon this record but Mr. Sandys hath the king's licence to trade in those places; he may license any other subject to trade there.

And that the king by his grant cannot exclude himself of his prerogative.

It will serve our turn, for the defendant in this case to avoid the plaintiffs' action. If the plaintiffs ought not by law to have the sole licensing of traders in these limits; for the stinging part of their declaration is laid in this, 'That the defendant traded without their licence.'

There was greater care had to greaten this Company, than to preserve the prerogative of the king in this grant; and the prerogative is named in this case, to serve the Company, and not the king: and they that drew this grant, did neither consult the honour nor prerogative of the king, the liberty or property of the subject, the trade of the kingdom, nor the law of the land: but their business was to greaten this Company, to the detriment of the king, the law, and the subject; as I hope to make out in this case.

In my way to the particular questions in this case, I shall observe, 1. That the plaintiffs in their declaration do allege, That they have established and managed, and do manage a great trade of merchandize to the East-Indies, with the inhabitants there, who at the time of the making the letters patent, were not, and ever since are not Christians; but then were, and now are infidels, and enemies to the Christian faith.

Yet they do not allege, nor can say that these Indians are in enmity with the crown of England, or that they are alien enemies to England.

2. Though the present inhabitants of these places are infidels, and enemies to the Christian faith, yet it may be, and we hope there may be an universal conversion to the Christian faith; and we are taught by the church to pray for it, and to use all manner of means to bring it to pass.

Why may not these places, or some of them, become inhabited with Christians, as Spain and Portugal are now inhabited by Christians, where infidels did inhabit about 200 years ago?

3. This grant doth not exclude a trade with infidels only in these places, but with all persons in these places.

I do not observe, that any of the Company's counsel that argued before Mr. Attorney, have denied Englishmen the liberty of trading with Christians in any part of the world, without licence from the king. Herein I take him to be alone.

4. They say, this trade cannot be managed but 'per corpus corporatum.'

Yet have they an exclusion of all persons, and bodies politic and corporate, to trade, or manage a trade in these places without their licence; and by this means exclude the king from constituting any other company within

the limits of their grant, or in any part of it, which may be very necessary for the government, and public trade of the king.

1. It may be, the Indians may insist upon some such company to be instituted by the king, by some treaty of commerce.

Now hath the king by this means, not only excluded his subjects from the trade of this place; but he hath excluded himself of the liberty of making or constituting any other company for trade or commerce, in all, or any of these places.

2. Perhaps the government and good management of trade in these places, may in time require more companies to be instituted, in all, or some of these places; and the Company's counsel, except Mr. Attorney, are now arguing the king by his prerogative out of his prerogative:

That the king had prerogative enough to make this glorious Company the sole traders, and managers of trade in these places, and to exclude himself and his successors, and all the rest of his subjects, from this trade and management:

3. And by this means constitute a sort of republic for the management of trade in these places, borrowing perhaps from Hamburgh and other republican places, the ways and methods of managing trade upon a common stock; in fraternities and companies; and by this experiment alter the constitution of England in the management of trade, by altering the nature of our English properties in our goods vested and placed in persons, and placing our properties in companies and fraternities; and by fixing the mystery of trade in companies, to the prejudice of single persons; and may in time turn to ill example, and endanger the government in its other parts, as well as the trade of England.

The main question in this case doth turn upon the power of the king;

If the king by his royal power may appropriate this trade in these infidel places to this Company?

First, That the king hath power to do this, by the advice of his great council, the parliament, is not doubted. So there is no defect or want of power in the king to do this by the law of England; the exceptions in the statute of 21 Jac. cap. 3, do except such grants out of that statute.

The question is only a question of the manner of doing this by the king.

Secondly, Whether he may do it, without the advice of his great council in parliament?

As there is no defect or want of power in the king, so there is no defect in the law of England.

Thirdly, But if there be a necessity or a conveniency to the doing of this for the crown, or for the government, for the subject or for trade?

Fourthly, It is not to be supposed but that the Lords and Commons in parliament, will and ought to assent to such a grant in parliament.

ment as much as the privy-council, or any other of the king's council, are obliged to advise it out of parliament; and it ought to be so presumed by the constitution of England.

And I take this to be one of the *Ardua Regni*, which is a subject matter fit and proper for the consideration and deliberation of a parliament, and ought not to pass by any grant without them.

The trade of England, the property and liberty of the subject, the king's revenue by tonnage, poundage and customs, the prerogative of the king, are under great restrictions by this grant.

This work is too heavy for the pen of an attorney, or solicitor, to put into a bill for the great seal, without the deliberation of a parliament.

The king cannot naturalize an alien; but by the act of parliament, the law doth intrust the king by his letters patent, to make denizens of aliens, but not to naturalize them.

It may be too much for me to give the reason of this, why the king hath not power to naturalize aliens, as well as to denizenize them.

I humbly take the reason to proceed from the interest of the subject, that the right of the subject is immediately concerned in letting in aliens to have the same right, liberty and freedom with English subjects in England, and that this ought not to be granted to aliens, not by the king under his great seal, without the consent of the Lords and Commons, the representatives of the subjects in parliament.

There may be high state-policy, sometimes to naturalize an alien, and that perhaps it cannot always wait the meeting of a parliament; yet hath the law placed this trust in the king, to be exercised by the king, with the advice of the Lords and Commons in parliament, and no otherwise.

The right of every Englishman in his freedom of trade in these parts, is concerned in this grant, and every Englishman not admitted to trade by this grant, is excluded of his freedom; and the king disables himself to license any other English subjects to trade in these parts.

If the king had made such a grant to aliens, and excluded all his English subjects from trading in these places, or if the king had granted only to his Irish or Scotch subjects, and excluded his English subjects, had these been good grants or legal?

If the king has the prerogative, the company's counsel urge in this case, all this might have been done, and these grants had been legal, though exclusive of all his English subjects.

It is enough, I humbly conceive, the king hath the prerogative of granting and constituting such companies, and making such grants in parliament; and the law allows no more in cases of this nature, which concern the right of every subject in England, and therefore ought not to be taken from him, but by his consent in parliament.

I think it may be admitted, the king may by his great seal, without the advice of the Lords and Commons in parliament, constitute a company for the good management of trade in these parts, or any part of the world:

But he cannot, as I humbly conceive, by any grant under his great seal, totally exclude his subjects of their right and liberty of trading in any place upon the seas or beyond the seas.

Rolls 1, Rep. fol. 4. The taylors of Ipswich case; the king may grant a charter for good ordering of trade; this is for the benefit of the subject, 3 Ed. 3, Britton's case.

The good management of trade is for the benefit of the subject.

I shall endeavour to maintain, that the subjects of England had a right to trade in these parts, before the making of this grant, or the constituting any company by the crown in the East-Indies, and without any licence from the crown; and by consequence this grant appropriating this trade to this company, and excluding the rest of the king's subjects from their right and liberty of trade there, is an illegal monopoly in trade, condemned both by the common law and statute law of England: and the infidelism of the inhabitants of these places, is no bar nor impediment to the trade and commerce of English subjects in these places, without leave or licence from the crown, no more than in Christian countries.

That the prerogative of the crown, to grant and issue out writs of *Ne Exeat Regnum*, against this or that subject, is no argument for this power to make such a grant as this, or to exclude his subjects from trading in infidel countries.

The *Ne Exeat Regnum* is a writ that may be granted by the keeper of the great seal, without any express warrant or command from the king, upon some suggestion, that the party may be required to give caution not to leave the kingdom, till he answers such a suit, or the like.

This writ is never granted without some special reason or cause in a particular case; the subject complained of may appear in Chancery, and answering the cause, may discharge the writ.

Such a grant under the great seal, for some of the king's subjects to go abroad, and for the rest to stay at home, I conceive would not be good in law. No parity of reason, because the king may, by his writ of *Ne Exeat Regnum*, stay a subject from going out of the kingdom, that therefore the king may by his grant hinder him to trade out of the kingdom. Men may, and do trade by their factors and correspondents, and do not stir out of the kingdom; their personal attendance in their trade in places remote is not necessary.

The subjects of England trading in merchandise, have, and always had a right to trade upon the seas, and beyond the seas, without licence from the crown.

That they had such liberty to trade with all Christian countries, I do not find it denied by

any of the company's counsel, but Mr. Attorney; he hath yielded something the other counsel have denied, and denied what others have admitted; and in something in his argument, he is, as I conceive, inconsistent with himself.

That trade is as free to all men as the air, that the seas are like the highways, free and open to all passengers.

Grotius de Mari libero, 'Mare et littora
'*Maria jure gentium sunt communia.*'

Grotius de jure belli et pacis, cap. 3, par. 19.
'Illed certum est, etiam qui Mare occupaverit,
'*Navigationem, impedire non posse neminem*
'*et innoxiam, quando nec per terram talis*
'*transitus prohiberi potest, qui et minus esse*
'*solet necessarius et magis noxius.*'

Cap. 3. 'Ad Reges potestas omnium pertinet, ad singulos proprietatis.'

Wellwood's Abridgment of Sea-Laws, in his Epistle to the duke of Lenox, and earls of Northampton and Nottingham, lord admirals of England, Scotland, Ireland, and the isles, he presses them to maintain the privileges due for the maintenance of the admiralty, and the jurisdiction thereof, and that they would vindicate the same from all sort of encroaching and usurping; but above all, the conservancy of the seas (as the chief point of the office) requires security and safety in common for all loyal subjects, traders on sea.

By his opinion there is a community for all loyal subjects to trade on the seas, and not to be appropriated to a few.

Britton, cap. 33. De Purchas. he distinguishes of things corporeal and not corporeal, of things in common and things particular.
'*Cheses communes sicome la meer, et la eyr,*
'*et la ryvaille de la meer, droit sicome et de*
'*pecher en floe, et en meer, et en communes*
'*cives, et ryvires.*'

The king I admit hath a sovereignty in the seas, and his sovereignty in the British seas is exclusive of other princes.

Mr. Jo. Burroughs's Sovereignty of the Seas; the king was 'Dominus utriusque Reipublice' when he had Normandy.

Julius Caesar de bello Gallico, lib. 4. King Edgar's title, 'Basileus omnium rerum, Insularum Oceani, quæ Britannium circumjacent, cunctarum Nationum, quæ infra eam includantur, Imperator et Dominus.' Barthol. tractat. de Insulis.

'*Bal. de rerum Dominiis, videmus de jure gentium in Mari esse distincta Domina sicut in terrâ. Mare ipsum ad centum usque miliaria pro territoris distinctaque illius Regionis, sui proxima appropinquat, assignatur.*'

I do agree that the king hath a prerogative in the sea, and that the sea is within the king's liegeance; and that, by this prerogative, wrecks and sturgeon, and other great fish in the sea belong to the crown. Stat. 17 Ed. 2, cap. 11.

And that the statute De prerogative Regis, among other things, does reckon wrecks, whales and great sturgeons to belong to the king by his prerogative.

And that the king hath his old customs, and these royalties of wrecks and great fish, by his conservancy of the seas; sir Henry Constable's case, lib. 5, fol. 108, b. 5, Ri. 2, para. 2. The king hath tunnage and poundage, Pro Defensione Maris.

But the king hath not any prerogative that I meet with, to exclude the subject from the benefit of his right of community in the seas, as fishing and trade.

As the king hath his sovereignty upon the seas, and his subjects owe him liegeance there; so have they their rights and properties in and upon the seas, and they are not to be invaded.

And the king hath the care and conservancy upon the seas, and for his care, guard and conservancy of his subjects, their ships and goods upon the seas, he hath his tunnage, poundage and customs.

Rolls Abridgment, Tit. Prerogative. The subsidies of tunnage and poundage are granted to the king for the safe-guard of the seas.

Stat. 1 Ed. 4, cap. 13, recites, that H. 7, and H. 8, and other kings, had granted to them by the Commons in parliament for the defence of the realm, for the keeping and safe-guard of the seas, for the intercourse of merchandize safely to come into the realm, and to pass out of the same, a subsidy of all manner of goods and merchandizes coming in, and going out of the realm.

And if any one be afterwards robbed by pirates, or lose his goods by misfortune, he shall ship as many more without paying custom.

Stat. 1 Mary, cap. 18, and Eliz. 19, the same renewed.

Stat. 45 Ed. 3, cap. 4. And all rates and impositions upon ships, trade and traffic upon the seas, and beyond the seas, are laid by the king in parliament, and cannot be laid by the king alone, by any prerogative out of parliament. 3 Inst. fol. 181. 'Commercium jure gentium commune esse debet, et non monopolium et privatum pauculorum questum convertent dum, iniquum alios permittere, alios inhibere mercaturam.'

Dyer, fol. 296. 13 Eliz. That a subject of England, being a merchant, may depart out of the realm without the queen's licence, to live there, though not merchandize; and such going out of the realm is no contempt to the queen, before a *Ne exeat Regnum*, an express prohibition or proclamation issue.

Stat. 5 R. 2, cap. 2, doth affirm this by the exception in that statute.

Dyer, fol. 165 and 296. agrees with Nat. Br. and says further, that no merchant pays at the common law any custom for any wares or merchandize whatsoever, except three, viz. wool, wool-fells, and leather, express for all merchants, and confirmed by Stat. 5 R. 2, cap. 1 and 2.

Rolls 1. Rep. fol. 4. Taylors of Ipswich case, 12 Jac. Banco Regis; no trade mechanic or merchandizing ought to be hindered

by the king's patent in any sort, but by act of parliament.

9 H. 3, cap. 30. A charter to hinder trade at sea is void; a charter that only 100 persons shall trade at sea is void, in itself; and he was chief justice at this time. 2 Inst. 57. The patent to Greenland was allowed, because the trade was found at the peril of the party's life who first discovered it.

Taylor's of Ipswich case, where there is no new invention, the king by his charter cannot hinder trade.

The patent to the college of physicians, that no person shall practise physic without their licence, would have been void, had it not been confirmed by act of parliament; yet this concerned not all the subjects of England: and is a mystery, and the professors thereof fit to be approved by persons of skill in it.

It may be admitted, that the king for special causes may prohibit this or that subject, perhaps, to trade in some certain places.

As the king may inhibit a subject's going beyond seas; and if a person goes beyond the seas after such an inhibition, it is a crime in the subject, for which he is punishable.

But it is hard to infer from such particular inhibition of particular persons, to trade in particular places or countries, or to inhibit particular persons from going beyond the seas, to infer universally, that the king may inhibit all his subjects to go beyond the seas, or that he may inhibit all his subjects except some few to trade.

There is a great difference between an inhibition from the crown to this or that person to go beyond the seas, and an inhibition for all persons to trade, except such a company.

This grant imports a restraint upon trade, and upon the common liberty of the subjects, for the benefit of some few of the subjects, without any benefit to the crown, or security to the kingdom, as in the case of *Ne exeat Regnum*.

The Company may license aliens only, and exclude subjects. No trust is placed in the company, which the law places in the crown.

For the ally that is offered to this exclusion of trading for Englishmen, and English merchants in these places;

Obj. That they are excluded only from trading in the East-Indies with infidels, and the inhabitants there, who are enemies to the christian faith and religion.

And that it is for the common safety of the christian religion, that this is done to avoid the danger of corrupting and perverting christians to infidelism.

I do not meet with any authority for this power given to the king.

But that English subjects have the same freedom of trade with infidels as they have with christians in places beyond the seas; so they be not in enmity with the crown of England.

Michelborne's case, Brownlow 2d Rep. 296. That case hath been observed already to have

no authority, nor the book authentic, and at best but some saying of my lord Coke, in a matter not then in judgment before the court, and that perhaps mistaken by the prothonotary.

I oppose to the probability of this saying, the report of the Taylor's of Ipswich case, in Rolls Rep. fol. 4. 12 Jac. The lord Coke was then chief-justice of the King's-bench, and says in the resolution in that case, that no trade mechanic or merchantable can be hindered by the king's patent, not in any place, without an act of parliament; a charter to hinder trade at sea is void.

How can this stand with what is published in Brownlow, that my lord Coke should say in the common-pleas, before this time, that an English subject cannot trade with infidels, without licence from the king; and that he had seen a licence in the time of Edw. 3, to that purpose?

The reason given for that saying, is as weak, because they are common enemies to the christian faith.

They may be enemies to the christian religion, and not enemies to the crown of England, or to the trade of England.

The law denies trade and commerce only with enemies to the crown, not with enemies to the christian religion.

It is sufficiently observed already, by the counsel that have argued on this side, that there are treaties of trade and commerce between the crown of England, and these places of infidels, and that there are leagues and embassies between them. 4 Inst. 155. allows leagues of commerce, and trade, and peace with infidels.

And what may be the consequence, to declare that to be law, that they are incapable of the benefit of the law of England, allowed to other aliens, and that they are not to be protected from personal injuries by our law?

12 H. 8. 4. A Pagan beaten in England cannot sue, *quia perpetuus inimicus*.

And to put them in the same condition with outlawed and excommunicated persons, how doth this consist with the common justice of nations, or with the policy of trade in an island?

Obj. By Mr. Solicitor, 5 Inst. fol. 32. A Jewess born in England, marrying a converted Jew, not dowable.

Mr. Solicitor hath cited many cases and records out of Mr. Prynne's collections, and from the rolls themselves, how the Jews were treated in England in trade; what restraints and taxes were laid upon them by the crown.

I do not take it that any of these records reach the reason of restraint of trade, imposed upon English subjects by this grant.

There's no restraint but that English subjects might trade with Jews in their own countries.

That Jews were used thus in England, is no argument that the East-India Company may use English subjects like Jews abroad in other countries.

St. Paul's first epistle to the Corinthians chap. 6, reprehends the Christians for going to law one with another before infidel judges, who were their enemies; calling it a fault, and bespeaks it to their shame, that they would not rather receive wrong, or make arbiters of their own to judge between the brethren, than to go to law one with another, and that before unbelievers; but there is no reproof to the Christians for conversing or trading with infidels.

4 Inst. fol. 155. Darcy and Allen's case, Moor's Rep. fol. 674, and 675, are authorities for leagues and commerce with Pagans, which signify leagues of commerce with infidels.

Lord Coke cites several texts out of the holy writ to justify it, out of the books of Joshua, Kings and Chronicles.

If it be true, there was such freedom of trade by the common law for all English subjects with infidels and christians in all parts of the world, and that without licence from the king:

To restrain this freedom of trade to a Company of English subjects, excluding all others the king's subjects from their ancient liberty and freedom of trade, I take to be a monopoly, and comes within the description and reason of the odiousness of monopolies, so largely argued by Mr. Pollexfen, that I shall not take up the time of that court in repeating what he hath said, and I cannot add to it.

Neither will I trouble the court with mentioning the authorities he hath cited for that purpose; but refer myself to the same authority in that matter.

Yet I take it, under correction, that it is fit to be very well considered, if this patent be not a monopoly, and an ingrossing and appropriating of trade to few persons, which did belong and was common to all Englishmen, though a licence from the crown was necessary for their exercise of this trade; yet every Englishman was capable of such licence, and was intitled to such licence from the crown, and had a right to it.

Now hath this grant put it out of the king's power to grant such licences, and hath placed this power, and the exercise of it in this Company, and by this means hath by this patent granted and appropriated a trade to this Company, which was common to all his subjects; and hath given to this Company the sole licensing of traders in these parts, excluding all the subjects of England, which shall not be licensed by this Company, to trade in these parts; I conceive this makes this patent and grant illegal and void;

And makes this restraint in trade, which was common to all with the king's licence, now peculiar to this Company; and doth monopolize the trade and the means of trading, by placing it in the sole hands and power of the Company, even the sole licensing of traders, and they may by this grant license aliens only to exclude English subjects.

My lord Coke's description of monopolies and

monopolists, projectors and propounders, doth sufficiently illustrate this, with reflecting upon what Mr. Pollexfen hath said in this argument, without repetition of them to the court.

The statute of Magna Charta declares the liberty and freedom merchants have to buy and sell without restraint, by the old and rightful customs, except in time of war.

2 Inst. cap. 29 and 30, Stat. 9 H. 3. 30. *Nisi publice prohibentur*, saith my lord Coke; is intended a prohibition by act of parliament.

Yelverton, 10 Jac. is of the same opinion with lord Coke in his book about impositions upon trade; as I have it from a gentleman in our profession. Vide his manuscripts.

21 Jac. cap. 3, declares all monopolies to be against common law.

Coke 11. Case of Monopolies, 84 Moor's Rep. 673, nay, Darcy's grant for the sole importing of cards from beyond the seas, and selling them for twenty-one years, 44 Eliz. prohibited and judged a void grant.

Stat. 2 E. 3, cap. 9, confirms Magna Charta, for going and coming with merchandize to and from England, according to Magna Charta.

9 E. 3, cap. 1, damns all charters to the contrary, as illegal and oppressive to the people, 4 E. 3, cap. 2, confirms also Magna Charta. 25 E. 3, cap. 2, doth the same, and makes letters patent to the contrary void.

11 R. 2, cap. 7, 12 H. 7, 6, for free passage, &c. such letters patent restraining trade have been pursued in parliament, with hue and cry, in all parliaments and ages.

Obj. This grant is made to a Company for good government, and for the ordering of trade, and no monopoly, and it is within the proviso of the statute 21 Jac.

Ans. Allowed in Darcy's case by the arguments for that grant, and if it be not for public good, the grant is illegal.

If this grant be neither good for the king, nor for the subject, nor for the trade of England, it cannot be said to be for the public good.

It cannot be good for the king, for it restrains him in his prerogative, as you would have it the king had power to license every subject; by this grant he hath excluded himself of all power of licensing. He can license no subject to trade in these parts.

The king suffers in his customs and in his navigation.

The subject is excluded from trading in these places, without the licence of this Company.

Trade itself is restrained, for it is reduced and appropriated to a Company, and to few persons, which was common to all the king's subjects.

2 Inst. fol. 57. Lord Coke's reason against it, for all the subjects are concerned in trade; therefore all ought to consent to it in parliament.

Though they are a Company, they are not constituted by this grant, to regulate and ma-

mere trade for England, but for themselves and their Company.

The heightening, the lowering of commodities, the raising, the lessening the rates of all the commodities of these places, the ingrossing of all the trade of these places, is in their power and in their pleasure.

There are no rules or qualifications in this grant, injoining to admit numbers into this Company, or directing or requiring their licences for this trade. They have the trade in themselves, without any check or control from his majesty or the government; they are independent from the government by this grant, they are without appeal.

Obj. That they are a company, and that this grant to them is within the exception of the stat. 21 Jac. cap. 3.

Ans. 1. Because that exception doth not reach to letters patent made to corporations, after the making of that act.

No words of saving to any corporation, that should be afterwards erected or granted.

2. This proviso doth not make them better than they were before the making of the act, only leaves them as they were before, and as it found them.

If they were legal before, they continue so; if illegal, they are so notwithstanding this act.

Obj. That many grants of this nature have been made to several companies; to the Turkey Company, Muscovy and Hamborough Companies.

Ans. They do not trade in joint-stock, and monopolize, as this Company doth; they do not exclude persons from their company, as this doth. Mr. Pollexfen hath differenced them at large.

That there have been many monopoly grants in all ages from the crown, appears by the statute of Magna Charta, by other statutes made in Ed. 3rd's time, R. 2, H. 7, and king James's time; and by the judgments given on monopoly patents in all ages.

In the Case of Monopolies. In the Taylor of Ipswich's case.

Peachy's case, 5 Ed. 3, severely punished for procuring a licence under the great seal, that he only should sell sweet wines in London, &c.

Inst. 3. fol. 181. Darcy and Allen's, Mar. Rep. 44 Eliz. Oppression is elder than the law made to punish it; Monopolies are as old as the laws made to punish them; it is no argument to justify injuries by their ages.

Sir Arthur Ingram's Patent, 17 Car. 2, for the Canary company, granting them the sole trade there. There are glorious recitals in that patent, of advantage to the king's subjects, and for the regulation of trade; making the Company a body politic, that they should have the sole trade to those islands, excluding all others under pains and forfeitures, with a *non obstante* to the statute against monopolies; judgment was given against this patent, Mich. 20 Car. 2.

11 Rep. fol. 54. Taylors of Ipswich case. Compare this case with the company of tay-

lors case; for the good of trade and company, and the orders and by-laws fair and plausible, yet damned, because a restraint on trade.

The company had the profit of the reformation. No other difference between the cases, than that this is a mighty, that a petty company.

14 Car. 2, cap. 24. That statute provides, that persons by having stocks in this company, shall not be adjudged traders within the statutes against bankrupts, which is called by Mr. Solicitor the judgment of the parliament for this grant.

Says Mr. Solicitor, Stat. 14. Car. 2, cap. 24. takes notice of this Company, and that it is an advantage to the nation and trade of it.

Stat. 29, Car. 2, 1. takes notice of this company, and taxes every capital stock in the Company at 20s. for every 100l. capital stock in the Company.

Ans. This poll-act taxes all guilds and fraternities, bodies politic and corporate; this doth not make them legal corporations, guilds or fraternities.

The judgment the parliament had of this grant doth better appear upon the journals of the houses of parliament, of the complaints made to the parliament, that this grant was a grievance.

It is no new thing to mention proceedings upon journals of parliament: and the judges take notice of them. Hob. Rep. and Rolls.

And in a cause of this consequence it may be proper to adjourn it to parliament, where it may receive the judgment of his majesty in parliament.

This will be a safe establishment of the law in this great case, which concerns the king's prerogative, the right of the subject, and of the whole kingdom in the trade of the nation.

It will meet there with a judgment that will certainly establish it, if it be for the interest of the king and kingdom; but if for the enlarging of this great Company, it will meet with the common fate of projecting patents against the interest of the king and subject.

It is a mighty argument for the reputation this patent had with the parliament, and the opinion they had of it, by taxing their capital stock at 20s. per cent.

So they do reputed esquires, at 5l. by the head.

Solicitors, attorneys, and oppressive usurers, have the like esteem with this act of parliament.

Stat. 3 Jac. cap. 6. This statute is but declaratory of the common law, and made to avoid questions and suits in law; which might be occasioned by charters of appropriating the trade of Spain and Portugal, and then in making for the trade of France.

If the mischiefs recited in that statute, and the evils happening to England, and the king's subjects be true, without all hesitation,

Those charters mentioned in that statute, and condemned by that statute, were not only grievous, but illegal, and monopolies;

It appropriating the trade of these domi-

ships to few merchants, and excluding all other his majesty's subjects from the trade ;

Debarring the king's subjects in England from that free and common traffic, which his subjects in Ireland and Scotland had ;

To the manifest impoverishing of masters, owners of ships, mariners, fishermen, clothiers, tanners, spinners, and many thousands of handicrafts-men ;

The decrease of his majesty's customs, subsidies, and other impositions ;

The ruin and decay of navigation ;

The abating of the prices of our wool, cloth, corn, and such like commodities ;

The enhancing of all French and Spanish commodities ; that all owners and mariners, with divers others, shall be cut off from the ordinary means of maintenance, and preserving their estates ;

And all French and Spanish commodities shall be in a few hands ;

To the hurt and prejudice of all the subjects ; therefore enacts, it shall be lawful for all his majesty's subjects in England and Wales, to have free liberty to trade into, and from Spain, France and Portugal, in such sort as was accustomed at any time in his majesty's time.

Stat. 4 Jac. cap. 9. Made to confirm the charter to the company of Exeter Merchants, upon singular reasons recited in the act of parliament, declaring the stat. 30 Jac. cap. 6. should not impeach that charter being for public good.

Stat. 45 Ed. 3. cap. 4. That no imposition shall be charged upon wool in no sort, without the assent of the parliament : this statute was not made out of necessity, for it was the common law ; yet it was thought fit by the parliament at that time, to declare the law by an act of parliament.

Stat. 1 H. 4. cap. 16, 17. Against letters patent made to ingross trades, &c.

So ancient was the monopoly, and ingrossing of trades by illegal letters patent.

When illegal things turn to a grievance, it is usual to suppress them by acts of parliament, and not to leave their judgment to the ordinary courts of justice without declaration first had in parliament.

Stat. 21 Jac. cap. 3. This statute takes notice, though the king's disposition, judgment and declaration was, that all monopolies were against law ; and that no suitors should move for such grants yet upon misinformations and untrue pretences of public good, many such grants have been unduly obtained, and unlawfully put in execution, to the great grievance and inconvenience of the subject, contrary to the laws of the realm.

For the avoiding whereof, that statute is made against all grants to any person or persons, bodies politic or corporate, of any monopoly ; and declares the same illegal.

This statute doth quadrate with the description of a monopoly.

So doth the East-India Company's charter in all its points and parts, and in the exercise

of it, quadrate with these monopolies and their descriptions in our law-books and cases ;

With my lord Coke's description of a monopoly, in his 3d Inst. cap. monopolies.

If Mr. Sandys be pictured in Mr. Attorney's argument, I take it the East-India charter is pictured in this statute.

The act of tunnage and poundage, 12 Car. 2. says, The commons in parliament reposing trust and confidence in your majesty, in and for the safe-guard of the seas, against all persons intending, or that shall intend the disturbance of your commons, in the intercourse of trade, and the invading of this your realm, give and grant for every tun of wine of the growth of France, that shall come into the port of London, by your natural-born subjects, 4l. 10s. by strangers and aliens, 6l.

The like notice taken of poundage to be paid by subjects and aliens.

Fol. 67. Rates in wares, silks, imported in ships English-built, directly from the East-Indies, the pound weight containing sixteen ounces ; subsidy duty 15s.

Of the manufacture of Italy, imported from thence in English-built ships, the pound weight containing sixteen ounces ; duty 1l. 18s. 4d.

This act distinguishes between subjects and alien importers, between English and foreign ships, not between the East-India-Company only and aliens : shall this law made for England, be now appropriated to this Company, and the rest of England excluded by this grant against this statute ?

This law is made for all the king's subjects and their English-built ships.

The consideration of this subsidy moves from all the subjects, the grant is by all, and the benefit ought to be for all the subjects of England.

The law is the same as to foreign importation from the Indies, as to importation from Italy, to which this Company doth not pretend.

The act for encouraging and increasing of shipping for navigation, 12 Car. 2. the best law that ever was made for England in that parliament, except the laws for the prerogative :

The proviso in it follows : Provided that this act, nor any thing therein contained, extend not, or be meant to restrain the importing of any East-India commodities, laden in English-built-ships ; and whereof the master and three-fourths of the mariners at least are English, from the place or places of loading them, in any part of the seas to the Southward or Eastward of Cabo Bona Speranza, although the said parts be not the places of their growth.

This law made for the increase of English shipping and navigation, doth this Company invade ; and appropriate this shipping and navigation to themselves, by excluding all other English subjects.

Is this for increase or decrease of English shipping and navigation, to confine it to few hands, excluding many ?

There is neither common nor statute law can hold this Company.

I hope the judgment of this court will bind them; and that this act of parliament will prevail against this Company.

The proviso is, for all Englishmen to carry in all English-built ships any East-India commodities brought from infidels.

The charter says, this Company, and the ships and their men shall only carry. Which shall prevail, the act of parliament or the charter? These last mentioned acts of parliament distinguish between subjects and alien importers, between English and Foreign ships; *

Not between the East-India Company only, and aliens: Shall these laws made for England, be now appropriated to this Company?

Shall they have the benefit of it? Can the king's grant take from his subjects the advantages given by acts of parliament, and appropriate to some what is granted to all?

I crave leave to observe some things, by way of answer to Mr. Attorney's positions and inferences in his argument yesterday.

He distinguishes between inland and foreign trade, he did allow the subject the benefit of a home trade without restraint.

That the husbandman might plough.

That one Englishman might privately sell to another by the common law, without licence from the crown.

Yet one subject could not buy, sell, or trade with another publicly in an open fair or market, without licence from the crown, and this for the preservation of the peace, to prevent public assemblies and meetings: and that no fair or market could be kept, but by licence from the crown.

I think there are fairs, markets, and corporations in England by prescription, and their beginning is not known, and such are allowed by law.

And prescriptions are compared to the head of Nile, which could never be discovered.

And that such ancient prescriptions are as ancient as the grants of kings or inhabitants in the world.

And for foreign trade; he laid it down for a position, that no subject could trade abroad without the king's licence in any part of the christian world.

I do not find any authority for this, practice is against it.

The rest of the counsel that argued for the company did not insist upon it; nay, they did seem to admit a trade for English merchants with alien christians, without the king's licence.

This is against the authority of F. N. Br. 85. Dyer 165, 296. against lord Coke's opinion, Rolls Rep. Taylors of Ipswich, Stat. 9. H. 3. chap. 30. Magna Charta, 2 E. 3. cap. 9. 18 E. 3. cap. 3. 25 E. 3. cap. 2. 38 E. 3. cap. 2. 5 R. 2. cap. 2. 12 H. 7. cap. 16.

Stat. 26 H. 8. cap. 10. Rastall 566. which gives the king for a limited time power to license trade and traders in some measure, in some parts, in some commodities. Vide the statute,

His distinction for merchants to trade, without coming to the staple: and therein he distinguishes between merchants and traders, who are obliged to come to the staple.

What warrant hath he for this distinction? The prayer of the commons to the king in parliament: the petitions of merchants to the king: the king's restraint of merchants in their trade, notwithstanding acts of parliament: the continuing of the staple notwithstanding acts of parliament seeming to the contrary, give him a handle for this argument.

1 H. 5. 7. The prayer of the commons to the king, to send foreign merchants out of the kingdom: the king's answer, 'Roy advisers.' 2 H. 5. cap. 5.

Those were bills in parliament presented to the king for the royal assent; so were many of the rolls of those ages, presented to the kings for their royal assent, especially in things which any way concerned the king in his prerogative.

The commons did not demand their rights in their bills, but by petition claim their right.

Such answers of 'Roy advisers,' are no argument against the right of the subject.

Neither is the petition or prayer of the commons in parliament, in any matter that is their right, to the crown, any argument against their right.

This was the usual method, and ancient course of presenting acts of parliament to the kings, especially in Rich. 2's time; H. 4. and part of H. 5. then corrected upon some complaints in parliament tempore H. 5. and H. 6. which may be read at large in the rolls of parliament.

It is their usual way to secure their rights thus; so is the Petition of Right in Car. 1.

The Prince's case, Co. Tit. 8. fol. 19. shews the various forms of acts of parliament, in the several reigns of kings, sometimes by way of grants, &c.

That the staple did continue till lost, by the loss of Calais.

Stat. 2 E. 3. cap. 9. That the staple beyond the seas, and on this side the seas, ordained by kings in times past, and the pains thereupon provided, shall cease, &c.

This statute took away the staples set up by the kings.

But there was a staple set up by act of parliament, and reformed and altered by several acts of parliament, did continue notwithstanding the act of 2 E. 3.

But English merchants are not within any of those statutes, or the meaning of them.

And I do not find that Mr. Attorney gives any account how these staples were taken away by law, but vanished at the taking of Calais; he hath not told us the beginning or ending of the staple by law, I know no common law for them, or his distinction.

Rolls Abr. Prerogative, Title Proclamation, pl. 6. 27 E. 3. by the statute of the staple, it was ordained, that merchants-aliens might bring from beyond seas merchandize of the staple, but not merchants-desizens.

Because merchants-denizens doubted to be impeached in time to come for their merchandize, which they passed by virtue of such grant and proclamation, forasmuch as they were made out of parliament.

Ideo it is granted in parliament, 34 E. 3. c. 2. Stat. 5 R. 2. cap. 2. This statute prohibits the exportation of gold or silver, and that no person other than lords and great men of the realm, true and notable merchants, and the king's soldiers, go out of the realm, without the king's licence.

This is declared to be after publication of this ordinance, which implies such licence was not necessary before the making of this statute.

Mr. Attorney was pleased to allow, licences to particular persons to trade were not revocable; but companies having such licences may be dissolved by *Quo Warranto*.

Therefore more safe to fix trade in companies than persons.

Then doth this charter do the greater wrong to particular persons, who by law may have such licences, which cannot be taken from them.

And it doth not appear, but Sandys hath such licence, or may have, and ought not to be restrained therein by any grant.

Mr. Attorney did turn this matter upon a question of fact, which will, or will not make this company and their grant a monopoly:

Viz. Whether this company and their grant be a public good and advantage to the trade of England?

This is a matter not to be decided in this court, I suppose, and we cannot come at this question in this case; therefore not fit, safe or wise to determine the law in this case; till the fact be cleared and settled, and that in such a judicature where this question may be determined and settled, and the law thereupon declared and established.

It appears to the court, there are many illegal things in this grant.

That the grant is a restraint to the trade of English merchants:

That it is a new grant.

That it may be dangerous to establish such grants by judgment in a court of law.

That there are some things in the Canary patent, in Darcy's patent, nay, in the patent for sweet wines, that were commendable and useful; yet that little good did not prevail, but the whole perished, and was poisoned in the monopoly of those grants.

It is advisable how this court, in this action, can adjudge for the plaintiffs upon this record where the whole grant is set forth upon record in pleading; and it appearing to the court, that some parts of this grant are manifestly illegal, and may occasion oppression to the subject, and that the best parts of this grant are doubtful, if good or useful for England or the trade of it:

It cannot appear upon this roll, for what part of this grant the court shall adjudge for the plaintiffs, and against the defendant.

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And it cannot appear what part of it doth appear to the court to be illegal.

This may turn to a precedent for the whole grant in after-ages, since we judge by precedents: and this precedent may occasion more monopoly-patents, and this judgment give them sanction.

As for the second point in this case; whether this action be maintainable by the Company against the defendant Sandys, admitting their grant to be good:

1. To allow such an action in a court of law for this Company against a single subject, will be to give them opportunity to ruin any subject, that shall oppose them in trade.

They that are too great for all other companies in England, must be too strong for any private subject in contest.

2. If their grant be a legal grant, they have sufficient pains and penalties in it to reduce any person to compliance with their grant, without the aid of actions in Westminster-hall.

And the grant which makes them a company, and doth constitute them and their power, doth direct the remedies, ways and methods to support and maintain them in their power and company, in all the things granted them; and there being no remedy given them by action, I think it may be hard to adjudge, that an action will lie for them in this case, against the defendant.

In cases of new injuries created by grants or by act of parliament, and remedies created to repair such injuries in the grants and acts that create them, such remedies are to be pursued, and not new remedies to be given in courts for such new-created injuries.

This is an action brought upon the grant, where no such remedy is provided by the grant, and other penalties are provided by the grant.

The grant directs and gives forfeiture of all the goods imported against it, and the ship, wherein they are imported; but the grant doth not express the offender to answer damages to the company, which is required by this action, and no special damages are laid in the declaration.

This is like a penal statute, which creates an offence, and adds a penalty.

The party ought to sue for such penalties, and not to sue for damages in an action upon the case.

This may be the case upon the statute, 2 E. 6, for tithes, it gives debts and no damages; so the case doth not lie upon that statute.

Upon the statute for forcible entries, and upon all other penal laws, which give penalties by single, double, or treble damages;

It was never practised to bring actions upon the case, upon such statutes, unless in Darcy's case, which action miscarried, Moor 671.

I humbly conceive this action is not like actions upon the custom of London, or upon duties to the city of London, which have been brought by way of indebtedness for the duty.

2 L

The ARGUMENT of the Lord Chief-Justice JEFFERIES*, at the Court of King's-Bench, concerning the Great Case of MONOPOLIES.

The East-India Company Plaintiffs, and Thomas Sandys Defendant; wherein their Patent for trading to the East-Indies, exclusive of all others, is adjudged good.

Entered Trin. 35 Car. 2. B. R. Rot. 126. add adjudged Termino S. Hilar. Annis 36 and 37 Car. 2. and Primo Jac. 2.

PLEA.

1. Defendant demands Oycr. of the letters patent which are set forth 'in hæc verba': In which (as it hath been observed) the penalty of forfeiture of ship and goods, one moiety to the king, and the other to the company, and imprisonment, is omitted.

2. There is a clause, that the company may license strangers or others, and that the king will not without the consent of the company give licenses, &c.

3. That none shall have a vote in the general assembly, but he that hath 500*l.* stock.

4. And there is another, which hath not been mentioned by the counsel on either side; that if it should hereafter appear to his majesty or his successors, that that grant, or the continuance thereof, shall not be profitable to his majesty, his heirs and successors, or to this realm, that after three years warning, under the privy-seal or sign manual, the same should be utterly void.

For Plea, the defendant says, by an act of parliament, made 15 E. 3. it is enacted, that the sea shall be open for all merchants to pass with their merchandizes where they please; and that the defendant, by virtue of that act, and according to the common law of England, did traffic within those places mentioned in the declaration, without any license, and against the will of the company, as the plaintiffs have declared, 'prout ei bene licuit.'

Plaintiffs demur.

In the debate of this case, at the bar, there were several matters discoursed of; but at length by the consent of both sides, as I ap-

* "This was the great cause that depended, at that time, against Sandys for interloping: but concerned the merchants in London, who complained against the East India Company for being a monopoly, and began almost to form an interloping company. But the judgment of law, being for the Company, put a stop to it. Jefferies espoused the matter with great fury; and though not much given to law matters, he, in giving his judgment made a prolix Argument, as the Reports of the case, wherever they appear, will shew. There was somewhat extraordinary at the bottom: but I have no ground to say what." North's Life of the Lord Keeper Guilford, vol. 2^o. p. 109. Edit. 1808.

prehend, the case was resolved into these two points:

1. Whether these letters patent giving or granting license or liberty to the plaintiffs, to exercise the sole trade to the Indies, within the limits of their grant, with prohibition to all others, be good in law?

2. Admitting the grant good, whether this action be maintainable for the plaintiffs?

Now to let me into the debate of these two points: I think not amiss, to remember some things that have been mentioned by the counsel, that I think are no ways in question.

1. At this time I conceive, therefore, that whether the king may prohibit his subjects from going beyond seas by writ or otherwise, by his absolute prerogative, without giving any reason, is not the question; nor sure was it ever thought a question, till it was lately stirred at the bar. For the writ in *Fits. N. B. 85.* and the Register import no such thing; and our books say, the surmises mentioned in those writs are not traverseable: so is *Dyer 165* and *296.* For surely the king may restrain his subjects from going beyond sea, and is not bound to give any reason for his so doing; but that is not now in question.

2. In the next place, I do not conceive there is any difference (though much discourse hath been about Indians and Infidels) whether the East-Indies were, at the time of the grant of this patent, inhabited by christians or infidels; though by the way, in the debating of this case, I shall shew perhaps that matter may in some measure affect the defendant, but will not at all affect the grant to the plaintiffs. So that I conceive, that whether this country or place, or any other inhabited by christians or infidels, that is not otherwise provided for by act of parliament, will make but the same question.

3. Whether every clause and article in these letters patent, viz. touching forfeiture of ship and goods, imprisonments, or divers other clauses contained in the charter, be legal or not, is not now in question. For surely it would be hard to maintain them all, and therefore the plaintiff's counsel have avoided those questions, by bringing this action; and though the defendant's counsel have mentioned them, yet surely it was only intended to sully the cause, and not that they thought them to affect the question.

4. Nor is it the question, whether by this grant to the plaintiffs the king has fettered or confined his prerogative, by putting in a covenant to exclude himself from granting licences to others of his subjects to trade within the limits of the plaintiffs charter; though Mr. Williams (always a friend to the king's prerogative), in tenderness and care thereof, seemed to be surprised by the inconsiderate extravagancy of the grant; and would have us believe, that he was afflicted with the dismal consequences that must necessarily ensue by the king's parting with so great a prerogative; and that either by the advice, consent, or the inadvertency of his attorney-general, and the rest of his counsel,

by having a greater regard to the East-India Company for the sake of their money, than they had to the king in discharge of their duty. To acquit them and us, therefore, of that dilemma, I am of opinion, though it makes nothing to the question that is now before us, the king may grant licences to any of his subjects to trade to the East-Indies, notwithstanding the charter, or any article, clause or condition therein contained, to the contrary; and notwithstanding any caution or advertisement, that in his argument he gave to the king, or his reflection that he made upon his counsel, either for their ignorance or hasty inadvertency in the passing of that grant. And I am the rather induced to be of that persuasion, for that the most learned of our profession, whose opinions have been quoted by him and others that have argued on the defendant's side, were then of the king's counsel, and were privy to, and advised both these letters patent, and all others of the like nature, that have been granted for these hundred years last past. I therefore think fit to say, that I believe Mr. Attorney-General, and the rest of the king's counsel, have discharged their duty as well to the king, by maintaining of this grant, as Mr. Williams has in this instance manifested his loyalty, by endeavouring to destroy it. In short therefore, as I said before, every clause in this charter is not to be maintained, and therefore is not to affect the question now to be determined.

5. Whereas it has been objected, that though upon the pleadings it is agreed, that the defendant never was a member of the East-India Company, nor had any licence from them to trade to the Indies, yet he might have a licence from the king; which, as I conceive, the king is not deterred to grant by any clause in the letters patent; yet I am of opinion, that if the defendant had any such licence, it ought to have been shewn on his part; which not being done, it ought to be taken by us, as I believe the truth of the fact is, the defendant never had any such licence.

6. It was observed, that the plaintiffs in their declaration had alleged, that this trade could not be managed but 'per hujusmodi Corpus Corporatum;' and by this means they had excluded the king from constituting any more companies to trade within their limits, though perhaps the advantage of this kingdom might hereafter require it. Nay, though the Indians might desire a further treaty of commerce, or that the trade of these places might require more companies to be erected; yet say they, this grant hath made the plaintiffs a mere republic, and thereby has altered the constitution of England, in the management of trade by commonwealths, by placing it in companies, who (were they independent upon the crown) are truly so called. Yet in as much as I did before observe, that the king is not by this grant either excluded from making any new treaties with the Indians, or from making any corporations, or granting any other licences to any of the rest of his subjects, notwithstanding

any of the clauses in the charter; so I am of opinion that that objection also does not affect the question now to be determined; and for that reason, amongst others, I thought it not improper to mention that clause in the charter that was omitted at the bar, which the king has annexed as a condition to his grant; that if it should hereafter appear to his majesty or his successors, that that grant, or the continuance thereof, in the whole or in any part, should not be profitable to his majesty, his heirs and successors, or to this realm; that after three years warning by warrant, under the king's seal or sign manual, it should be made utterly void. So that it appearing that the king hath neither divested himself of the power, nor at the time of the grant did design to be prevented, to shew his inclination for the promoting of the advantage of his kingdom has given himself scope enough to obviate all those emergencies. Yet by the way I cannot but observe that Mr. Williams, to shew his dislike to a commonwealth, declared it to be absolutely opposite to the interest of a single person; but the single person he concerned himself for, was not the king and his prerogative, but his client the defendant, and his trade; who though I cannot in propriety of speech call a commonwealth, yet I cannot but think this opposition of his seems to proceed from a republican principle. For he by his interloping has been the first subject that within this kingdom, for near an hundred years last past, hath in Westminster hall publicly opposed himself against the king's undoubted prerogative in the grant now before us; and I hope, by this example, the rest of his majesty's subjects will be deterred from the like disobedience.

There were some other superfluous objections made against the clauses in the charter, and against the formality of the pleadings, which I think not necessary to remember; and therefore having thus premised, I shall now descend to those points I think only material in this cause.

1. The first and great point in this cause, is, whether this grant of the sole trade to the Indies, to the East-India Company, exclusive of all others, be a good grant in law or not? And I am of opinion it is. And by the way, I cannot but make the same remark in this case, as my lord chief-baron Fleming made in the great case of Bates in the Exchequer, Lane, f. 27, that it is a great grace and eminent act of condescension in the king to this defendant, that he does permit this great point of his prerogative to be disputed in Westminster-hall; but by this he does sufficiently signify to all his subjects, that he will persist in nothing, though it seem never so much for his advantage, but according to the laws of the land. I shall therefore endeavour to make it appear, that he is invested with this prerogative by the law of this nation: but by the law I do not only mean the customary common law or statutes of this realm, which are native and peculiar to this nation, which, as Mr. Attorney

well observed, are not adapted to this purpose; but such other laws also as be common to other nations, as well as ours, and have been received and used time out of mind, by the king and people of England in divers cases, and by such ancient usage are become the laws of England in those cases; namely, the general laws of nations, the law-merchant, the imperial or civil law; every of which laws, so far forth as the same have been received and used in England time out of mind, may be properly said to be laws of England.

And for the better communicating my thoughts upon this subject, I will proceed by these steps:

1. I will very briefly consider of the inland trade within this kingdom, and the foreign trade with other nations; and therein observe, that the king's prerogative is concerned in both, and that there is a great difference between both, allowed by the municipal laws of this kingdom.

2. I shall shew that the liberty of foreign trade may be restrained.

3. That foreign trade and commerce being introduced by the law of nations, ought to be governed and judged according to those laws.

4. That by the laws of nations, the regulation and restraint of trade and commerce is reckoned inter *Juris Regalia*; *i. e.* the prerogative of the supreme magistrate.

5. That though by the laws of this land, and by the laws of all other nations, monopolies are prohibited, yet societies to trade, such as the plaintiffs, to certain places exclusive of others, are no monopolies by the laws of this land, but are allowed to be erected both here, and in other countries, and are strengthened by the usage and practice of both in all times.

6. I shall shew the authorities that are extant in our books, together with precedents, and reasons both public and politic; for, as my lord Fleming says, that such reasons are good directions for our judgment in such cases as these, being demonstrations of the course of antiquity; and therein also observe the necessity and advantage of such societies, and by the way endeavour to answer the several acts of parliament, precedents and authorities, with all other the objections that have been made against my conclusion.

First, then, to consider the difference between the inland and the foreign trade allowed of in our books, and that the king's prerogative doth affect both. As to manufactures, under which all sorts of artificers are concerned, I think they remain with the most liberty by the common law; and as Mr. Attorney observed, the public weal is little concerned therein, only to preserve every one in the quiet enjoyment of the fruits of his own labour and industry, yet even in that the king's prerogative hath not been totally excluded: for as it is taken notice of in our books, all things that are at this day enjoyed by custom or prescription, had their commencement by royal grant; and by that means no artificer within the city of London

can at this day use two trades; *i. e.* a carpenter cannot use the trade of a joiner, or a brick-layer of a plaisterer.

2. As to the trade of merchandize or inland commerce, generally speaking, it had the next freedom by the common law, but was subject nevertheless to be limited or restrained by the king's prerogative in several particulars; as for instance, to prevent all forestalling and ingrossing. So Mr. Attorney did well observe, that numbers of people could not meet to traffic or merchandize, without being in danger of being punished as unlawful assemblies: the crown therefore granted the liberties of fairs and markets, for the sake of commerce and trade; all which did originally proceed from the crown, and therefore by abusing those liberties may still be forfeited to the crown; and passing by all other instances, I shall only instance one taken notice of in our books, which well considered may go a great way in the case at the bar. Register, fol. 107, the king grants to the abbot of Westminster and his successors, that they should hold a fair at Westminster thirty odd days together, with a prohibition that no man should buy or sell within seven miles of that fair during that time; and the king does there command the sheriffs of London by his writ to seize the body of an inhabitant of Salisbury, for selling cloths in London within the time of the fair. Now here is a charter granted to a particular person exclusive of others, for a time subject to more objections than the charter now in question, yet approved of by our books. Hence it came that corporations were erected, and trade confined to places and persons exclusive of others, for all such came originally from the crown: and as I said before in the case of fairs, so I may now say in the case of corporations, that though they claim liberties and privileges by prescription, yet these originally proceeded from the crown, and are therefore forfeitable to the crown: an eminent instance hereof is that case of the city of London, for abusing their liberties, which they claimed by prescription, confirmed by divers charters and acts of parliament; by judgment of this court, their liberties and franchises were seized into the king's hands, and therefore remain as a will to all intents and purposes, till his majesty shall be pleased of his bounty to restore them. Now that the inland traffic is most concerned, either in corporations, markets, or fairs, which all proceed from the crown, does plainly evince that the king's prerogative has a more immediate influence over dealings in merchandizes, than it has over other mechanic crafts and mysteries: and that, as Mr. Attorney did well observe, to prevent frauds, deceits, and other abuses either in weight, measures, or otherwise, which would certainly interrupt such commerce. But our law goes yet a step further, and allows further difference between inland merchandize and foreign, and allows a different way of determining controversies that arise thereupon; the common law and statutes

of this realm, allowing the law-merchant, which is part of the law of nations, should decide such controversies. Decimo tertio H. 4, fol. 19, a complaint made to the king and council of some goods taken away from a merchant; it was moved in that case, that the matter might be determined at the common law: but the lord-chancellor said, that the suit being brought by a merchant, who is not bound to sue according to the common law, to have his cause tried by twelve men, and to observe the other solemnities of our law; but shall sue in Chancery according to the law of nature, which is the universal law of the world. And it is in that case agreed by all the judges, that if foreign merchandize were stolen or waifed, they could not be seized; as other English merchandizes might be by the rule of the common law, as waifs and strays: which shews plainly there is a difference in the consideration of our law, between foreign merchandizes that cross the seas, and other inland goods and commodities. If two merchants be partners in merchandizes, one shall have an action of accoimt against the other, secundum Legem Mercatoriam, says the Register, fol. 135, and F. N. B. 117, D. And yet by the rule of the common law, if two men be jointly possessed of other goods, which are no merchandize, the one cannot bring an action of account against the other; if one of the merchants die, the executor may bring his account against the survivor for his moiety, Reg. 135, F. N. B. 177. But if it were a copartnership for other goods, it would survive 'per jus accrescendi,' according to the rules of the common law.

In an action of debt upon a simple contract, the defendant may wage his law; but it is otherwise in a contract about merchandize, in Lane's reports, Bates case agreed, Reg. 260. A. at common law, the goods of ecclesiastical persons were excused from toll; but says the writ, 'Dum tamen merchandizas aliquas non exercitat de iisdem.' It shews, that then they fall under another consideration. If one man wrongs another man of his goods, here an action of trespass will lie: But if a merchant's goods be taken upon or beyond the seas, there must be a writ of reprisal to obtain satisfaction; the Parl. Roll. 3 Ed. 1. M. 19. in Archivi Turris Londini, where the bailiffs of Southampton are commanded by writ, 'quod omnes Mercatores Leodienses ad partes Angliæ accidentes per bona & catella sua distinguantur secundum Legem Mercatoriam et consuetudinem regni, ad satisfaciendum Mercatoribus Florentinis, &c.' Where, by the way, observe, that *Lex Mercatoria*, which differs from the ordinary common law, is said to be *Consuetudo regni Angliæ*; by which we may observe, that foreign merchandizes and trades differ from others in the eye of law, even by the allowance of common law itself.

Several acts of parliament have been also made for the more speedy recovery of debts contracted for merchandizes, as the statute of Acton Burnel, the statute *de Mercatoribus*, and

the statute vicesimo septim. Ed. 3. cap. 2. amongst other things it is enacted, 'That for merchandizes taken away, the party shall be arrested, and speedy and ready process shall be against him from day to day, and from hour to hour, according to the law-merchant, and not at the common law.' So the statute for erecting the court of insurance, designed for the speedy ease of merchants, has left the determination according to the law of merchants; and therefore hath ordered the judge of the admiralty court always to preside in those commissions. By all which I think I may fairly conclude, there is a great difference allowed of, between the inland and foreign commerce, and that.

2. I shall endeavour to prove, that the liberty of foreign trade may be restrained.

And here I must premise, that as at first all things were promiscuously common and undivided to all, so the free exercise of this universal right, was then instead of property; but as soon as the number of men increased, and they found by experience the inconveniency of holding all things in common, things were reduced into property by agreement and compact; either express, as by partition; or implied, by 'premier occupancy.'

After this government was established, and laws were made, even for the ordering those things to which no man had any right; as for example, deserts, places uninhabited, islands in the seas, wild beasts, fishes, and birds; the former were usually gained and disposed of by him that had the sovereignty over the people; the latter, by him that had the dominion over the lands and waters, who might forbid others from hunting, fishing, &c.

And in virtue of this universal law, his majesty and his predecessors have always disposed of the several plantations abroad, that have been discovered or gained by any of their subjects, and may do for the future, in case any other be discovered and acquired. For though the laws of nations can command nothing which the law of nature forbids, yet they may bound and circumscribe that which the law of nature leaves free, and forbid that which naturally may be lawful. Now to apply this to our present purpose of trade and commerce, Mr. Williams quoted that common saying, 'Commercia debent esse libera;' from whence he infers, that by the law of nature and nations, the sea and trade, and traffic ought to be as free as the air: and for that he has cited 'Grotius de Jure Belli ac. Pacis, cap. 3. Welwood's Abridgm. of the sea-laws, in his epistle to the lord Admiral; 'Grotius de Mari libero,' where he says, 'Mare & Littora Maris Jure Gentium sunt communia. Britton, cap. 33. De pur- chas. le mere & le air sunt thores Common; 'Sir John Bnrrough his sovereignty of the 'seas; Baldus de rerum Dominis.' But I think none of those books can warrant his conclusion; for surely that expression, 'Commercia sunt libera,' cannot possibly be understood in such a literal sense, That every man in

every nation should be at liberty to trade, either in what commodities, or to what place, or at what time soever he shall think fit. For I took it to be granted by all that argued for the defendant, that trade and commerce must be subject to some laws; and Grotius, in his book 'de Mari libero,' proposes this main design, to prove, that any one nation had not power to hinder another nation from free commerce; and that the Spaniards therefore had no right to prohibit the Dutch from trading into such parts of the Indies, whereof the Spaniards were not possessed, upon pretence that they had the dominion of those seas: 'Internes & Hispanos,' says he, 'hæc controversio est, sitne immensum et vastum mare regni unius nec maritimi a cæsis? Populane unquam jus sit volentes populos prohibere ne vendant, ne perantent, ne denique comente inter sese.' And for the benefit of his countrymen he doth therefore assert, 'licere cuisvis genti quamvis alteram adire, cumque ea negotiare;' which taking that to be true, which by the law of nations is certainly otherwise, yet nothing can be inferred from thence, but only the question of commerce between one nation and another. And how that was before leagues and treaties were made, little may perhaps be found, as Mr. Attorney well observed, besides the laws of hospitality, which do not give any demandable right; but surely Grotius there hath no particular respect to particular subjects of this or any other nation, how far the supreme power of any nation may erect a society of trade to a certain place, and for certain commodities, exclusive of all other subjects of their own.

And that plainly appears, both from the scope of his book, as also for that for several years, both before and at the time of publishing that treatise, the Dutch East-India Company was established; which I shall have farther occasion to discourse of by-and-bye.

As for Welwood's Epistle, I have seldom observed that epistles have been cited in Westminster-hall as authorities: yet supposing it to be so, that all loyal subjects shall have their petitions granted to safety and security in their trade; I suppose Welwood little dreamt of interlopers, when he talked of loyal subjects; if it can be meant only of such who may trade by law, that is to beg the question in respect of the plaintiff and defendant. As to that of Britton, that the sea is common, it is answered by what hath been said before; and Welwood, page 66, says, that by commune or publicum, is meant a thing common for the use of any one sort of people, according to that saying, 'Roma Communis Patriæ est,' but not for all of all nations; Welwood, page 66. That passage of Burrough is only observed to prove the king's prerogative within the four seas; and though Mr. Williams would have insinuated, as if the sturgeons and other great fish, and wrecks, and the like, had come to the king by the Stat. of 17 E. S. c. 2; that act was but a declaration of the common law; for he had

it by the right of his prerogative; Plowden's Commentaries, in the case of Mines; Coke 5. Sir Henry Constable's case; these things were vested in the king by his prerogative by the common law. Yet I cannot but observe, that the treatise of *Mare Liberum*, on which Mr. Williams so much relies, was craftily writ, to overthrow the king's prerogative in that beneficial part thereof, relating to the fishing on the English coasts; and contains a plain proclamation for all persons of any nation, indiscriminately to fish in all kinds of seas; for says cap. 5, fol. 10. 'Quæ autem navigationis eadem Piscatus habenda est ratio, ut communis maneat omnibus.' And herein though Mr. Williams intends to make good the premises, I presume that Mr. Pollexfen, that argued on the same side, has a greater concern for his friends in the West, than to join with him to make good that conclusion. And before I go off from this point, I think it not amiss, the better to clear the way to my conclusions, to give some instances wherein other nations, as well as our own, have not only thought it legal, but necessary for their several public advantages, to put restrictions upon trade, and did not think it injurious to natural equity, and the freedom of mankind, so much discoursed of on the other side. To give some few instances; 'Videmus Jura Commerciorum,' says Bodin de Repub. lib. 7. 'non solum omnibus populorum principumque inter se conventis, verum etiam singularum Statutis,' &c. And after he has enumerated the compacts for trade between the Pope and the Venetians, between the citizens of the Hans towns, and the kings of England, France, and Spain, and several other countries; 'Illi,' says he, 'inter se Commercium multis modis personarum, mercium, locorum, temporum atque omni alia ratione coerctarunt.' So is Marguardus, fol. 155, and Buchanan in his 7th book de *Rebus Scottie*; and in all countries, the importation and exportation of some commodities are prohibited, as salt from France, horses from other countries, wool from hence. In whomsoever that power of restraint does remain, the power of licensing some, and restraining of others, surely does also remain by parity of reason; but of that more by-and-bye. And as Mr. Attorney did truly observe, upon perusal of the statutes that are now in print relating to trade, the parliaments have in all ages even to this king's reign, since his restoration, thought fit to make more laws to prohibit foreign trade, than to increase it; as looking upon it more advantageous to the common weal. And thus having observed that other nations, as well as we, have not only thought it legal, but necessary, to make laws for the restraint of trade; and thereby thought they did no injustice to the liberty of mankind:

3. I proceed to the next step. I shall therefore, thirdly, endeavour to prove, that foreign trade and commerce, being introduced by the laws of nations, ought to be governed and adjudged according to those laws; and I do not know of any statute or book of the common

law now in print, that doth oppose this assertion. Coke 3 Inst. fol. 181, in the margin, cited by the defendants counsel at the bar: 'Commerciorum,' says he 'Jure Gentium esse debet;' nay, it is the express text of law, 'ex Jure Gentium Commerciorum sunt instituta;' which being laid down as undeniably true, and so admitted to be by the defendant's counsel; I would infer from thence, since commerce and traffic are founded upon the law of nations by the natural reasons of things, all controversies arising about the same, shall be determined by the same laws, especially where there is no positive and express law in that country where such controversies do arise, to determine them by: and Mr. Williams seems to allow, that there are no such laws in this kingdom; for he thinks that the controversy now before us, is not to be decided but by parliament.

All other nations have governed themselves by this principle; and upon this ground stands the court of admiralty in this kingdom, viz. That there might be uniform judgments given there to all other nations in the world, in causes relating to commerce, navigation and the like. And in as much as the common and statute laws of this realm are too strait and narrow to govern and decide differences arising about foreign commerce, and can never be thought to bear any sort of proportion to the universal law of all nations, as the interests of all foreign trade do necessitate them to contend for; it will become us that are judges in Westminster-hall, for the better determining this case, to observe the methods used by our predecessors in determining such like causes, and take notice of the law of nations.

The common law, by several authorities I cited before, takes notice of the law-merchant; and as the book of Ed. 4, before cited, says, it is part of the law of nations, and leaves the determination to be according to that law; the several acts of parliament I before cited, make a particular provision, that matters of this nature should be determined according to the law-merchant, which is part of the law of nature and nations; and is universal, and one and the same in all countries in the world. And therefore Cicero speaking of this law, says, 'Non erit alia Lex Romæ, alia Athenis, alia nunc, alia posthac; sed et inter omnes gentes et omni tempore una eademque lex obtinebit.' And I the rather thought myself obliged, more industriously to search into the law of nations, the better to enable me to give judgment in this case; the consequence whereof will affect the king's subjects in all parts of the world; and I was minded thereof, particularly, by my lord chief baron Fleming, in the giving judgment of the great case of Bates, about the imposition upon currants, Lane, fol. 27, and does not only affirm it as necessary, but the common practices of all judges, in all ages.

Do not we leave the determination of ecclesiastical causes to be decided according to the ecclesiastical laws; foreign matters, matters of

navigation, leagues, truces, embassies; nay even in the case at the bar, the stopping of the defendant's ship by an admiralty process, was left, by the opinion of all this court, and afterwards by the courts of Common Pleas, and Exchequer, to be decided in the admiralty; and by virtue of a process out of that court, his ship is detained this day. And as I said, that court proceeds according to the law of nations, and the matters before specified are not to be controuled by the rules of the common law.

And if customs make a law, then the custom of nations is surely the law of nations; which brings me to my next particular, which is the main thing upon which this cause will turn.

Therefore, 4thly, I conceive, that both by the law of nations, and by the common law of England, the regulation, restraint and government of foreign trade and commerce, is reckoned 'inter Jura Regalia,' i. e. is in the power of the king: and it is his undoubted prerogative, and is not abridged or controuled, by any act of parliament now in force.

This question is not concerning the consequences of this power, or any inconveniences that may happen thereupon, because upon inconveniences arising, the king is to be supplicated to redress them: which I shall farther take notice of, when I come to answer the particular objections made against this grant.

'Commerciorum Jura sunt privilegiata, ac non nisi iis concessa qui exercendorum Mercatorum licentiam principis indultu et autoritate mæruerunt,' is the very express text of the civil law; and so is Carpzovius, Const. n. 5. Bodinus de Republica, lib. 1. c. 7. says, 'Quæ tametsi Jure Gentium esse videantur prohibere, tametsi sæpe à Principibus videmus.' And in c. 6. quoted by Mr. Attorney, That the laws of commerce are contained in the particular compacts and agreements of princes and people. So Salmasius, pag. 236; 'Mercatura est res indifferens, in qua Magistratus vel in vetando vel permitiendo suam pro Commodo Reipublicæ potest imponere autoritatem.' So Carpzovius, a famous German lawyer, in his decisions, lib. decis. 105. N. 13, & 14. 'Exempla haud rara sunt, ubi Privilegio et Edicto Principis commercia ad certas personas certave loca restringerè videmus.' These rules and principles, asserted to be the laws of nations, agree with the principles of our laws. Mr. Attorney, in his argument in this cause, cited many records and precedents to make good this assertion; which I think he did with great clearness. I therefore will contest myself with as few of them as I can; and only remind you of such as I think absolutely necessary to make good my assertion, which I will do by these steps. I conceive the king had an absolute power to forbid foreigners, whether merchants or others, from coming within his dominions, both in times of war and in times of peace, according to his royal will and pleasure; and therefore gave safe-conducts to merchants strangers, to come in, in all ages, and at his pleasure commanded

them out again, by his proclamation or order of council; of which there is no king's reign without many instances. And the statute of Mag. Chart. c. 30. so much insisted on by the defendant's counsel, is but a general safe-conduct; 'Omnes Mercatores nisi publicè ante prohibiti fuerint, habeant saluum et securum conductum, &c. Where by the bye I must observe, that Mercatores, says my lord Coke, in his comment upon the charter, is only intended of merchant-strangers; for I cannot find, that in those days any of the subjects of this kingdom did apply themselves to foreign trade; or at least the trade was not so considerable, as to be taken notice of in any book of record that I can meet with. And before the making of that statute, my lord Coke, 2 Inst. fol. 57. does agree, that the king might, and did prohibit strangers at his pleasure: but he conceives, and, with great respect be it spoken to his memory, I think without any colour of reason, would make these words, 'nisi publicè prohibeantur,' to intend only a prohibition by parliament; and his reason is, for that it concerns the whole realm. Now did the coming in of strangers concern the realm after making of the act, more than it did before? surely no. Doth not the power of making war and peace, absolutely belong to the king by his prerogative? And is not that of public concern to the kingdom? And is not the prohibition of strangers a natural dependant upon that prerogative? If the word publicè there had been out, there had been no colour for that conceit; and surely the king's proclamation will make the matter as public as an act of parliament can do: nay, and I may say more, for acts of parliament anciently were made public by proclamation; for in our books we have many instances of writs directed to sheriffs of counties, to cause acts of parliament to be published by proclamation; and so was the constant and ancient usage. And is it not more natural for strangers that are abroad, to take notice of the king's public edicts, which are known to be of great importance in all countries, more than they would of an act of parliament that affects the king's own dominions only? Besides, it appears more impertinent, if you turn those words into a Proviso; and then it will amount to no more in plain English than this, 'provided that this law shall continue, except it be hereafter repealed;' which surely would be very ridiculous.

Mr. Attorney and Mr. Solicitor both, in their arguments, quoted several records and precedents, where the king, in all times after the making of that act, did prohibit strangers from coming in, and did command them out when they were here, at pleasure. I shall not trouble you with the repetition of the records, for they were many; nay, the king, when acts of parliament had prohibited, did grant safe-conduct; and of that sort, in Rolls Prerogative, 180. you will find several instances; and in the several acts of parliament cited by Mr. Attorney, to confirm the king's

prerogative, as to safe conducts, it doth appear. Syderfin. fol. 441. it is said, that the king by the common law, might prohibit the importation of foreign goods; and whoever acted against such prohibition, forfeited his ship.

The king might prohibit any of his subjects from going beyond the seas at pleasure, and recall them again as he thought fit; and that, as I have said before, without giving any reason. The books of Fitzherbert's N. B. and Register, before recited, make this evident. Mr. Attorney indeed cited many instances wherein the kings had made use of their prerogatives, as 7 Ed. 2. M. 10. Quadragesimo Ed. 3. M. 24. stat. 5 R. cap. 2. which confirms it, 3 Instit. 179. Vicesimo quinto Ed. 2. M. 10. with many more*; and indeed I think it was not denied, but that after a prohibition, it was an offence admitted of by the defendant's counsel for any subjects to go beyond the seas, Dy. 165 and 296. agrees it.

And that is sufficient for the present purpose, there being a prohibition in the charter in question, to all persons that are not there mentioned. What influence the king's prerogative must necessarily have upon foreign trade and commerce, appears by his frequent granting letters of mart and reprisal: These are not allowed of by the law of nature, civil or common law; for thereby no man is bound by another's act, without his consent, but by the general consent of nations, 'humana necessitate exigente.' The king only has the power of making leagues and truces with foreign princes, upon which only all foreign trade does depend; and those leagues are made upon such terms and conditions, and under such limitations, as both princes think fit: Many instances to this purpose were also cited by Mr. Attorney, to which I refer myself; and the differences that arise from merchants beyond the seas, are to be determined according to those leagues, and cannot be decided by the municipal laws of this realm, which cannot be put in execution in foreign parts.

Fourthly, The king is absolutely master of war and peace; which he could not be, in case he had not a power to lay restraint upon his own subjects in relation to foreign commerce; since *eo ipso*, that war is proclaimed, all public commerce is prohibited: and the counsel that argued for the defendant, admitted, That the king might prohibit his subjects to go or trade beyond the seas in cases of war or plague. How strangely preposterous then would it be for a man to imagine, that the king should have an absolute power of war and peace, and yet be denied the means to preserve the one, and prevent the other! Is not that therefore the great reason why the king is at so great expence in

* Rolls Abr. 2. fo. 314. The Common pray leave to export and import foreign goods at their pleasure, except goods of the staple; notwithstanding any proclamation to the contrary. Resp. Le Roy voet vostre advice par son Counsel.

maintaining ambassadors and envoys in all the trading parts of the world, without which we should be in a perpetual state of war? would it not be monstrous, that when the king is entered into league with any sovereign prince, in a matter of trade very advantageous to his people, to have it in the power of any one of his subjects to destroy it? As for instance, suppose a league between our king and the emperor of Morocco, for a trade to Tangier, were made upon condition, That no English ship coming there for commerce, should be above a hundred ton, and a fleet of merchant ships within that condition, were in port at Tangier; and Mr. Sandys, with the same obstinacy as he seems to appear in this case, should have gone with a ship of above a hundred ton to Tangier; that would have been an absolute breach of the league; we should have been immediately in a state of war, the merchant-ships and goods absolutely forfeited to the emperor by the law of nations, and they and their families thereby undone, without any remedy, till Mr. Sandys should be pleased to return into England; and also bring with him an estate sufficient to make them a recompence: and then also perhaps it would be difficult to contrive such an action in our law, to compel Mr. Sandys to do it. Besides, the king has no other way, if his ambassadors and ministers in foreign parts cannot prevail that right should be done to his subjects; or if Mr. Sandys's interloping ship, and all its cargo, had been wrongfully taken away from him by any foreign prince, but by the king's declaring of a war, and compelling them to make restitution by force; the consequence whereof will affect more than foreign traders, who would be then concerned, both in their persons and purses; and it would be very hard for all the king's subjects to be under the burthen and charge, and the profits and advantages accrue only to a few. And here, by the way, I think it not improper to take notice of an objection that was made by the defendant's counsel, of the unreasonableness that the king should be entrusted with this prerogative: for as well as he may restrain persons trading to the Indies, he may also restrain them from trading into any other part of the world. The very objection seems to carry an unsavoury, as well as unreasonable mistrust in a subject to his prince. For as it is a maxim in our law, the king cannot be presumed to do wrong; and I am sure the constant practice of our present king has not given us the least umbrage for such diffidence; and I think I may truly say, we are as safe by our prince's own natural inclinations, as we can be by any law in this particular. The king has the absolute power of pardoning all offenders by his inherent prerogative, which an act of parliament cannot deprive him of, the case of murder is a full instance of that; nor was that prerogative ever disputed in any age, though never so troublesome; saving in that single case of the earl of Danby, and that without any reason, that I could ever hear of. Is it therefore to be ob-

jected and presumed, that the king will pardon all the traitors, murderers and robbers, and other felons, and make use of his prerogative to let all malefactors escape?

The king is the fountain of honour, as well as of justice, and in virtue of that prerogative, may enoble as many of his subjects as he pleases; and thereby exempt them from arrests, and other common processes of the law, by means whereof men do more speedily recover their just debts, and have redress for injuries. Is it therefore to be presumed the king will make such a gift of noblemen, because he may do it? And as this is against his inclination, so certainly it is against his interest, to make such grants as the defendant's counsel seem to fear; for it is more for the king's benefit than it can be for his subjects, the greater the importation of foreign commodities is; for from thence arise his customs and impositions, those necessary supports of the crown: and therefore, in some sense, the king is the only person truly concerned in this question; for this island supported its inhabitants in many ages without any foreign trade at all, having in it all things necessary for the life of man.

'Terra suis contenta bonis, non indiga metis,' says the poet. And truly, I think, if all this day most of the East-India commodities were absolutely prohibited, though it might be injurious as to the profit of some few traders, it would not be so to the general of the inhabitants of this realm. And therefore, as I have offered these few instances to prove the king should have such a prerogative; in the next place I come to shew, that the kings of England have exercised this their prerogative at all ages: and as the king has the power of restraint of the foreign trade, so he is only judge when it is proper to use that power, which seems plainly to be for the same reason. And I think Mr. Williams's remark of the difficulty of this case, that it should necessitate the king to call a parliament to assist him with power to determine this question, is not to be passed by without some observation.

God be praised, it is in the king's power to call and dissolve parliaments, when and how he pleases; and he is the only judge of these *Ardua Regni*, that he should think fit to consult with the parliament about. And Mr. Williams would do well to save himself the trouble of advising the king of what things are fit for him to consult with his parliament about, until such time as he be thereunto called. But it hath been too much practised at this and other bars in Westminster-hall, of late years, to captivate the Lay-Gens, by lessening the power of the king, and advancing, I had almost said the prerogative of the people: and from hence comes the many mischiefs to the king's subjects in parts abroad, by making the power of the king thought so inconsiderable, as though he were a mere duke of Venice, being absolutely dependant upon his parliament. Would it not be mightily for the honour and dignity of the crown of England, think ye, that

the emperor of Fes and Morocco, or any prince of the remote parts of the world, should be told, That Mr. Sandys, one of the king of Great Britain's subjects, came into the emperor's territories against his prince's consent, and that he had no power to hinder him, unless he would consult with all his nobles, and the representatives of all his common subjects, to assist therein? Would not the emperor believe Sandys to be the greater prince of the two? But though such sort of declamations are so much for the service of the crown, and for the honour of the kingdom, as they would have it believed; yet I think they have the same tendency of duty and service to the king, with some other matters that of late have happened amongst us, viz. Some have been so concerned, as well for the safety and security of his majesty's sacred person, and to make him formidable to his rebellious subjects at home, as to desire that his guards might be discharged, because it looked as though he designed to rule by a standing army; and to shew their tenderness to his sacred life, would have him removed from the assistance of evil counsellors as they called them; and put himself into the hands of assassines, as though one murdered prince were not sufficient to satisfy that piece of state-policy in one and the same age. And in order that he might have sufficient to support the necessity, as well as the dignity of a crown, which all good subjects are zealous for; some, of late, have industriously endeavoured to have prevented him from being able to borrow any money upon the credit of any part of his revenue, a privilege that the meanest of the persons concerned in that question would think themselves highly injured to be debarred of.

These and the like attempts, if not prevented, will render the king and his government low and despicable in all other parts of the world: and as for the instance between a denizen and a man naturalized, I think it rather makes against, than for Mr. Williams's conclusion, as to the main question. For though the king cannot naturalize a man, and thereby give him inheritable blood, as a natural-born subject, to inherit lands; yet he may make an alien a denizen; and by that means he becomes to have as much privilege as any of the king's natural subjects hath as to trade and commerce, which is the only question now before us: and I cannot help being of opinion, that this kingdom was in greater regard abroad, and the inhabitants thereof more prosperous at home when the prerogative of the crown was more absolute than now it is; therefore it is our duty as good judges, as well as good subjects, to endeavour to support it as much as we can by law. And so I proceed to mention some precedents and authorities, whereby the kings of England have in all ages exercised this part of their prerogative, of restraining, disposing and ordering matters of commerce and foreign trade, by royal licences, charters, and dispensations.

And herein I shall content myself with as much brevity as I can, only in producing some few of those many instances, which were with great care and industry found out by Mr. Attorney, and Mr. Solicitor; and by them so learnedly and properly applied to the case in question.

1. Therefore it has been well observed, that the staples, which were the common and public marts for all merchants to resort to, were first erected by the king's prerogative, without any act of parliament; as it doth plainly appear by the several acts of parliament mentioned at the bar, either for setting the places, or enlarging the commodities that were permitted to be brought to the staple; for surely in all times, when the staple was fixed in the dominions of any other prince, that must be done by league, which none can make but the king. To instance one authority for all, the Stat. 2 Ed. 3, cap. 9. expressly says, 'It is enacted, That the staples beyond the seas, and on this side, ordained by kings in time past, &c.' Mr. Attorney and Mr. Solicitor cited several records, and other acts of parliament, that allow this to be the king's prerogative absolutely; which I shall only name, they having opened the particulars at large, viz. Vicesimo E. 3, Plac. Parl. Rolls Abr. fol. 108. 130. Octavo E. 3, num. 20. 27 E. 3, cap. 1. 43 E. 3, c. 1. 47 E. 3, N. 17 Prim. R. 2. N. 98. with many more; which did not only license merchants to repair to their several staples, but prohibited them from carrying their staple commodities to any other places, and the several acts of parliament made touching the staple, only inflicted greater forfeitures upon the persons offending, more than the king by his prerogative did inflict; but neither added to, or diminished any part of the power of the crown; the truth whereof will also farther appear by the consent of the parliament plainly declared in several statutes following, viz. 2 H. 5, c. 6. 2 H. 6, c. 4. 8 H. 6, c. 17 and 27. by which, and several other instances, both by Mr. Solicitor and Mr. Attorney, I do conceive it does plainly appear, that the statute of 2 Ed. 3, c. 9. Nono Ed. 3, c. 1, 'decim-quarto' Ed. 3, c. 2. the Stat. of 'decimo-quinto' Ed. 3, mentioned in the defendant's plea, decimo 8 Ed. 3, c. 3. which the defendant's counsel have much insisted on, for the opening the liberty of trade only concerned merchants of the staples; and by the acts of parliaments made relating to that trade, since particularly mentioned by Mr. Attorney, stand now repealed.

And though the place of the staple, as well as the commodities, were ascertained by acts of parliament, yet the king granted to merchants licences to trade elsewhere; which prerogative is allowed of by acts of parliaments, and other authorities in our books: for instance, amongst many others, the stat. 8 H. 6, 21, 22 Hen. 6, chap. 4. 15 Hen. 6, c. 2. 27 H. 6, c. 1. 1 H. 7, fol. 3, A. 16 Ed. 4, fol. 3. 1. 5 E. 4, 33.

And as the king, before those acts of par-

lament mentioned, ordered the merchandises of the staple; so all other foreign trade not taken notice of by acts of parliament, were begun and absolutely disposed of by the king's prerogative; for as my lord Coke, in his comment upon Mag. Chart. c. 30, does truly observe, that by *Mercatores* there, only is meant merchant-strangers; for as I said, I do not find that any of the subjects of this king meddled in foreign trade, in many years after the making of that act: the first instance I meet with, is in *Malin's Lex Mercatoria*, fol. 150, of the society of merchants, which is the staples-adventurers, made by a grant from king Ed. 3, and were called the brotherhood of St. Thomas à Becket of Canterbury, until the time of Hen. 7, who confirmed their charter, but changed their name to that of Merchant-adventurers, by which name they continued a corporation.

And that the king did shut and open foreign trade at his pleasure, by many instances mentioned by Mr. Attorney and Mr. Solicitor, does farther appear, 33 H. 3, mem. 1, 2 E. 3, pars secunda, memb. 35, 3 H. 3, N. 33, Rolls Prerogative 170 and 214, before cited, primo H. 5, 41, decimo-octavo H. 6, N. 60, and the Stat. of 12 H. 7, c. 6, which I have caused to be searched. And in *Plowden's Commentaries*, in the great case of *Mines Royal* it is set down as a rule, that ancient charters and grants of the crown, are the best evidences of the prerogative. *Phil. and Mary* erected the corporation of *Russia* merchants, by charter, with a prohibition to others, with the like conditions within mentioned in the charter at the bar; and was afterwards approved of in parliament in 8 Eliz. and the forfeiture mentioned in the letters patent made more effectual. And as Mr. Attorney did truly observe, that when *Calais* was taken, and thereby the staples unsettled, queen Elizabeth thought, according to the precedent of the *Russia* and other companies, it was most advantageous for the carrying on of trade and foreign commerce, to erect societies and corporations; which was well approved of in those times, and so has continued ever since undisturbed, until this present question; which I shall more particularly insist upon, when I come to discourse of the next head.

And here by the way, I shall only remember, that there were many records and books cited by the counsel at the bar, to prove the difference between alien enemies, and alien amies; and how these infidels are in law looked upon as perpetual enemies, and the many cases that were cited about the Jews, and others, I think will not be necessary to be farther insisted upon; for I conceive they do not concern the question that is now before us. For were not the charter now in question in being, it would be worth while for Mr. Sandys to consider, how far he might be obnoxious to punishment, for trading with infidels, who are in law called 'perpetui inimici.' And therefore I conceive, it is as penal for any of the king's subjects to trade with infidels, who are alien

enemies, without a royal licence, as it is to trade with alien amies, contrary to a royal prohibition. And I cannot conjecture how he will avoid this rock, notwithstanding his pretended skill in navigation, without making use of this charter as a safe-conduct to him, by implication; though he seems here so much to struggle against it: and how far that would prevail for his benefit, may be also considered. But as I said before,

4. The true question is, Whether this be a good grant to the plaintiffs, of a sole trade to the Indies, were the inhabitants thereof Christians or infidels, exclusive of others?

And therefore I proceed to the next step, that though unlawful engrossing, and monopolies, are prohibited by the laws of this, and all other nations; yet I do conceive, that the charter now in question, of a sole trade exclusive of others, is no such unlawful engrossing, or monopoly, but is supported and encouraged, as conducing to public benefit by the law, practice, and usage of this and other countries. And herein, by the way, though the word *Monopoly*, or *Engrossing*, generally spoken of is odious in the eye of our law, yet some engrossings, and so some monopolies, are allowed of in our books; and so I desire to be understood, when I say a lawful or unlawful monopoly, or a lawful or unlawful engrossing. And in as much as this is the great, and as I think, the only objection that either hath, or can be made against the present charter, I shall be the more particular in giving my opinion therein, with the reasons and authorities that have induced me therunto.

I premise only this, that in all those countries, where societies of trade are erected by the supreme power, exclusive of all others, as the case at the bar, monopolies are forbidden; and are as severely punished by their laws, as they can be by the common and statute laws of England, (*viz.* in Holland, Germany, France and Spain, &c.

And so wherever the civil law prevails, monopolies are punished with confiscation of goods, and banishment. *C. de Monopoliis et Cens. forens.* part 1, fol. 497.

Now though monopolies are forbidden, yet that cannot be understood to be so universally true, (as no general law can ever be) that it should in no respect, and upon no occasion or emergency whatsoever, admit of any exception or limitation.

The exceptions thereof may be such as these:

1. Though no private persons can have the sole trade to themselves, by their own private authority, yet this may be granted to a public society, by the prerogative of the prince; if,

2. It be upon good cause, and for the public advantage of the kingdom.

3. From the necessity of beginning and carrying on such trades and foreign commerce, which can be only done by companies and societies.

4. Such companies and societies ought to be continued and supported upon the natural

equity and justice, that no other persons should be permitted either to reap the profit, or to endanger the loss of what hath been begun, and been carried on by them, with great hazard and expence.

Now in as much as foreign trade can never be of advantage to this kingdom, except the balance be kept equal between this and other countries; which can never be done, but by keeping up to proportionable rules for the regulation thereof with the other countries: and because, as I said before, the municipal laws of this realm seem too scanty for that purpose, I will therefore first consider how this question stands, as to the law of nations; and then how it is considered by our law, producing authorities in both to make good my assertion. And because I thought the former more natural and effectual for the decision of this question, made me more inquisitive than otherwise I should have been. Cujacius, lib. 16, Obser. 23, distinguishes inter 'Monopolia licita et illicita.'

'Licitum Monopolium,' says he, 'est, si certis personis vel quod potius est certo Collegio concesserit Princeps ut ei soli jus sit vendende certæ mercis;' and therefore recites a law of the emperors Theodosius and Valentinian, by which certain governors of commerce were appointed; 'Edictali Lege sancita, ut nulli Mercatori nisi ad designata loca temporibus præstituta ad negotiationis sui species distrahendas passim liceret accedere.'

Carpovizius, in his Decisions before-mentioned, lib. 2, Decis. 105, N. 13 and 14, makes this no new case; 'Et certe (non est novum) modum commercii (quæ tamen libertina esse debent) poni ex causa nimirum publicæ utilitatis vel necessitatis, ex quo Monopolia aliis prohibita jure subsistunt.

And again, 'Exempla hæc rara sunt ubi necessitate et Edicto principis Monopolia quandoque probari: Commercia ad certas personas et loca restringi videmus.'

Idem, Decis. 4. N. 10. et N. 13. 'Nimirum Exercitium ac permissio Monopoliorum à Principis arbitrio dependet,' &c. Scaccia de Commercio, Q. 7, fol. 301, N. 15. 'Hoc non procedit in Monopolio, autoritate Principis sive Reipub. contracto, quia sicut monopolia, privata autoritate contracta Reipub. sunt perniciosa: Ita hæc quæ Legis Autoritate, ex justa contrabantur, Cause Reipub. valde utilia sunt.'

Grotius de J. B. et P. lib. 2, cap. 12, sect. 16. 'Monopolia non omnia cum Jure naturæ pugnant: nam possunt interdum à summa potestate permitti, justa de causa et pretio.'

He gives amongst others these two examples:

1. From the history of Joseph, when he was vice-roy in Egypt; which is, says he, an illustrious instance of this matter.

2. That under the Romans, the Alexandrians had the sole trade of all Indian and Ethiopic commodities.

So Thuanus, lib. 32, gives an instance of a

grant from the French king, Ann. 1604, for the sole trade into Canada, or New France; for which he gives this reason, 'Ne gravis esset arario ad sublevandos navigationis illius institutæ sumptus.'

Which I conceive will go a great way in supporting all such trading companies as cannot be begun but by a public expence.

C. de Monopolis, the prohibition is expressly limited, 'Nisi Privilegium vel alia consuetudo in utilitatem publicam vergens resistat.'

'Mercatura est res indifferens, in qua Magistratus, vel in vetando vel permittendo solum pro Commodo Reipub. potest interponere autoritatem.' Salmas. de Foen. Trapezit. fol. 236. 'Hoc solum permissum est Regi ut possit prohibere, ne aliis vendat eadem.' Alciat. in Q. inter publica 17, in Fin. F. de Verb. Sign. as it is at this day practised in France, Thuan. lib. 5.

'Sic in Sale Vendens, Monopolis etiam hodie in Italia licet exerceri à Superiorum permissione.' Scaccia de Mercat. part. 4, N. 30.

'Sic in Reipub. Labocensi, certis quibusdam Mercatoribus ob prædictas rationes jus vendendi sacchari, et salis speciali Privilegio concessum est.' Marguard. lib. 4, c. 7, N. 27.

And then as to the usage:

'Hæc est communissima omnium, nullis proventus reluctante Doctorum sententia, quod jura hujusmodi Emporalia et Regalia possunt acquiri non modo per Concessionem summi Principis, sed etiam Consuetudine et Prescriptione.' Lessius de Justicia, lib. 2. c. 27, Dub. 21.

By the imperial laws commerce and traffic have received several other limitations; sometimes the subjects of the empire have been forbidden to trade to certain places, particularly named; and in general by other constitutions, forbidden to export coin, gold, or arms, to any of the barbarous nations.

And that the law or customs of nations is so, the practice does evince.

And first in Germany, where the law prohibiteth all monopolies; yet see how the law there stands in respect of our case.

'Circa Monopolia autem, quæ exercentur adversus Cives, observandum, non esse illicitam, si non cuius quodvis negotiationis genus exercere conceditur, sed illis dumtaxat qui ad idem exercendam juxta instituta Civitatis sibi jus quaesiverunt, quemadmodum in rebus pub. Europæis tecta quædam præstitisse oportet etiam, qui mercatorum aut officium aliquod tollere vult.'

This as to Corporations.

As to trading Societies thus:

'Sed et fieri potest ut a summa potestate Societas mercatorum indulgetur certum genus Mercium & certis locis advehere, exclusis reliquis cujus privilegii concedendi variaz possunt esse cause.

1. Nam Commercia quæ ad loca remotissima instituerentur, priusquam rite stabiliantur

'magno requirunt sumptus, & accipiunt eventui imo sunt obnoxia; ergo auctoribus talium commerciorum cavendum est, ne quod ab ipsis constitutum magno cum periculo, & sumptu sunt, ahi gratis intercipient.

'2. Ad præterea ejusmodi Societates privilegiatas opibus suis Reipub. exigente necessitate, felicius possunt quam singula succurrere.

'3. Videntur etiam meliori fide commercia tractari, ac majorem copiam mercium hoc modo posse advehi, neque de tot fraudibus et compendiis cogitare necesse habent quorum lucrum in commune velut ærarium redactum æqualibus portionibus distribuitur. Puffendorf de Jure Naturæ & Gentium. lib. 5. fol. 655.'

A learned author does more at large describe it.

It has been a question sometimes debated, whether the society entered into by the Hans Towns were not against law? 'Quippe quod speciem Monopoli præ se ferre videtur, ut certis locis merces emant confederati quæ rursus pretio eas, quo volunt, vendant.'

This is the same objection now made against the charter at the bar.

But the answer given was twofold, and will come home to this case.

1. That the emperor Charles 4. has given his approbation, and made it lawful by his authority.

2. That they had continued in possession of this society so long, that now the length of time (together with the prince's consent) removed all doubt whatsoever; Carpovius de lege Regia Germanorum, cap. 6. sect. 10. And the charter now in question, and other charters of like nature granted by the kings of England, which I shall have occasion to remember by-and-bye, remain undisturbed without the least interruption, as long as this society did before this question was stated.

And though, according to the rules of our law, such a length of time does not obtain the credit of a prescription; yet by the law of nations, and the practices of all other countries which are only adapted for this purpose, it is otherwise. 'Prescriptio enim tam longi temporis vim legis obtinet, imo tollit omne vitium.'

'Prescriptio temporis immemorialis, quæ privilegiata est et ex vitioso etiam titulo dominium et jus tribuit, omnesque solemnitates, etiam extrinsecus, negotio accessisse, præsumit tanti temporis antiquitas, num. 10. n. Atque omnem Monopoli respectum consuetudo immemorialis vel Cæsarium approbatio excludit, n. 10. 26.

'Quia consuetudo immemorialis Cæsarium scitu et concessu hæc antiqua societas fulcitur, omnis Monopoli respectus etiam minimus læserat.' Marg. lib. 4. cap. 7. §. 39.

And as these Hans Towns were one of the first corporations of trade I have read of, so was it thought the interest of England to support and encourage them. I find above sixty

(some say eighty) towns and cities united their stocks, making Lubeck, Brunswick, Dantzic, and Cullen, the chief places of their residence; and so great was their trade and credit under that constitution, that many princes granted them large privileges, and they kept courts by their deputies and councils at Bergen.

By the laws of Spain, all monopolies are forbidden and under the same penalties appointed by the civil law: yet there also a right may be acquired to a sole trade, by licence obtained from the king, or by prescription.

Quinta partida Tit. 7. leg. 2. membris hoc Commercium Maritimum exclusis cæteris ad 20. annos concederetur. 'Neque ulla re se magis prodidit Imperii odium Batavica nostris diebus, (Deo ita volente) constituti magnitudo et felicitas, quam Navigationum in Indias Orientales suscipiarum constantia et successus, ad quas ut ærariorum parceretur, societates instituit; cautumque tandem, ut sub unam societatem omnes coirent, quod alioque experimento constitisset, Aromatum pretia ab insularis ob emptorum frequentiam augeri, et cum alii aliis prævertere, et lucrum ad se aliorum damno derivare satagerent, ubi concordia maxima est opus, æmulationum et dissidii semina spargi.'

I come in the next place to make it appear, that as the law of nations, and the practice of all other countries, warrants the like grants and restrictions with the case at the bar; so I conceive this charter of sole trade to the Indies, excluding others, is neither opposed by the common law, or prohibited by any act of parliament; but is supported by both, as will more evidently appear by the practice and constant usage in all times.

Therefore, though ingrossing be a crime, odious in the law, and punishable, yet all manner of ingrossing is not.

Therefore in the case of foreign trade, which is only applicable to the case at the bar; it was resolved by all the judges of England, 3 Instit. 196. That merchants may buy beyond sea in gross, and sell here again in gross also. I say, that all monopolies are not unlawful. Generally speaking they are, and therefore, I will admit the description of an unlawful monopoly made by my lord Coke, 3 Instit. 181.

A monopoly is an institution or allowance by the king, by his grant, commission, or otherwise, to any person or persons, bodies politic, or corporate, of, or for the sole buying, selling, making, or using any thing; whereby any person or persons, body politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.

Now if the subjects of England had not, before this grant, a freedom and liberty to trade to the Indies, against the king's royal pleasure, the charter at the bar will be no monopoly within that rule.

Now that they had no such liberty, hath been sufficiently proved by the several prohibitions mentioned before; and the many

more instances thereof cited by Mr. Attorney and Mr. Solicitor; and it would be very strange that the king might prohibit foreigners from coming here into England, and not prohibit his own subjects from going into foreign countries.

And it is not denied, but if the king should proclaim a war with the Indians, that then it would be a prohibition to all his subjects to have any commerce with them; nay, and he might continue that war as long as he pleases; and by that means all his subjects would be as well prevented of any of the commodities of that country; and also of exporting any of our commodities thither. So that surely this charter, with these restrictions, is much better than a total exclusion; and therefore foreign trade is not like our home trade, to which the word monopolies is properly applicable; for that cannot be totally excluded for any time, though never so small, by any act of prerogative.

Object. Ay, but, say the defendant's counsel, though the king can by his prerogative prohibit all trade in any country, upon such great emergencies as war and plague, &c. yet to grant liberty to some, and exclude others, that makes the grant at the bar be thought a monopoly. Which is still begging the question, for if the king, by his prerogative, have the power of restraining and disposing foreign trade, where acts of parliament have not interposed; as by the precedents already cited I conceive clearly he has, as inherent to his crown; therefore, as he may restrain all, so he may restrain any part by the same parity of reason.

If the king proclaims a war with any country, which is a general prohibition of trade, and should order that John a Style, or a dozen, or any greater number of his subjects, &c. and give them instructions to treat for a peace, and the persons so appointed should carry on a trade, would not Mr. Sandys, do you think, have as much reason to murmur that he was none of those ambassadors, as he has now by being not comprized within the charter? And would it not be thought an arrogance and sauciness in him, to demand an account of the instruction given by the king to such ambassadors? Or durst he trade there till a peace were proclaimed with that country?

And the gloss of that law says, 'Mercatores non faciant inter Monopolium de re non vendenda nisi pro certo pretio, vel de non exercendo officium nisi per eos recipiatur officiales et socios: Possunt tamen hæc facere cum consensu et scientia Regis et contra facientes perpetuo exulabunt, et eorum bona Regi applicantur. Ex privilegio ergo Regis possunt similiter et consuetudine vel prescriptione, quia quod privilegio acquiritur, etiam prescriptione acquiri potest.'

And there quotes 'ubi dicitur, quod potest concedi privilegium; quod quia solus piscetur in certa parte Maris, et aliis potest prohiberi.'

In France Monopolies are prohibited also, 'Sub pœna Confiscationis corporis et bonorum iudici.' Const. Fr. 1, Art. 191.

Notwithstanding which, there are established several corporations for trade; I will name but two. Anno. 1657, the French king makes a grant of the sole fishery in his dominions to a society, excluding others upon pain that interlopers shall incur the penalty, 'de Confiscation des Vaisseaux et Merchandizes et de dix mille Livres d'Amende.' Aytz. vol. 4. pag. 207. And in the year 1664, the East-India Company, by his declaration, with an exclusion to all others, like our East-India Company, page 74, 75.

In the United Provinces, the laws against monopolies are the same, yet there always were several trading corporations exclusive of all others. 3 June 1621, in the charter of the Dutch West-India Company it is granted thus: "and in case any one shall go to, or negotiate in any of the aforesaid places granted to this Company, and without consent of the said Company, it shall be upon pain and forfeiture of such ship and goods, as shall be found to trade in those coasts and places, which bring presently and on all sides, on the behalf of the said Company, set upon, taken, and forfeited, shall be and remain to the use of the said Company," Aytz. vol. 1. p. 62. sect. 1.

And in case such ships or goods be sold, or fly into lands or havens, the riggers and part owners thereof shall and may be distrained to the value of the said ship and goods.

That the aforesaid Company shall within the said limits make governors, officers of war and justice; and for the other necessary services for the preservation of the places, and maintaining of good order, policy and justice, and the advancement of their trade, shall appoint, dispose and displace, and substitute others in their places, as they shall find their affairs do require.

All ships coming to any place where the Company have their garrison and government shall not transport thence any men, goods, or money, without leave and consent of the council, upon the pain and forfeiture of six months wages, &c.

In the grant to the Dutch India Company 20 Mar. 1602, that no body of what quality or condition soever, shall for the space of twenty-one years pass Eastwards of the Cape of Good Hope, upon forfeiture of ships and goods, Aytz. 1 vol. fol. 157.

That the said Company may appoint governors and officers of war and justice, and for other necessary services, for the preservation of their places and maintenance of good order, policy and justice.

The said officers to take the oath of supremacy to the states general; and of fidelity, as to what concerns trade and traffic, to the Company.

And afterwards, the 9th of Sept. 1606, a Placart was published, that nobody, directly or indirectly, shall pass or trade beyond the Cape of Good Hope, upon pain of death, and forfeiture of their ships or goods, which shall be found to have done or to do so. And though

they should absent themselves out of the United Provinces, yet the sentence shall go on, and be decreed and executed, with the present confiscation and selling of their goods, actions, and credits.

Idem, page 158. And surely the Dutch have been always by us esteemed as our greatest and most dangerous rivals in trade.

And as for the reason and necessity of establishing this way of trading by companies, see the judgment of Thuanus, lib. Hist. 124 and 130, where making mention of the East-Indies, he saith thus: 'Diversis itineribus hujus Regionis Incolarumque Ingeniis cognitius tanta frequentia à privatis hæc ipsa Navigatio et Commercium exercitum fuit, ut alter alterum fere ivisset perditum. Ad obviandum itaque huic malo visum fuit, An. 1602. quibusdam hujus Navigationis mercatoribus, præpotentum ordinum consensu certum constituere corpus, cujus tantummodo, &c.'

The Indians being infidels are by law esteemed common enemies; and the opinion of my lord Coke in Michelborne's case, I think, therefore, to be law, notwithstanding the objections that have been made against it, which none of our books warrant; now the king by his charter makes the plaintiffs as it were his ambassadors to concert a peace, and Mr. Sandys murmurs because he is not one of them.

The king may grant a fair or market to every subject he has; but because he grants that privilege to some of his subjects, have the rest any just ground of complaint? because the king may pardon every offender, but will not pardon any highwayman now in Newgate, must those gaol-birds, therefore, think themselves injured in their liberty and property? because the king granted to his town of Hull, that no other ships should be there freighted for foreign parts, till the ships of that town were first freighted; as he did, Rot. Claus. 41 E. 3, memb. 25. did London, Dover, or any other town of trade complain? Would any of these gentlemen that contend for this liberty of trade, adventure with their fortunes to Algiers, and when they are seized upon by the Algerines, tell them we are Englishmen, and we have by the common law of England, and many statutes of our kingdom, which support the liberty of the subject, a freedom to trade wherever we please? Or would not they rather say, we have a pass from the king of England, and rely upon that, which presumes treaties, leagues, and truces between princes; and in case that will not prevail, the king will see them righted? And in the charter that is now before us, there is a particular restriction and limitation of trade to any prince in amity with our king. Now as the constant usage and practice of other countries warrants such societies as these, so does ours too: For, as I said, the Hans towns were some of the first corporations of trade that we read of in history; so was it thought the interest of England to support and encourage them.

King H. 3, gave them great privileges, and

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the Sull-yards for their residence, which they enjoyed near 300 years, managing their trade by an alderman and counsel, called The Guild of the Hans, ingrossing the trade of England for grain, cables, masts, pitch, tar, &c. and under that colour the Jacobsons at this day claim several privileges.

It is observed by many historians, that the most flourishing trades have been begun by united stocks and policies.

In this kingdom a patent was first obtained for the erecting the staple, from E. 3, before any act of parliament intermeddled in that trade, and proceeded under several regulations till the time of queen Elizabeth. In the book I cited before, Malyn's *Lex Mercatoria*, fol. 150. says, This company of merchants are above 400 years standing, as that book reckons from 1248, when the said merchants obtained privileges of John duke of Brabant, and were called the brotherhood of St. Thomas Becket of Canterbury: which were confirmed by king E. 3, H. 4, H. 5, H. 6, E. 4, R. 3, H. 7, who gave them the name of Merchant-Adventurers; and after him confirmed by H. 8, E. 6, Q. M. Q. Eliz. and king James, not without many enemies and opposers; especially, says that book, of late taxing them to be monopolies, and unprofitable to the commonwealth, being that all our cloths are not dressed and dyed in England; yet it still prevailed, as being thought for the public good.

And it is observable, that queen Elizabeth did not only confirm what was done by her predecessors, but augmented and greatly enlarged the privileges of this ancient company; and confirmed the charter of the Muscovy company, granted by Philip and Mary; and set up several other companies, as that of Exeter, mentioned at the bar; the East-India company, and the Levant and the Eastland company. And although that ancient and beneficial company of staplers was often opposed by particular persons, and complained of as a monopoly intrenching upon the liberty of the subject, in several parliaments, in the time of H. 4, H. 7, E. 6, and queen Mary: yet all parties being heard, these complaints were fully answered, and the Company's privileges ratified and enlarged.

Again, in queen Elizabeth's time, the clothiers having prevailed against the company, the clothing countries were almost quickly ruined, and reduced to that extremity, that in 29. Eliz. the lords of the council sent for the members of that Company, desiring them to reassume their privileges, and cheerfully to proceed in their society; with assurance of all countenance and assistance from the government. And in the reign of king James, after several interlopers had endeavoured to destroy the Company, the king published his proclamation to restore the Company to its ancient privileges.

So did king Charles 1, 7th Dec. 1634; reciting, 'Whereas we have taken into our princely consideration the manifold benefits that redound to this kingdom; and finding

'how much order and government will conduce to the increase and advancement of the same, we have thought fit, with the advice of our privy-council,' &c. There he gives an establishment to the Company, and prohibits any to intrude upon their privileges, upon pain of such punishments as the Star-chamber shall inflict.

Since this, it may be worth consideration, whether the breaking of this Company, has not occasioned the great decay of our trade in wool: it being agreeable to reason, that as no law can be effectual without courts of justice to put them in execution; nor a straggling army subsist without discipline: so a straggling trade managed by particular persons, whilst every one strives to advance his own private interest, will ruin the trade in general, especially such a hazardous trade as this to the East-Indies, which already hath been so chargeable, and can only be prevented by the conduct and government of a public society: and surely to look after and settle these matters, properly belongs to the care and prudence of our governors.

Now I shall observe, how the practice has been both in queen Elizabeth's time, and ever since, and that although many charters like ours at the bar have been granted; and none ever demanded by a judgment in Westminster-hall, or so much as objected against, save only that of the Canary patent, till this cause at the bar: and though several attempts have been made both in parliament, and in the courts at Westminster-hall, against monopolies; yet this charter, and others of the like nature, were never looked upon under that character. For instance,

1. A charter was granted 2 Eliz. to the merchants of Exeter for the sole trade to France, excluding all other merchants of Exeter not of that company, continued undisturbed, and prevailed against a great opposition that was made against it in parliament. King Edward 6, and king Philip and Mary, having granted a charter like ours to the Russia company, which continued in peace till the eighth of queen Elizabeth; when the parliament taking notice of that patent, thought fit to confirm it with all the commendations imaginable; and was so far from thinking it a monopoly, that it says, the commonwealth before that time had received great advantages by it; and grants, and inflicts greater and other penalties than were or could be inflicted by the letters patent: and it is observable, that there were some interlopers upon that trade in those days, and had been liable to the forfeitures inflicted by those letters patent, and were therefore forced to apply themselves to that parliament, and did obtain a special proviso to excuse those forfeitures, which, had not that act of parliament been made, they had been liable to; which I take to be an authority full, as to the case at the bar.

Queen Elizabeth, during her reign, granted several charters of the like nature, which passed

the perusal of her attorney and solicitor, learned men in our profession. In the beginning of her reign my lord chief-baron Weston was solicitor, sir Gilbert Gerrard attorney-general, and passed those patents both to the Russia and Exeter companies: 23 Eliz. my lord chief-justice Popham was attorney, and the lord-chancellor Egerton solicitor, in whose time some few such charters were also granted like to this at the bar. And then my lord Coke was attorney-general, and my lord chief-baron Fleming solicitor-general, who approved thereof; and it is observable, that in the 43 and 44 of the queen, the parliament took notice of many patents of monopolies, as it appears by the book cited at the bar; Townshead's Collections, 244 and 245. The parliament seemed to be as high as ever they were in any age before, and particularly were incensed by those patents. A list of all were brought in by Mr. Secretary Cecil, that were thought grievous or prejudicial to the commonwealth; and though there were a catalogue of forty or fifty, amongst whom that of Darcy is one, yet the parliament, nor none other, complained of any charter granted to corporations, but they continued undisturbed. And by the way it is not amiss to observe, that Darcy's patent was not immediately damned in parliament, but referred to take its fate in Westminster-hall; the great reason that guided that judgment was, the restraint that was put upon the home trade; and so it appears in More's Reports, 672. And thus stood these charters; the China charter, the Turkey company, the Barbary company, the Guinea company, all charters of sole trade, excluding others, remained in trade during all queen Elizabeth's time.

But in the third year of king James was the first act made for opening a general trade to Spain, Portugal, and France, to all the king's subjects; which could not be done in Westminster-hall, as appears by the preamble to that act; nor does that act call those charters monopolies, or open a free trade to any other parts of the world, but leaves all charters of foreign trade, save to Spain, Portugal, and France, to remain as they did before. And in the 4th of Jac. cap. 9, there is notice taken particularly of the charter granted to the Exeter merchants of the sole trade to France; and because it was thought to be damned by the general words of that statute E. 3, yet it is there enacted and declared, that the said statute of patents, neither did nor should dissolve, annihilate or impeach the said charter, or the said company in any of their privileges, liberties, or immunities, granted unto them by the said charter, any thing contained in that general act to the contrary notwithstanding; and from this act of parliament I observe two things:

I. That the parliament thought that the charter to Exeter for sole trade to France, exclusive of others, was for the public benefit and weal of that city.

II. That the letters patent were good in

law, and did not want the assistance of an act of parliament to support them; for that act does not confirm these letters patent, but provides only, that the statute 3 Jac. should not by general words be thought to impeach or destroy them. Now had the parliament thought the charter void or infirm, they might have confirmed or strengthened it, as the Russia patent was; but they concluded, that had it not been for the statute of Tertio, the charter was good to all intents and purposes: and this I take to be full authority in the case at the bar. But to proceed, the Greenland patent for sole fishing, exclusive of others, granted by queen Elizabeth, is held good, Rolls, Part. 5, fol. 3. Taylors of Ipswich's case, and the case of the abbot of Westminster, is agreed to be law; in Darcy's case, More, 673, by Mr. Justice Dodderidge: and by the way he gives good advice to all persons that dispute the king's prerogative; and for the friendship I bear to Mr. Sandys, and others that are now in court, and I think need the advice, I shall read the very words of the book: he that hews above his hands, chips will fall into his eyes; *Et qui Majestatem scrutatur principia, opprimetur splendore ejus.*

In king James's time, many grants, like ours, were made, but particularly in 7 Jac. the patent granted to the East-India Company by queen Elizabeth, was, by the advice of her council, as well as by my lord Hobart, then attorney-general, and sir Francis Bacon, solicitor-general, confirmed and allowed with the same clauses as the charter at the bar; and so remained undisturbed and uninterrupted all king James's reign, and was not thought to be any whit touched or aimed at by the proviso in the statute, 43 Eliz. cap. 1, sect. 9, that act only pointing at the monopoly patents complained of in that parliament of 43 of the queen, which I mentioned before. Then comes the statute so much insisted on by the defendant's counsel, commonly called the statute of monopolies, Stat. 21 Jac. cap. 3, which certainly doth not at all affect the case at the bar. For first, this charter is not a general grant for the sole buying, selling, making, using of any thing within this realm, which are the very words of the acts: nor does this charter give the East-India Company licence or toleration to do, use, or exercise any thing against the tenor or purport of any law or statute, which are the only things provided against by that act. But the parliament then seemed to take the same general care of all such charters as this at the bar, as the parliament did in 3 Jac. of that particular charter of Exeter; and therefore, to the end that these words in the beginning of this act of monopolies might not be thought to extend to charters, to corporations for trade, there is a proviso, sect. 9, that that act should not extend to any corporations, companies, or fellowships, &c. erected for the maintainance, enlargement, or ordering any trade or merchandize, but leaves the same as they were before that act, without any immutation: and it is observable,

that the parliament then thought a general saving sufficient to support those charters that were then in being, to corporations for trade and merchandize; but made particular provisos for the saving of patents for inland commodities, viz. such as salt, gunpowder, ordinance, shot, and the like.

So that this company was in full possession of their privilege of sole trade, exclusive of others, all king James's and king Charles 1st's time, till all the prerogatives of the crown were invaded, and the crowned head too was taken off by traitors and rebels. But the providence of God having restored us our king, and re-invested him with all his undoubted prerogatives, as well as restored us to our ancient rights and privileges, and scarce, as I may say, warm in his throne, but amongst the other considerations that he had for the public weal of his subjects, he considers the public advantage of this kingdom arising by trade, and amongst them, one of his first thoughts are fixed upon this Company. For 3d of April, 1661, he by his letters patent taking notice of the charters of queen Elizabeth, and king James, granted to the East-India Company, and of the injuries that were done to them by the late troubles; with the advice of his council, and approbation of Mr. Attorney Palmer, and my lord-chancellor Finch, he granted and confirmed to them all their privileges. The 27th of May, in the 20th of his reign, lord-observer Finch being attorney, and my lord-keeper, that now is, solicitor, he confirms this charter; and grants to the East-India Company other privileges, by another charter in the 28th year of his reign; at which time the Lord-Keeper was attorney, and sir William Jones, solicitor; he confirms the former, and grants more privileges: and in the 25th year of his reign, by the charter now in question, passed with the approbation of the present attorney and solicitor, men of great ability in their professions, and of whom, were they not present, I should say much more; the charter to this company was confirmed with additional privileges.

Nor has this charter passed only the approbation of his majesty and council, since his happy restoration, but the parliament has likewise taken notice of it; the statute 14 Car. 2, cap. 14, takes notice of it to be of great advantage to the public. The stat. of the 9th of this king for poll-money, taxes them with twenty shillings for every hundred pound in stock. In the great case between Skinner and the East-India Company, the House of Commons defended them, even to an eruption between the two houses.

Mr. Jenks and some other linen-drapers and tradesmen of London, taking the advantage of the heats that too frequently possessed the House of Commons of late years, especially against the point of prerogative, did furiously attack the East-India Company, but without any success: and this company was never assaulted in Westminster-Hall till this

cause at the bar. I cannot help therefore this observation, that as the king by his charter 1667, takes notice, that the charters granted by queen Elizabeth and king James remained uninterrupted till the late rebellion; so the interlopers against the king's prerogative in this particular, and the horrid conspirators against the king's life in this last bellish conspiracy, first appeared in Westminster-Hall about the same time.

As to the objections I have not yet given answer to, I think they are but few: my lord Coke's opinion, cited by Mr. Pollexfen, 2 Inst. 540, where my lord observes new things, which with fair pretences prove hurtful to the commonwealth; and amongst them reckons, that new corporations trading into foreign parts and at home, which under the fair pretences of order and government, in conclusion tend to the hindrance of trade and traffic, and in the end produce monopolies, does not at all concern the case at the bar. For this charter that hath continued for 100 years without any interruption till of late, can neither be thought a new corporation or hindrance of trade; and sir Edward Coke, when he was attorney-general; and past this charter, was as learned in the law, as he was when he published that book, and was turned out of being chief-justice, did not think this charter needed that caution.

As to the case of the Canary patent between Horn and Ivy, that cannot affect the case at the bar.

I. For first, the judgment in that case was given upon the point of pleading, and not upon the validity of the patent.

II. That patent was in perfect opposition to the statute, 3 Jac. that opened a free trade to Spain, and therefore could not be restrained by the king's letters patent, but there is no such objection to our case.

The counsel that argued for the defendant seemed to allow the charters to the Virginia, Turkey, and Eastland Companies, which are exclusive of others, to be good; because they are managed by a regulation, and not by a joint-stock, which surely can make no difference: for it is a grant of a sole trade to them, exclusive of others, as well as the case at the bar. And it is as hard to get into the Turkey Company, as it is into this; and may be more chargeable: for you cannot be a member of the Turkey Company, but you must be a free-man of the city of London; and makes you liable to all the great offices of charge in that government. But a freedom of the East-India Company may be purchased at a much easier rate; the members of the East-India Company are as visible as those of the Turkey. And though it was said, the East-India Company were sometimes invisible, yet, were the Turkey Company infected with so many interlopers as the East-India Company have, they would not appear so glorious and splendid as they now do, and as I heartily wish they may long continue. But the king by this charter has

reserved to himself a power to destroy and alter the whole charter, or any part thereof, so as to put it into a way of regulation instead of a joint-stock, in such manner as he shall in his great wisdom think fit; therefore it becomes us in duty and modesty to wait till we receive his further royal pleasure therein. And whereas it was objected at the bar, because the king cannot lay any imposition upon foreign trade, therefore he cannot restrain it:

I do not know to what end that objection was made, because it does not affect the question at the bar; but lest it may obtain the effect, that I presume was aimed at, I think it is not amiss to say, that even at this day there is much more may be said in the maintenance of the king's prerogative in Westminster-Hall, in that case, than can be offered against his prerogative in this. But in as much as that and several other objections against the charter proceeded from an unreasonable, as well as unmannerly mistrust they have of the crown, I cannot but remember that his sacred majesty was not so mistrustful of them. For he since his restoration has bestowed upon his subjects more than all his predecessors, put them all together, since the conquest, ever did. Nay, he in a moment frankly bestowed upon us more than ever he desires he should be trusted with again, for by his act of indemnity he bestowed upon his subjects their lives, liberties and estates, which were all justly and legally forfeited to him by the late rebellion; the consideration whereof will prevent all fears and jealousies, and promote in all loyal hearts a firm resolution to sacrifice their lives and fortunes, so freely bestowed upon us by him, to maintain the crown and just prerogatives thereof; so that it may have a perpetual continuance in that royal family, in a lawful succession; which I heartily pray may be so long as the sun and moon endure.

From what has been said, I hope it doth plainly appear that since the law of this land, and the law of nature and nations, allow the power of making companies to manage traffic, exclusive to all others to be in the prince, that this is reckoned to be 'inter Jura Regalia'; that no act of parliament does restrain this prerogative; that the practice of all Europe has been accordingly; that particularly such companies have been erected in England, and those companies have been in quiet possession of their privileges for such a number of years; that they have passed the approbation of many learned men; that they have been thought for the public advantage of the nation, by so many kings and princes, with the advice of their council, both in and out of parliament; that all statutes and authorities of law that we can meet with in our books affirm it, and none that I can meet with oppose it.

That the East-India company have solely run the hazard, and been at great expences,

In discovering places,
Erecting forts, and keeping forces,
Settling factories,

And making leagues and treaties abroad ; It would be against natural justice and equity, (which no municipal law can take away) for others to reap the benefit and advantage of all this :

Especially since all this has been occasioned by an act of the public, and by the just prerogative of the crown, under which they claim.

So that now, supposing the matter had been doubtful at the beginning (as yet the contrary is evident), yet after so many years undisputed and uninterrupted prerogative of the king, and the possession of the companies pursuant thereto ; and yet the laws having always been open to any subjects who conceived themselves grieved ; that speech which Josephus records of king Agrippa, to those Jews who after many years endeavoured to recover their lost pretence, may be applied to these clamorous interlopers :

‘ Intempestivum est nunc libertatem concupiscere, olim ne amitteretur certatum oportuit. Non amantes libertatis discendi estis, sed subditi contumaces. ’

And so the Romans answered Antiochus (to shew the injustice of his demands), ‘ That he required those cities which his predecessors for so many years had never enjoyed. ’

And queen Elizabeth pleaded against the king of Denmark, for the rights of fishing upon the coasts of Norway and New-Island, That neither his great-grandfather, grandfather, nor father, had exacted any thing for it ; and therefore concluded it to be unjust. Cambd. Eliz. sub. ann. 1600.

So that I conclude the first, and, as I conceive the only point in this case, that letters patent which gave licence and liberty to the plaintiffs to exercise their sole trade to the Indies, within the limits of their grant, exclusive of all others, is a good grant in law.

2. I do conceive, that the defendant trading to the Indies, contrary to this charter, may be punished by information at the suit of the king ; and that this action by the plaintiffs is also well brought ; but in as much as I have detained you so long upon the first point, I shall trespass upon your patience but a few words to this.

1. Therefore I conceive, the plaintiff need not allege any special damage, no more

than the grantee of a fair, market, or any other franchise.

2. The action is brought, and grounded upon the grant of the sole and entire trade ; which, as I conceive is a franchise the king may grant, and is like the case of new inventions ; upon which letters patent actions are brought by every day's experience ; and the prohibiting clause is added, only to make the thing more notorious : and that interlopers, in case they should be prosecuted at the king's suit, should be more inexcusable. And until you can imagine there be as many East-India Companies as there are commoners and school-masters in England, Mary's case, Coke 9. can never be thought an objection. As to the objection in the 11 Rep. 88. Rolls Abridg. part 1. p. 106. Darcy's case, that admitting the grant or dispensation to Darcy had been good, for the sole importing of foreign cards : yet that being only a dispensation to the stat. of Ed. 4. and did only exclude Darcy from the penalty of that act, he could not maintain the action : but if in case that grant had vested an interest, as our grant at the bar does, he might have brought an action ; as my lord Rolls says in the next paragraph, may be collected out of Darcy's case.

The case upon patents of new inventions, are full authorities in the case at the bar : and so is that case of the abbot of Westminster, wherein the grant of the market for thirty days, exclusive of others, is particularly set forth in the action. And the Salisbury man that brought cloth to London, and sold the same contrary to that charter, is prosecuted in an action of trespass upon the case, at the suit of the abbot ; and the writ concludes, (supposing the grant good) ‘ In nostri contemptum et predicti Abbat'is grave damnum ac Fr. et libertatum suarum predictarum læsionem manifestam ; ’ which is an authority full as to this point.

Upon the whole matter, I am of the same opinion with my brothers ; and do conceive, that that grant to the plaintiffs of the sole trade to the Indies, exclusive of others, is a good grant, and that the action is well brought :

And therefore let the Plaintiff take his Judgment.

513. *The Lady Ivy's Trial*, for great Part of Shadwell, in the County of Middlesex, Die Martis 3 Junii, A. D. 1684. Ter. Trin. 36 CHARLES II. B. R. Before the Lord Chief Justice JEFFREYS.*

Elam Mossam, Plaintiff; v. Dame Theodosia Ivy, Defendant.

THIS day this cause came to be tried at the bar of the Court of King's Bench, by a special jury of the county of Middlesex; whose names follow: Sir Reginald Forster, bart. sir John Cutler, kt. and bart. sir Goddard Nelthorpe, bart. sir Michael Heneage, knt. sir William Gulston, knt. sir Richard Downton, knt. Richard Reynell, Ralph Bucknall, Thomas Austin, Joseph Dawson, Thomas Cleve, Richard White, esquires.

Who being counted, the Record was read to them by the clerk of the papers, in English; and opened by Mr. Holloway, for the plaintiff.

Serj. *Stringer*. May it please your lordship, and you gentlemen of the jury, I am of counsel in this case for the plaintiff; and the question will be, whether the lessor or the plaintiff hath a good title to the tenements in question;

* "Jefferies," says Mr. Fox, "was a man entirely agreeable to the temper and suitable to the purposes of the present government" [that of James the second.] "He was thought not to be very learned in his profession; but what might be wanting in knowledge, he made up in positiveness; and indeed whatever might be the difficulties in questions between one subject and another, the fashionable doctrine which prevailed at that time, of supporting the king's prerogative in its full extent, and without restriction or limitation, rendered, to such as espoused it, all that branch of law, which is called constitutional, extremely easy and simple. He was as submissive and mean to those above him, as he was haughty and insolent to those who were in any degree in his power; and if in his own conduct he did not exhibit a very nice regard for morality, or even for decency, he never failed to animadvert upon, and to punish the most slight deviation in others, with the utmost severity, especially if they were persons whom he suspected to be no favourites of the court." Hist. of the Reign of James 2., ch. 2.

Burnet had before said, *Own Times*, vol. 1. p. 567. "All people were apprehensive of very black designs when they saw Jefferies made Lord Chief Justice, who was scandalously vicious, and was drunk every day, besides a drunkenness of fury in his temper that looked like enthusiasm. He did not consider the decencies of his post: nor did he so much as affect to seem impartial as became a judge, but run out upon all occasions into declamations

which are about three or four hundred tenements near Radcliffe, in Shadwell parish; and the ground thereof is, say we, the ancient inheritance of the church of St. Paul's, who have had the possession thereof for four or five hundred years †. We shall prove leases down for some hundreds of years, till we come to that made to the lessor of the plaintiff; under whom we claim. We will begin with the last lease of dean Stillingfleet, 30 Sept. 1678, upon the surrender of the lease made by dean Sancroft, now lord archbishop of Canterbury.

Swear Jeffrey Willan (which was done;) it is a church-lease, but yet he is a witness to it.

The Lease of 30 Sept. 1678, was read.

Serj. *Stringer*. (Shewing to him another deed). Did you see that deed sealed and delivered?

Willan. Yes, Sir.

An Indenture quadripartite made the 25th of

that did not become the bar, much less the bench. He was not learned in his profession, and his eloquence, though viciously copious, yet was neither correct nor agreeable."

Mr. Barrington, in a Note to his Observations on 4 Hen. 7, observes that bishop Burnet "is generally very accurate with regard to points of this sort" [legal history.] "and it is not improbable that his history was revised by his great patron sir Harbottle Grimstone, who was Master of the Rolls."

This conjecture cannot be true of any part of Burnet's History of the reigns of James 2d, king William, or queen Anne, for Grimstone died about Christmas 1684, at the age of 82, see 1 *Own Times*, 597.] His being likewise chaplain to sir Harbottle must have introduced him to the acquaintance of the great lawyers of the time: in his history he occasionally gives us their characters. In the trial now before us Jefferies displays considerable acuteness, accompanied by his usual insolence and coarseness. There is a story that having commenced the profession of the law in the unsettled times between the death of Charles the First and the Restoration of Charles the Second, Jefferies had never been regularly called to the bar.

† "The state of the question being, Whether the seven acres in Shadwell, was part of the ancient inheritance of the dean of St. Paul's to whom Mr. Neale was lessee, and so now lessor of the plaintiff; or part of Wapping marsh, that had been drained by one Vanderdelf, and after sold to the Stepkins's under whom the lady Ivy did claim." Former Edit.

March, 1679, 31 Car. 2. between Thomas Neale, esq. the lady Gold, &c. read.

Att. Gen. (Sir Robert Sawyer.) We admit the assignment.

Serj. Stringer. Then we shall prove the lands in question were always held of the dean of Paul's.

Att. Gen. Ay do, shew that these lands in question were so, if you can.

L. C. J. (Sir G. Jeffreys.) I would not interrupt you, gentlemen, pray go your own way; but if I mistake not, you had as good begin with 5 Ed. 6. as you did last time, as I remember; I have not indeed my book I had then, here: I fear we have not overmuch time to waste: we shall want time at the latter end of the cause, therefore pray come close to the merits of the cause.

Serj. Stringer. We will shew it, if they require, they know it well enough.

Att. Gen. Shew what you can.

Serj. Stringer. In 5 H. 8. the dean of Paul's, Collet, leases to one John Hall.

L. C. J. But it is 5 of Ed. 6. I ask for.

Serj. Stringer. 23 Feb. 5 Ed. 6. dean May doth make a lease to Joan Hall, and Marcellus Hall. Then dean Jeffreys, 10 Dec. 2 and 3 Phil. and Mar. in consideration of a surrender of that lease, lets another lease to Marcellus Hall; and so it continued till May, 1630, and then dean Donne made a lease for three lives: and upon the surrender of that in 1636, dean Winniff made a lease to Moor; and in 1640, he made another lease to Winterburn, which was sold to Mr. Neale, and so came to the lessor of the plaintiff. First read this book.

Att. Gen. What book is it, Mr. Serjeant?

L. C. J. Ay, tell us what it is; open it before you read it.

Clerk reads.] 'A tenement with a water-mill, cum Pertinentiis'—

L. C. J. What is it you read there?

Serj. Stringer. It is a book that belongs to the dean and chapter of St. Paul's.

L. C. J. What book is it? How do you prove it to belong to the dean and chapter of Paul's?

(Then Mr. Spencer was called, but could not readily come in by reason of the crowd. Mr. Porter was sworn.)

Serj. Stringer. Mr. Porter, what say you to this book?

Porter. Since the beginning of this suit, this book was found among the writings of the dean and chapter of Paul's.

Att. Gen. How long ago, Sir, upon your oath?—*Porter.* About a year ago.

L. C. J. That is but a slovenly account of such a book as this.

Mr. Williams. It is plain, my lord, it is not a new book made on purpose.

L. C. J. It is plain, that in this slippery age we live in, it is very easy to make a book look as old as you would have it.

Serj. Stringer. We will go on to the lease made to Marcellus Hall.

(Then Mr. Spencer came in and was sworn.)

Mr. Williams. Pray, Sir, when first saw you that book?

Spencer. Seven years ago.

Att. Gen. Where, Sir?

Spencer. Among the evidences of the dean and chapter of Paul's.

L. C. J. What is it you would read in it? An entire lease, or what?

Serj. Stringer. 'Tis a short note of a lease.

Clerk reads.] 'A tenement with a water-mill'—

L. C. J. See if the book have any title.

Clerk. No, my lord.

L. C. J. Let me see it. (Which was done.)

Serj. Stringer. The 23d of Feb. 5 Edw. 6.—

L. C. J. You, Spencer, have you seen in any of the books an entry of any lease made by Dean Collet?

Spencer. I have not observed that I have seen any lease of Dean Collet.

L. C. J. Have you seen any lease made by Dean Collet, in the time of Henry 8, about any of the church's lands? I ask you the question, because I observe here in this paper, in two places here is the word 'Dean Collet,' writ with another hand than that of the book; but Nowell is writ with the same hand as the other. And so Nowell seems to have been put for the maker of this lease, as being put upon the top; when in truth he was not dean till long after. Upon your oath, in whose name was that lease let that is here spoken of?

Spencer. I know not, my lord; that is the book I saw then.

L. C. J. Is this lease in your book of leases?

Att. Gen. Pray, Gentlemen, you did produce before your original deed of purchase, where is it now?

Mr. Williams. That book was produced and read at the first trial.

L. C. J. What first trial? Not that last Term.

Mr. Williams. It was in the court at that time.

L. C. J. I believe not, you are mistaken in that; for I have brought the notes I took then, and I find no such thing here.

Att. Gen. They produced then the first purchase of the dean.

L. C. J. Is there any lease of Henry 8th's time in that book?

Spencer. I do not remember any lease of Henry 8th's time of this land; but I have seen that book ever since I belonged to the Dean's business.

L. C. J. Have you not a book of the succession of your Deans? When was Collet Dean?

Mr. Williams. In 1505.

L. C. J. When was Nowell Dean?

Mr. Williams. In 1560.

L. C. J. Then I assure you this book is grandly suspicious.

Att. Gen. They threaten us with forgeries,

and I know not what; I believe it will be found on Mr. Neale's side.

L. C. J. If in case you come and produce a book, and you value yourselves upon the antiquity of it, as an evidence that this land did belong to the Dean and Chapter, and leased by them, 5 H. 8, and in that book Nowell is written by the same hand as the rest of the book, as Dean then; but because you find Collet was then dean, and Nowell not till threescore years after, Nowell is turned by another hand to Collet; it draws a great suspicion certainly upon your book, as set up for a purpose.

Mr. Williams. It is true, my lord, if we did that, it were something; but we find an old book among the evidences of the church, and we produce it as such; we have not altered it, therefore it cannot be done for our purpose.

L. C. J. Who knows who did it? But done it is.

Att. Gen. And your title is under the dean and chapter of Paul's.

L. C. J. Who keeps the evidences that belong to the dean and chapter of Paul's?

Spencer. They are kept in the chapter-house.

L. C. J. I am persuaded there may be an ancient book, and this may be such an one; but it looks a little untoward in this particular. You, Spencer, did you look upon those two particular passages?

Spencer. No; I did not observe it.

Serj. Stringer. My lord, our next lease in the book recites one made by Collet.

Att. Gen. Come, upon your oath; did not Mr. Baron, or Mr. Neale, come to search in this book?—*Spencer.* Yes, they did.

Serj. Lutwich. How long ago was that?

Spencer. As to Mr. Baron or Mr. Neale themselves, I did never see them come to search; but some for them have.

Mr. Williams. Do you believe the book was thus as it is now, before you came at first to it?

Serj. Lutwich. You say they did not come to search, what did they come for then, to drink?

Spencer. They have come to the officer, Mr. Porter, but I never saw them search.

Mr. Williams. But I ask you again, was it so when you found it first?

Spencer. I believe it was, I know of no alteration.

Serj. Stringer. But to put it out of doubt, we have this second lease, which does recite this lease of Collet's.

Mr. North. Nay, my lord, we have another piece of evidence that will fortify that book to be true, as to the foundation of it; that such a lease was then made as the book says: for we have a kind of particular, or Catalogue or evidences of the dean and chapter. It is an ancient writing. And in this there is mention particularly made of a lease made in 5 H. 8. Pray, Sir, look upon that, and give an account of it.

Spencer. I have seen this among the rest of the evidences of the dean and chapter of Paul's.

Att. Gen. How long ago?

Spencer. I cannot directly tell.

Mr. Pollesfen. How long do you think, upon your oath?—*Spencer.* Two years ago.

Att. Gen. That is since this contest.

L. C. J. Ay, that is a little too lately for an ancient writing.

Serj. Lutwich. Did you see it before Mr. Neale or Mr. Baron ordered a search there.

Spencer. I cannot say particularly I did: I have seen this paper—

Att. Gen. Paper, man? It is a parchment, prythee mind what thou sayst: How long is it since you first saw that parchment?

Spencer. I believe I have seen it this seven years; but not that I can swear to have taken any particular notice of it.

Att. Gen. Where did you see it first, upon your oath?

Spencer. Among the rest of the deeds and evidences that belong to the dean and chapter of Paul's.

Att. Gen. Upon what occasion did you take notice of it first?

Spencer. Upon searching among the writings.

Att. Gen. Who did search with you at that time, upon your oath?—*Spencer.* Mr. Porter.

L. C. J. Read it.

Att. Gen. Was it delivered to Mr. Neale before it was brought hither?

Spencer. It is brought here now among the dean's other writings, we never use to deliver any out.

Clerk reads.] This is dated "2 Eliz. 1559. Books and other writings appertaining."

Serj. Stringer. Now we will read the lease to Marcellus Hall; wherein this is recited to have been made.

(The lease in the book was read, dated 23 Feb. 5 Ed. 6, for five-and-forty years at 10*l.* rent.)

Serj. Stringer. Then the next lease is in 2 and 3 Phil. and Mar. [Which was read.]

10th Dec. 2 and 3 Phil. and Mar. from dean Fecknam to Marcellus Hall for ninety years from Michaelmas before.

Att. Gen. There is a licence to alter the mill, which we shall prove he afterwards did.

Serj. Stringer. Your lordship observes here were grounds and several houses at this time lett, with the mill and ponds, and ditches to receive the water. After this, Marcellus Hall assigned to Adrian Moor; he in the year 1618, deviseth it to his wife Mary Moor; and in 1630, she surrenders, and hath a new lease for lives.

Att. Gen. Shew your assignments, Mr. Serjeant, from Marcellus Hall.

Serj. Stringer. That we cannot do, nor need we; for we are not to derive our title that way, but the church title is ours. We will shew you dean Donne's lease to Mary Moor, upon her surrender.

[Which Lease, dated 14 May, 1630. 6 Car. 1. for three lives, at 10*l.* &c. was read.]

Serj. *Stringer*. Then Mary Moor, six years after, surrenders this lease, and takes a new lease for three lives in Dean Winneff's time, at 10*l.* a year rent, and 40*s.* increase.

[Which Lease dated 5 Aug. 1636. 6 Car. 1, was read.]

Then another Lease dated 5 March, 1640, 16 Car. 1, by dean Winneff to Samuel Whitwick and John Winterborn, at 10*l.* the ancient rent, 40*s.* before increased, and 4*l.* more now increased.

Serj. *Stringer*. Thus far it stood upon leases for lives: this lease continued till 1669, till Mr. Neale bought this land, and then he renewed it from the now archbishop, then dean Sarcroft, who raised the rent to 80*l.* during the life of Freak, who was the surviving life, and to 100*l.* after.

[Which Lease, dated 12 July, 21 Car. 2, 1669, was read.]

Serj. *Stringer*. We have brought it home now, my lord, to the lessor of the plaintiff: for we have shewn this lease was surrendered to dean Stillingfleet; and thereupon he made a lease to Garrard and Cratford, which we have given an account of before. And so we have shewn a succession of leases from the church, for 130 odd years.

L. C. J. The last lease is at the rent of 240*l.* a year, I think.

Serj. *Stringer*. Yes, my lord.

Serj. *Maynard*. Have you done, gentlemen?

Serj. *Stringer*. Yes, we have, till you give us farther occasion, brother.

Serj. *Maynard*. Then may it please your lordship, and you gentlemen of the jury, I am of counsel in this cause for the defendant, my lady Ivy. The plaintiffs have given you a sort of evidence for a title; but the truth of it is all that they say will not make a conclusion such as they would have from their premises: for all that they have proved, is, that the deans of Paul's, successively one after another, have made leases. They did in the beginning tell you, they had had this land hundreds of years: but what have they had? and what leases have they made? But only a mill, a bakehouse, a trough of lead, and all houses, lands meadows and pastures thereto belonging. We do not deny but that they are to have a mill; their leases are also, even the new ones do mostly follow the track and words that were used in queen Mary and Henry the eighth's times. But here is the truth of our case: That the dean and chapter had a mill, we agree; nay, more than that, we agree that they have eighteen acres that lie on the North side of Ratcliffe high-way; and also that they have another parcel of land, called the Lynches. That this may be understood, we now crave leave to deliver maps to the court and the jury.

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Serj. *Stringer*. And we desire ours may be seen too.

Just. *Withens*. Aye, deliver in your maps, this is the only fit place for them. (Which was done on both sides.)

Serj. *Maynard*. Then, my lord, I will go on. We agree, I say, they had a mill, which is now taken down and put in another place: we shall shew them where it did stand, and that was no part of the land now in question. The jury have seen the place, and I hope have had a satisfactory view of it. There was once a mill standing, and there was once a pond, but that mill and pond do stand elsewhere. The land in question, we say, was anciently marsh ground, and subject to the overflowing of the water, and it is so to this day. In H. 8th's time, it was, by one Vanderdelf, a Dutchman, drained. This by act of parliament, Richard Hill was made owner of, and he conveyed it to Stepkins, who was the defendant's ancestor, and whose heir she is. And the boundaries are set down in that, and the subsequent conveyances, which cannot possibly stand with those that their mill is said to stand in. We shall shew by several records the queen had a title to it by a conveyance in way of mortgage to her; and this afterwards was conveyed back again to the ancestor of my lady Ivy. We yield they had a mill, and they have increased the rent sufficiently upon it, not to need other men's land. They have houses built upon it. I know not indeed how much, but I think it is near 1,000*l.* a year that it yields to them. If then we can demonstratively shew you where our ground is, and where theirs is, and if we affirm our title by records and good conveyances; then by a pretence to a mill, I hope they shall not grind us, or take away all our land.

Att. Gen. My lord, and gentlemen of the jury, I crave leave to answer the evidence that has been given, before I enter upon our title. They have spent a great deal of time to derive down a title to the dean and chapter of Pauls, to a mill, a bake-house, and some little ground thereto belonging. And truly, as Mr. Serjeant says, no man ever questioned the dean and chapter for their mill, and bake-house, and leaden trough. But the thing in question is, seven acres and an half of land, which in the memory of man was marsh-ground; if you observed it. Gentlemen, upon the view how it lies, you know the North bound is the dean's Lynches, the South bound is the Thames Wall, the West bound Foxe's-lane, and the East bound is the hilly ground that is called Cock-hill. And we say as to all this land, it is none of the dean and chapter's, nor ever did pass, or was enjoyed by this lease; but we shall shew you it was under another lease. I must observe, that it is very strange upon their own evidence, that a mill, *cum Pertinentiis*, should pass seven acres of ground; and a mill that was demolished so long ago as in queen Mary's time, (for so we shall plainly shew you it was)

and that these lands, containing so considerable a revenue, should not have a survey taken of them, or a boundary made of the land, that they might know what was theirs, and what their neighbours. For your lordship and the jury may observe, in all the leases and conveyances down to this time, in Dean Collet's lease, and onward, there was nothing mentioned but a mill with the appurtenances, or a tenement with the appurtenances. But they have not one fixed boundary of their lands; and really it cannot be presumed the dean and chapter should be so ignorant. Besides, in the ancient lease that they produced of Ed. 6th's time, there was a covenant to pay the quit-rent, as for lands holden of the manor of Stepney. And we did expect that they would have brought some of the rolls and records of that manor; and out of some survey, there remaining, would have given a particular testimony of what lands belong to the dean, and what do not. But in truth, we say this is properly marsh-land; for that will be your question, gentlemen, that you are to try, I believe, at last: whether these seven acres, thus bounded on Foxe's lane, West; on the Thames, South; on the Hilly-way, called Cock-hill, or Mill-ditch, East; and on the dean and chapter's Lynchets, North, be marsh-ground? The dean and chapter have given evidence of some leases, which upon the surrenders were delivered up to them; but there are none produced, they only read the entries in their books. Now we shall demonstrate that this mill of theirs was an overshot mill; for there is mention made of a leaden trough, which is the only proper instrument of an overshot-mill. Therefore we will first settle (because they themselves will not) what is theirs; and then we doubt not to give you satisfaction that this was never any of theirs, but the undoubted inheritance of the Stepkins; and not a foot of it belongs to any other man living. But further, since they will not, we shall produce a piece of evidence, which indeed we must thank Mr. Neale for; for he blabbing it about that he had a survey of the manor of Stepney, which would do our work, put us upon searching there for it; and we have it here; and there you will find a particular of all the dean's lands, under 33s. and 4d. quit-rent. And the particulars are thus described in that book, (which shews that there was a tenement that stood by the mill, and that paid a quit-rent, and the other lands came under that quit-rent.) Twenty acres, called Shadwell field, that lieth on the north-side of Ratcliff high-way, known at this day; and all this piece of ground, of twenty acres, is built upon and improved; which was one part of the land that came under a quit-rent, but not pretended to be any part of this. The next is five acres called the Lynchets; and it appears by the record to be but five acres, and so it is measured now. Ratcliff high-way went on the top of the hill, and this is called the Lynch-way, not improved nor built upon; and is exactly abutted according to our records, and decayed by acres to an acre. Then comes

the third parcel, and that only concerns you to enquire of, whether these seven acres and an half be parcel of that? And that is described in the record to be a tenement, called Derrick-hills, which is a bake-house with a mill, and the leaden trough, the appurtenances of the mill, at the rent of 33s. and 4d. These are all the parcels named of the dean and chapter's lands. And at the last trial when they produced the deed of purchase, whereby this was conveyed to the dean, which I think was in H. 3rd's time, it yielded but 3*l.* a year in the whole, and now in time it is come to 2000*l.* a year, without this great gobbet, which they intend now, if they can, to swallow up. And now as to this parcel, all they can claim is but a mill, and in the latter leases, it is a house where the mill stood, and that we shall shew by records where it stood; and it is said to be called Derrick-hills, and situate on the East end of the marsh now in question. And to go a step farther we shall shew that this was altered in queen Mary's time; for in 5 E. 4, the book wherein their lease is, makes mention of the mill as standing; then in 10 D. 2. and 3 Ph. and M. there is a kind of mystery which we shall by our evidence unride: for then though the tenant had above forty years in being, and to come, he must renew his lease from dean Fecknam at that time. Now we shall shew that the 90th of the same December, this place where the mill then lately stood, was lett to John Carter, dar-maker. There are in that place, at this day, lands and houses that yield the dean and chapter an hundred pounds a-year, distinct from the Lynchets and the North ground of Ratcliff high-way, and that is a very good improvement for a mill, and a bake-house, and a leaden trough, and a ditch for the water. Now by their lease in 1630, they recite that the mill was not worth the keeping up; and according to the power given them by the lease, 2 and 3 Phil. and Mar. to pull down the mill, it was pulled down and built upon, and it came to yield them 100*l.* a year, as it doth at this day. After this we shall call witnesses to set forth, that in this place, in the East end of Cock-hill, in the memory of man, there was found the floor of the old mill; and there are those living that can attest it. So we shall shew they are fishing in a wrong pool; they have sufficient to answer their deed of purchase; and all the evidence that hath been given you, will appear to be only to entertain the court with an amusing nothing; and to take up the time. But we shall go yet a step further, and shew beyond all peradventure, that this land in question was marsh-ground: and the other side must admit, that if it be marsh-ground, the dean and chapter have nothing to do with it, never pretended to a foot of it, nor doth any title of their evidence mention marsh-ground. And truly we will admit it to them, if it be not marsh-ground we have nothing to do with it. So that, gentlemen, your great question is, Whether this be marsh-ground, or not? And there

upon the main of the question will be about the East boundary alone, and no other: for that Wapping-marsh bounded south on the Thames, north on the Lynches, and west on St. Catherine's, is no question, nor ever was in all the trials that have been. Therefore the only point that the evidence is to be applied unto, is about the eastern boundary. That we lay to be Cock-Hill, anciently called the Hilly-way, or Millbank, now Cock-Hill; and in the Records of Stepney manor, it is called Cornhill: and it is a rising hilly ground, it appears to be so to this day; I appeal to the jury who have seen it. Now that this was marsh-ground, and the inheritance of the Stepkins's, we shall prove by these steps: First, We shall produce an act of parliament made in 27 Hen. 8, wherein the bounds appear to be plainly the same as now we say they are at this day; only now it is all built, that is all the difference; and the marsh doth thereby contain 130 acres. Now by that act, the whole marsh is vested, as to one moiety, in Richard Hill, as assignee of Vanderdelt the Dutchman, who had drained it, and for his pains was to have one half; and he agreed with the participators, among whom Stepkins was one, and had 53 acres, and particularly this land. So that the dean of Paul's must derive a title from this act, if he will have the land. But we shall shew how they colour their possession. Afterwards Richard Hill, 11th Nov. 37 H. 8, he doth make a lease to the dean and chapter's miller, and that for 34 years, wherein you will exactly see the boundaries of the act are pursued. After he had leased it to the dean's miller, he passeth away the inheritance to Thomas Stepkins, in time, 16th April, 6 Ed. 6, Marcellus Hall the miller, after Stepkins had obtained the inheritance upon agreement between them, gets a lease from Stepkins of 128 years of the lands in question, as you may see by the bounds they are exactly the same; and this was in time, 20th April, 6 Ed. 6. So the miller had now ground on both sides the way that is called Cock-Hill; on the east side by lease from Hill, on the west side by lease from Stepkins. Then in point of time we shall come to shew the lease made to Roper. For Marcellus Hall after he had taken this long lease from Stepkins, 30th Nov. 2 and 3 Phil. and Mary, doth demise the land in question to Richard Roper, for 24 years: and we shall shew that in all the queen's time Roper was tenant. Then Jasper Hill, who was the heir of Richard Hill, in 12 Nov. 5 and 6 Ph. and M. by deed, and afterwards, 3 Eliz. by fine and common recovery, conveys all these lands particularly by name, and re-leaseeth them to John and Macheline Stepkins, and the heirs of John; and so lodged the inheritance in the Stepkins's, all but that which was thus out in a long lease to Marcellus Hall. We shall prove that before Richard Hill died, he entered into a statute to Vivold and Salvago for a great sum of money; and this statute comes to be extended, 3 Eliz. and there this land, notwithstanding

these leases, is seized and extended as Hill's lands. We shall shew all this land upon a commission of sewers, had a survey taken of it. When we have shewn all these records, and proved that this is marsh-ground, and not a witness of theirs but must acknowledge it to be marsh-ground (for that part of Fox's-lane, was raised at least nine foot, and so proportionably was the rest of the ground; and it appears at this day, that upon a high tide all their cellars are overflowed), I think then you will make no doubt, whether this be our land or no. And to proceed in this order that I have opened, we will first shew you the survey. There was one thing I forgot about the 11 acres—

Serj. Stringer. What is it you read first, Sir?

L. C. J. What do you begin with, Mr. Attorney?

Att. Gen. Your lordship observes they shew a lease from dean Fecknam, the 10th Dec. 2 and 3 of Ph. and M. Now on the 22nd Dec. in the same year, we shall shew Marcellus Hall, by lease to Carter, butts it upon the east side of the mill.

L. C. J. I took the notes the last time of your evidence, and it began in H. 8th's time.

Att. Gen. My lord, when we come to our title, we shall go on in the same method we did then; but now we are only shewing where the lands are.

L. C. J. Go your own way.

Clerk reads.—' This indenture, made the 22nd day of December, in the second and third years of the reigns of our sovereign lord and lady Philip and Mary, by the grace of God, king and queen of England, Spain, France, both the Sicilies, Jerusalem, and Ireland, defenders of the faith, arch-dukes of Austria, dukes of Burgundy, Millain and Brabant; counts of Haspurg, Flanders, and Tyroll; between Marcellus Hall, of Ratcliff, miller, of the one part, and John Carter, of Ratcliffe, oar-maker of Stebunheath, of the other part; witnesseth, That the said Marcellus Hall hath demised, granted, and to farm lett unto the said John Carter, that his wharf lying in Ratcliff, where late the mill stood, called Ratcliff-mill, adjoining on the west upon the east side of the mill-ditch, alias the mill-dam, reaching from thence eastward 30 foot; and from the north-east corner of the said mill-dam, southward to the river of Thames, 20 foot; to have and to hold all and whole the said wharf, as is before specified, with all commodities and profits belonging to the same, to the said John Carter, to his heirs, executors, and assigns, from the feast of St. Mary the Virgin, immediately following the date of these presents, until the end and term of 30 years—'

L. C. J. This lease was read the last time.

Serj. Stringer. Yes, it was so, my lord.

Clerk reads.] —' to be fully complete and ended, yielding and paying therefore for the same, unto the said Marcellus Hall, his heirs, executors, and assigns, ten shillings of

lawful money of England yearly; that is to say, at the feast of the annunciation of St. Mary the Virgin. And if it happen the said rent to be behind and unpaid at the said feast, in part or in all, by the space of one fortnight, and lawfully asked of the said John Carter, his executor, and assigns, then it shall be lawful to the said Marcellus Hall, his heirs, executors, and assigns, to distrain for his said rent so being behind, and the distress so taken, to keep until such time as the said rent with the arrearages, be fully satisfied and paid.'—

L. C. J. For how many years is that?

Att. Gen. Thirty years.

L. C. J. What is demise by this lease?

Att. Gen. Read the particulars again.

Sir J. Trevor. My lord, we would gladly know where they had this lease, that so it may appear whence it came; for we know they have an excellent art at finding out of deeds.

L. C. J. Ay, come, shew where you had it. Let me see it.

Att. Gen. We did produce it at the last trial, and at the first too.

L. C. J. But that this jury knows nothing of, and they call for some account of it on the other side.

Att. Gen. Mr. Knowles, do you know any thing of that deed? When did you first see it?

Mr. Williams. And where had you it?

Knowles. My lord, I had it in a garret, in a kind of a nook, about six foot long, and three foot and a half wide, in my own house, in the garret among other writings.

L. C. J. How came you to have them?

Knowles. As I was executor to Winterburn.

Mr. Povey. Pray, Mr. Knowles, will you tell upon what occasion you looked there and found them?

Serjeant Pemberton. Ay, pray givé an account of the whole.

Knowles. My lord, upon the 3d of August, 1682, was the first time I ever saw my lady Ivy to my knowledge; and she was informed by one Mr. Vicar, that I had several writings of Winterburn's: I told her I had so, and my lady desired me to search among them, if there were any writings that concerned Stepkins's estate; I told her it would take up a month's time to look all them over, for there was a great quantity of them. She said, I would do her a great kindness, if I would look; I promised her I would: and upon the fourth of September, I think I found the deed.

L. C. J. How was Winterburn concerned?

Att. Gen. They have shewn that he was owner of the land once.

Mr. Williams. Did you ever read over that lease?

L. C. J. I ask you again, how was Winterburn concerned?

Knowles. He was partner with Wright, who sold the estate to Mr. Neale.

Sol. Gen. (Heneage Finch) Wright sold it to Neale, Winterburn died, and this man was his executor, and so he came to the writings.

Att. Gen. But pray, Mr. Knowles, tell us, were these writings ever shewn to Mr. Neale?

Knowles. In the year 1669, when Mr. Neale bought this estate of my uncle Wright, the writings were all to be looked over; and upon Mr. Neale's request, all the writings were sent to his counsel, a gentleman in Gray's-Inn, one Cage, I think his name was, or something like it; and there they were left three months, and I believe in my soul that deed was among them.

Att. Gen. Were they brought back again?

Knowles. There were two hampers brought back.

Att. Gen. Had you any discourse with Mr. Neale about this business?

Knowles. I was arrested upon his account in an action of 2000*l.* and he presently after came and got me off from that action, and told me, Mr. Knowles, I am sorry you were arrested upon my account. So am I too, Sir, said I; said he, I do believe really you found that deed; I did so, Sir, said I: but says he, pray will you answer me one question seriously? That I will, two or three, if I can, Sir, said I. Says he, did not my lady Ivy, or Baniester, foist the deed into your house? No, said I, for before ever I saw either of them, I had seen that deed. Then I am undone, said he.

Mr. Williams. Who was by, pray, when this discourse past between you and Mr. Neale?

Knowles. There was none but he and I.

Mr. Williams. It was at the tavern; Mr. Neale, I suppose, will not deny this.

L. C. J. Will he not? Will you take his word for it?

Knowles. I do say, I found that deed there.

L. C. J. Read it; read the demise. But, Mr. Knowles, let me ask you a question or two: as I understand, you said my lady Ivy desired you to look among Winterburn's writings, for deeds that concerned Stepkins's estate?—*Knowles.* Yes, my lord.

L. C. J. Where was that?

Knowles. That was at her house.

L. C. J. And when did you find this deed?

Knowles. I found the deed in September, before any body came to look with me, or was in the place with me.

L. C. J. Was there any body with you, when you found the deed?—*Knowles.* No.

L. C. J. Then you found it yourself?

Knowles. Yes.

L. C. J. Did you read it?

Knowles. I did the outside; what was I concerned further?

L. C. J. Nay, do not be angry; when thou art most calm, thou speakest so fast a man can scarce understand thee; answer my question fairly: you say you read it, what part was it you read?

Knowles. The backside, the outside.

Mr. Williams. There is nothing writ upon the outside.

L. C. J. How did you gather by reading the outside, that it concerned my lady Ivy?

Knowles. I only read Stepkins's name.

L. C. J. Stepkins's name, you say?

Knowles. What deed do you ask me upon?

L. C. J. That deed, the only deed you have seen here. What is your christian name?

Knowles. Stephen Knowles.

L. C. J. If I mistook you, I beg your pardon; our question is concerning this very deed now shown to you.

Knowles. I thought you had meant the lease of 193 years.

L. C. J. Well then, let that pass for a mistake; I would know of you now something concerning this deed. Look upon it—(which he did)—upon your oath, when saw you that deed first?

Knowles. I cannot say what day it was.

L. C. J. But, look you, if I mistook you not (if I did, I ask your pardon again), did not you say you found that very deed among a great many other writings of Winterburn's, in a room, so many foot long, and so many foot wide, in your garret? Did not you say, that in time you saw my lady Ivy first, upon the 2d of August, 1682, that you found that deed in September following? And did not you tell us, that you did believe, in your conscience, that in the year 1669, Mr. Neale had this writing, among others, sent to the chamber of such a gentleman in Grays-inn; that they remained there three months, and then were brought back again to you; and you believe in your conscience this was one of them? And did not you say, when I asked you, how you came to know this belonged to my lady Ivy? you said, because my lady Ivy had spoke to you, to look if there was any thing belonging to Stepkins, and you read the outside of the deed, and found Stepkins's name, and so you knew it to concern her? Did not you say all this?—*Knowles.* I believe I did.

L. C. J. Now tell me then by the outside of that deed, how thou canst tell that it belonged to Stepkins? For if thou canst, thou art more crafty than any body here, I believe.

Knowles. I thought it had been the long lease, for that has Stepkins on the outside.

L. C. J. Well, let that pass for a mistake; we must now begin again upon a new matter. When first saw you that deed?

Knowles. In September, 1692.

L. C. J. How do you know that?

Knowles. I put my hand to it.

L. C. J. Did you read the inside of that deed?

Knowles. No, I did not.

L. C. J. Look you then, we ask you how you came to know it was a deed belonging to Stepkins?

Knowles. I read the backside, and put my hand to it.

L. C. J. How came you to put your hand to this deed as belonging to Stepkins, when you never looked into the deed?

Knowles. When I found this deed to have written upon it Marcellus Hall, I did believe it was something that concerned the Stepkins's.

L. C. J. Let us see the deed now—(which

was done)—You say that was the reason upon your oath?—*Knowles.* Yes, it was.

L. C. J. Then look upon it again, and do not be surprized, but let us have the truth come out, in God's name. Was that the reason?—*Knowles.* It was, my lord.

L. C. J. I would fain see Mr. Sutton, I have a question to ask him.

Att. Gen. He is here, my lord.

L. C. J. Give Mr. Sutton his oath—(which was done)—Look upon the outside of that deed, and upon your oath tell us whose hand-writing that is.

Sutton. All but the word (Lect.) is my hand-writing.

L. C. J. Are not the words Marcellus Hall all of your hand-writing?—*Sutton.* It is.

L. C. J. Then how couldst thou know this to belong to the Stepkins's by the words Marcellus Hall, when you first discovered this deed in September, 1682, and you found it by yourself, and put your hand to it; and yet that Marcellus Hall be written by Mr. Sutton, which must be after that time?

Att. Gen. He says he knows it, because he put his hand to it; I suppose he read somewhat of the inside.

L. C. J. He said the backside, the outside; he did not read the inside.

Att. Gen. My lord, I desire our evidence may not be anticipated.

L. C. J. Mr. Attorney, I would not anticipate your evidence; but I must tell you by the way, your evidence anticipate themselves: And this fellow, Knowles, without any more ado, has proved himself an errant, notorious knave. And if your evidence will blunder and spoil themselves, I cannot tell how to help it. I knew, as soon as I saw the deed, that that was Sutton's hand; I know his hand, as well as that you are Mr. Attorney.

Sol. Gen. Pray, my lord, give me leave to ask him a question, which I hope may clear all this matter, for it is plain the man is mistaken.

L. C. J. Mistaken! Yes, I assure you very grossly. Ask him what questions you will; but if he should swear as long as sir John Falstaff fought, I would never believe a word he says.

Sol. Gen. Did you look into the middle of one of the deeds?—*Knowles.* Yes, I did.

Sol. Gen. Can you tell which you looked into the inside of, and which you did not?

Knowles. The lease and some others I did, but I cannot particularly tell.

Sol. Gen. Then, my lord, here is the case: Here are multitudes of deeds, and a man looks on the inside of some, and the outside of others; is it possible for a man to speak positively to all the particular deeds, without being liable to mistake?

L. C. J. Mr. Solicitor, you say well; if he had said, I looked upon the outside of some, and the inside of others, and wherever I saw either on the outside, or in the inside the name of Stepkins, or Marcellus Hall, I laid them by,

and thought they might concern my lady Ivy; that had been something. But when he comes to be asked about this particular deed, and he upon his oath shall declare that to be the reason why he thought it belonged to Stepkins, because of the name of Marcellus Hall on the outside, and never read any part of the inside, when Sutton swears Marcellus Hall was written by him, what would you have a man say?

Sol. Gen. My lord, I have but this to say; if there were never a deed delivered by Knowles to my lady Ivy, or Sutton, where Marcellus Hall's name was written on the backside of it, but by Mr. Sutton; I confess it were a strong objection. But where there are other deeds, and a great many, a man may easily be mistaken. It is impossible for any man, in a multitude of deeds that he finds among a great parcel, and delivers many of them out, to take it upon his memory particularly, which he looked on the inside of and which he looked on the backside or outside of.

L. C. J. Did he not give it as a particular reason of his knowledge, that they belonged to my lady Ivy? For wherever he saw Marcellus Hall or Stepkins, he thought that belonged to her.

Sol. Gen. Wherever he saw those names, that is either in the inside or outside.

L. C. J. Under favour, Sir, he did not say so; but positively said, he knew it by that name. And you shall never argue me into a belief, that it is impossible for a man to give a true reason, if he have one, for his remembrance of a thing.

Sol. Gen. I beg your pardon, my lord; as I apprehend him, he swore he looked into the inside of some, and the outside of others, and there were a great many of them.

L. C. J. And I beg your pardon, Mr. Solicitor, I know what he swore as well as any body else: if indeed he had sworn cautiously, and with care, it might have been taken for a slip, or a mistake.

Att. Gen. My lord, we must leave it upon its own weight; but we are not come to our title yet: I have the deed in my hand, which is a very old one, and therefore needs not such exact proof. He is mistaken, we do own it; and I must appeal to the court, whether a man may not be mistaken in a great multitude of deeds.

L. C. J. Well now, after all this is done, let him give an account how he came to know this to belong to Stepkins, or my lady Ivy, if he can. I speak it not to prejudice your cause, but only to have the truth come out. But for the witness that swears, it may affect him I assure you. Give him the deed, and let him look upon it.—Look upon the inside, and look upon the outside too.

Knowles. I believe, my lord, upon better consideration, I have read this deed before now.

L. C. J. Very well; and yet you swore the contrary just now.

Knowles. I was in a maze, my lord.

L. C. J. I am sure thou sworest wildly.

Sol. Gen. Pray what deed did you take it to be at first?

Knowles. The lease of 128 years.

L. C. J. Prithes read it now to us.

Knowles reads. This indenture made the 22d day of Dec.

L. C. J. Between whom?

Knowles reads. 'Between Marcellus Hall of Radcliff, miller, of the one part, and John Carter, oar-maker, of the other part, witnesseth, that the said Marcellus Hall hath demised, granted, and to farm letten to the said John Carter, all that wharf lying in Radcliff, where late a mill stood, called Radcliff-mill.'—

L. C. J. Can you say you ever read so much before?—*Knowles.* I believe I did.

L. C. J. When was it?

Knowles. In September, 1682.

L. C. J. Then you read it before you shewed it to my lady Ivy?

Knowles. Yes, my lord.

L. C. J. And you found what the contents were by reading?

Knowles. Yes, my lord.

L. C. J. Did you read it through?

Knowles. No, I did not, I believe.

L. C. J. How far do you think you read?

Knowles. As far as I have read now.

L. C. J. Did you find any thing there of the name of Stepkins?

Knowles. No, not in that I did not.

L. C. J. I would desire to know of you, who it was that came to my lady Ivy, to inform her you had such and such writings?

Knowles. It was one Mr. Vicarer, about a trial that was to have been two or three years ago, at the bar of the Court of King's-bench here; but the cause did not then go on: after that Mr. Vicarer did tell my lady, that one Knowles had a great company of writings that were Winterburn's; and she desired him that he would please to talk with me, to see if I could do her any kindness or service in any of those deeds. The first time that I saw her was the 2d of August, as near as I can remember, and then I told her, I was executor to Winterburn, and had a great many writings. Said she, do you know the hand of Stepkins? if you do, and can find any writings that relate to Stepkins, you will do me a great kindness.

L. C. J. Did she name any body else to you?

Knowles. She named one Lun, and one Barker, and one Holder, and several others; I do not remember all.

L. C. J. Was there any mention made of one Collet?—*Knowles.* No.

L. C. J. Was there of one Donne?

Knowles. Of one Lun there was.

L. C. J. Of one Fecknam?—*Knowles.* No.

L. C. J. Of one May?—*Knowles.* No.

L. C. J. One Joan Hall?—*Knowles.* No.

L. C. J. Was there any mention made of any Hall?—*Knowles.* Yes, there was.

L. C. J. What Hall did she speak of?

Knowles. I am not certain whether any Hall was named or no.

Att. Gen. He says, he is sure there was of Stepkins, and several others, but not of any Hall.

L. C. J. He does so, Mr. Attorney. But now I would ask him this question; if there were no mention of any Hall, how came you to find out that this lease from Marcellus Hall to Carter should affect Stepkins, or my lady Ivy?

Knowles. My lord, I will give you an account of that.

L. C. J. Ay, do if you can.

Knowles. This was at the first time that I saw my lady Ivy; that this discourse was between us; upon another discourse, at another time, Hall was mentioned to me.

L. C. J. How many names did she tell you of at first?

Knowles. I cannot remember them all.

L. C. J. He remembers as punctually as can be the 2d of August to be the first time that ever he saw my lady; and then she spoke to him of looking for writings that concerned Stepkins, and Lun, and Barker; and he remembers such a day, the fourth of Sept. 1682, he found the deeds; but he will not give any account how he came to know, by Hall's name, that this belonged to Stepkins. I would fain know when you first heard of the name of the Halls?

Knowles. It was all within a month's time.

L. C. J. Who was it first spoke to you to enquire about the Halls?

Knowles. My lady Ivy spoke to me about Hall when I gave her account of some deeds I had found.

L. C. J. How often did you look over the writings?—*Knowles.* Several times.

L. C. J. The first time, did you give my lady Ivy an account that you had found any thing?

Knowles. Yes, I gave her an account of the lease of 128 years.

L. C. J. Did you find nothing else but that?

Knowles. Yes.

L. C. J. What did you find else?

Knowles. Several: I cannot give an account of all.

L. C. J. Did you find that lease, or this deed first?

Knowles. The lease.

L. C. J. When did you first find this deed?

Knowles. The 4th of September I found the lease, and within fourteen or fifteen days after I found the rest.

L. C. J. How many deeds did you find out?

Knowles. Half a score.

L. C. J. Who was by when you found the deeds the second time?

Knowles. When I had found the lease for 128 years, I laid it by, and looked further for other things, and found a mortgage which concerned myself, and that made me more eager to look for what might concern me besides; that I was not so careful as I should have been of the lease of 128 years, but mixed it among the writings again: but I told my lady

I had found such a deed; and she ordered Mr. Banister to help me to find it again.

L. C. J. Prythee answer me once more. Who first put you in mind of looking after the Halls?—*Knowles.* My lady Ivy.

L. C. J. Was anybody by, when she spoke to you to look after the Halls?

Knowles. Yes, Mr. Banister was by.

L. C. J. Who else?

Knowles. Several of my lady's servants.

L. C. J. Name some of them that were by.

Knowles. There was Mr. Banister's wife and his daughter by.

L. C. J. What day was it my lady Ivy first spoke to you to look after the Halls?

Knowles. Within a week after I first saw her.

L. C. J. Was it before you found the lease you speak of?—*Knowles.* Yes, it was before.

L. C. J. How comes it to pass then, that you did not find it at the first looking, which was the 4th of September, when you found that lease, you say?

Att. Gen. We must lay aside the testimony of this man.

L. C. J. Ay, so you had need.

Sol. Gen. Pray leave the deed in court, we shall have Mr. Neale too busy with it else.

Att. Gen. We shall desire your lordship to consider all the use we make of this deed is to prove, that the mill was removed to another place.

L. C. J. I do not know what it proves, but if you had kept your witness Knowles in the mill, I think you had done better than brought him hither.

Att. Gen. Swear Mr. Banister and Mr. Clerk. (Which was done.)

Sol. Gen. Did you examine that with the roll, Sir? (Shewing him a paper.)

Mr. Clerk. Yes, Sir, I did examine that with the book that Mr. Northy shewed me; I think they say he is steward of the manor of Stepney; he read in the book, and I read the copy; and it is a true copy of a survey of that manor, taken 25 Eliz.

Att. Gen. I heard say you have the books of the manor here; pray let them be produced.

Mr. Williams. You are merry, Mr. Attorney; if it is a true copy, pray let it be read.

Clerk reads.] 'The Dean of St. Paul's holds freely of fee or field, containing by estimation—

L. C. J. Who is lord of the manor of Stepney now?

Mr. Powis. My lady Wentworth is lady of the manor.

Clerk reads.] 'The Dean of St. Paul's holds—

L. C. J. This bounds it on the East, on the Dean and Chapter of Paul's lands, and so doth you no good.

Mr. Williams. Let them go on, my lord.

Att. Gen. With submission, these are our exact boundaries.

L. C. J. Well, go on.

Att. Gen. We shall go on; and with sub-

mission these bounds exactly agree with the bounds that are set by the act of parliament for draining the marsh. Here is nothing that we can see that they can claim but a mill and bake-house, and they are all bounded on the West by Wall-Marsh; and the Lynches are bounded in, part upon the North, and in part upon the West; and there was a little part of the marsh did run into the North bounds. But now we shall come to our evidence; and first we shall shew the act of parliament.

Which being anno 22 H. 8, was read.

Att. Gen. Next we shall shew Richard Hill's conveyance by mortgage, to Vivold and Salvago.

Which Indenture of Mortgage was read.

Clerk reads.] 'This Indenture made the eighth day of November, in the 32d year of our sovereign lord king Henry the eighth, between Richard Hill citizen and mercer of London, on the one party, and Anthony Vivold and Henry Salvago, merchants, of the other party; witnesseth, That where the said Richard before time was indebted unto the said Anthony Vivold and H. Salvago in the sum of 560*l.* of lawful money of England, whereof there are of their free will have pardoned 280*l.* The said Richard Hill by these presents All that moiety of marsh ground being 130 acres, lying and being that is to say, from Ratcliffe mill, that joins to the Hilly Lynch to Ratcliffe town, on the party of the East; to Grass mill by the Hermitage, on the party of the West; on the highway, leading from London to Ratcliffe on the party of the North; and on the river of Thames, on the party of the South given and assured to the said Richard Hill, by authority of parliament in the 27th year of the most noble reign to have and to hold—

Att. Gen. This doth vest the lands in question with others in Vivold and Salvago, as a security for their money.

Sol. Gen. Now we shall shew a lease from Hill to Marcellus Hall.

Clerk reads.] 'This indenture made the eleventh day of November, in the 37th year of the reign of Henry the eighth; between Richard Hill, citizen and mercer of London, of the one party, and Marcellus Hall of Ratcliffe, miller of the other party; witnesseth, that the said Richard Hill, for the sum of six pounds of lawful money of England, to him in hand paid, at the enclosing and delivery hereof, whereof the said Richard Hill hereby acknowledgeth himself to be fully satisfied, contented and paid; and whereof he doth clearly acquit and discharge the said Marcellus Hall, his executors and administrators by these presents, hath demised, granted, and to farm letten, and by these presents doth de-

mise, grant, and to farm letten unto, the said Marcellus Hall a parcel of marsh-ground, lying and being at the East end of the marsh that buttis on Ratcliffe hilly marsh wall-bank, or wall belonging and the well

Shadwell, containing by estimation eleven acres and a half, more or less, abutting on Thames wall, on the party of the South; to the lands called the Dean's Lynches, on the party of the North; and on the wall that reaches from the Lynches to the island, by the pond on the west, with all the foreland and soil.

All which marsh-land is in the parish of St. buntheath to have and to hold the marsh land foreland and soil to the said Marcellus Hall, from the feast of the annunciation of St. Mary the Virgin next coming, for thirty and four years—

Att. Gen. This was a lease made to their miller, and contains eleven acres and half an acre, which we shall shew is just exactly the contents of our land. Next then we shall come to the conveyance made to Thomas Stepkins, which will bring us to our title.

L. C. J. Read the reservation of that lease.

Clerk reads.] 'Yielding and paying therefore yearly, and every year, unto the said Richard Hill, his executors and assigns, three pounds of good and lawful money of England at four terms of the year; that is to say, the feast of the nativity of St. John the Baptist, St. Michael the Archangel, the birth of our Lord, and the annunciation of St. Mary the Virgin.'

Serj. Pemberton. Pray, my lord, we desire they may give some account of this lease, where they had it, and how they came by it.

Att. Gen. You have had it in your hands; you see what it is.

Serj. Pemberton. Yes, and therefore we desire to know something about it, because we find Knowles's hand to it.

Att. Gen. We can give you a better account of it than you think for; but that will let you into an hour's wrangle more, which is all you have to say for yourselves. We have it, improve it.

Serj. Pemberton. You have it we see; but remember you will give no account where you had it. But then we desire to ask Mr. Knowles a question, Whether my lady Ivy was with him—

Att. Gen. My lord, we desire we may go on and give our evidence in; they would fain break in upon us, and take up another hour in quarrelling with our witness. When we hear them in their time offer to impeach the validity of the deed, then will be our time to justify it; and I doubt not but we shall give a satisfactory account of it. Pray, will you give an account of the deed you mapped up the last time?

L. C. J. Nay, nay, Gentlemen, we cannot take up our time in your dialogues and little heats. Do you not hinder them, and we shall

as they shall not hinder you when it comes to your turn.

Clerk. This deed hath been read for the plaintiff and defendant, and is marked so.

Att. Gen. It has been twice read before.

L. C. J. Well, will ye go on, Gentlemen?

Sol. Gen. Then we shall show this deed-pull next.

Clerk. This is also marked to have been read twice. (Reads) This is dated 16 Apr. in the 6th year of king Edward the 6th.

'To all faithful people to whom this present writing shall come, I Richard Hill, citizen and mercer of London, send greeting in our Lord God everlasting. Know ye that I, the said Richard Hill, for the sum of one hundred and thirty pounds of lawful money of England, by Thomas Stepkina, alias Stipkin, of the parish of St. Mary Matfelson alias White-chapel, in the county of Middlesex, beer-brewer, unto me the said Richard Hill in hand paid, wherewith I confess myself to be well and truly satisfied—

L. C. J. Upon whose account is it that my brother Gregory comes here?

Serj. Stringer. My lord, Mr. Baron Gregory was desired by the plaintiff to be here; and as soon as we come to our reply, we shall ask him some questions: if he please to stay, we will dispatch him so soon as we can.

Att. Gen. Nay, rather than trouble Mr. Barre to stay, we yield he should be examined now.

Bar. Gregory. I am not in so much haste, my lord, but I can stay awhile, and not break in upon the middle of an evidence for me.

L. C. J. If you please, they consent you may be examined, and they may be long.

Bar. Gregory. I would not interrupt the course of evidence.

L. C. J. Nay, we will take you at your word; but if it be long, remember we would have eased you, but you complimented yourself out of it; now you are like to abide by it a while, I assure you, brother. Go on.

Clerk reads.] 'And do therefore acquit and exonerate the said Thomas Stepkina alias Stipkin, his heirs, assigns, executors, administrators, and assigns, have given, enclosed, sold, granted, and by this my present writing confirmed, all those

'my four-and-twenty acres and a half of marsh-land, measured by the rod or pole, lying in Wapping-marsh

'Three acres of which are lying adjoining on the west side of the mill that buttis upon the hilly bank, or way leading to Ratcliff town, called Ratcliff-mill, with the bank or wall thereunto belonging, and the well adjoining to the way that goeth up to the Lynches, called Shadwell, lying in the East end of the marsh, and all the next piece West adjoining to the same, containing by estimation one acre, and the pond and two acres adjoining on the West side, six acres lying in the bottom of the hilly Lynches, adjoining North west on the wall that reaches from the Lynches to the island by the pond. All which

eleven acres and a half of marsh-land are in the holding of Marcellus Hill, miller; and also the bank, or wall-flood or pond, adjoining West on the said eleven acres and a half, containing by estimation of measure two acres; and also all that parcel late divided into two, and now late in the tenure of Richard Hill, butcher, containing by estimation of measure six acres; and also all that parcel West, adjoining to the six acres, which I the said Richard Hill hold in my own hand;

and also, that is to say, all that parcel with the bank or wall

island and pond, containing by estimation of measure five acres; which last thirteen acres I bought of, and had conveyed to me and my heirs, from one John St. All which four-and-twenty acres and a half, more or less, of marsh-land, abutteth on the Thames wall, on the part of the South; to the lands of the dean and chapter of the cathedral church of St. Paul, called the Lynches, on the part of the North; on the aforesaid mill, on the part of the East; and on twenty acres of the said Thomas Stipkins, on the part of the West. And also all the Thames bank or wall, belonging to the said four-and-twenty acres and a half of marsh-land; which said piece or parcel of wall doth abutt on the South end of the said on part of the East, and on the bank or wall in the occupying of William Knevet, on the part of the West. All which marsh-land, bank or wall are in the east end of Wapping marsh, abutting on the aforesaid hill and hilly bank aforesaid, in the way leading to the town of Ratcliff aforesaid. And which four-and-twenty acres are part and parcel of one hundred and thirty acres which was heretofore continually for the most part overflowed and drowned with the water of the river of Thames; and all and singular messuages, cottages, houses, edifices, orchards, tofts, foreland and soil, which were the said Thomas Stipkins's before the overflowing, and all and singular messuages, edifices, cottages, cellars, solars, orchards, woods and underwoods, and all other the rest of my hereditaments, whatsoever, in the parish and manor of Stepney, in the county of Middlesex.'

Att. Gen. Now we shall produce a lease from Stepkins to Marcellus Hill.

Serj. Pemberton. I hope they will give some account of this deed first.

Att. Gen. When you say any thing against it, Mr. Serjeant, we will; but we desire now to go on with our evidence. Read that deed.

Clerk reads.] This has been read before, and is marked.

'This Indenture made the 20th day of April, in the sixth year of the reign of our sovereign lord king Edward 6, by the grace of God king of England, France, and Ireland; betwixt Thomas Stepkins, otherwise Stipkin, of the parish of St. Mary Matfelson, in the county of Middlesex, without Aldgate

beer-brewer, of the one part ; and Marcellus Hall of Ratcliff, miller of the other part ; witnesseth, That the said Thomas Stepkins, otherwise Stipkin, for the sum of 50*l.* of lawful money of England, to the said Thomas Stepkins, otherwise Stipkin, by the said Marcellus Hall at the ensembling hereof, well and truly paid and satisfied, and of the same doth clearly acquit and discharge the said Marcellus Hall, his executors and assigns, and every of them, by these presents hath demised, granted, betaken, and to farm letten ; and by these presents doth demise, grant, betake, and to farm lett unto the said Marcellus Hall, all those his parcels of marsh-land lying and joining on the west side of

hilly bank, or way called Ratcliff-way and the well adjoining to the way that goeth up to the Lynches, called Shadwell, lying in the east end of the marsh, containing by estimation of measure, three acres and a half, and all the next piece west adjoining to the same, containing by estimation of measure, six acres and the pond ; and two acres adjoining on the west side of the six acres, lying on the bottom of the hilly Lynches, adjoining north-west on the wall, which reacheth from the Lynches to the island by the pond ; all which eleven acres and a half, little more or less, abutteth on the Thames wall on the party of the south ; to the Dean and Chapter of the cathedral church of St. Paul, called the Lynches on the party of the north ; and on the wall by the pond on the party of the west ; and also all the Thames wall belonging to the said eleven acres and a half of meadow or marsh-land : which said piece or parcel of bank or wall doth abutt on the south end of the aforesaid hilly bank, or way reaching to the east side of it, which leadeth to Ratcliff town on the party of the east, and on the wall in the occupation of John Everard, on the party of the west, and also all the foreland and soil down to the low water mark of the river Thames belonging to the premises : all which in the east-end of Wapping marsh, abutting on the aforesaid mill, and the hilly bank, or way leading as aforesaid in the parish and manor of Stebbunheath otherwise Stepney, in the county of Middlesex ; and now in the holding of the said Marcellus Hall, to have and to hold all the said parcels of marsh-land, foreland and soil, and every part and parcel thereof, to the said Marcellus Hall, his executors and assigns, from the feast of the annunciation of St. Mary, the Virgin, before the date hereof to the end and term of 128 years, thence next ensuing, yielding'—

Sol. Gen. Read the Proviso.

L. C. J. Read the reservation of the rent.

Clerk reads.] 'Yielding and paying therefore yearly for the same, to the said Thomas Stepkins, his heirs and assigns, one pepper-corn, at the feast of the annunciation—

Sol. Gen. Now read the Proviso.

Clerk reads.] ' And the said Marcellus Hall for himself, his executors and assigns, covenanteth and granteth to and with the said Thomas Stepkins, his heirs and assigns, that he the said Marcellus Hall, his executors and assigns, shall and will bear all manner of charges.—And it is further covenanted, granted, and agreed between the said parties, that it shall not be lawful for the said Marcellus Hall, his executors or assigns, to alienate or assign this present term of years, or any part thereof, without the special licence and consent of the said Thomas Stepkins, his heirs and assigns.'

Mr. Williams. Pray, my lord, will you give me leave to ask a question of Mr. Banister?

Att. Gen. My lord, he has not been examined yet ; they cannot, under favour, ask him any questions.

Mr. Williams. You have sworn him, and so he is under an oath, and we may doubtless examine him as your witness to this deed that you have read. Is that your name, Sir? (Shewing the deed of 16 April.)

Banister. This is my name written by my own hand.

Mr. Williams. When did you write your hand there, Mr. Banister?

Banister. The 16th of April 1682.

Mr. Williams. Pray, Sir, look upon it again.

Banister. This is my hand, and I writ it myself when the deed was found ; I writ a paper of such deeds as were found at the same instant of time.

Mr. Williams. And you writ it when you found it?

Banister. I writ that name at that instant of time.

Serj. Pemberton. When was it, do you say?

Banister. The 16th of Sept. 1682.

Mr. Williams. Are you sure of it?

Banister. Yes, I am sure of it.

Serj. Pemberton. Just now it was April.

Banister. It was in September, 1682. I writ this paper at the same time.

L. C. J. Where did you write this name to this deed?

Banister. At Mr. Knowles's house.

L. C. J. When was the first time that you saw that deed?

Banister. The very same day that I writ my name on this paper.

L. C. J. Did he find the deed, or you? Let me see it. (Which was done.)

Banister. He had found that deed before, but had mislaid it, and desired my assistance to find it again.

L. C. J. Where did you find it?

Banister. In a garret in Mr. Knowles's house.

Sol. Gen. Were there not a great many deeds there?

Banister. Yes, there were a great many.

L. C. J. Frythar, look upon it again, and consider what thou sayest.

Banister. This is my name.

L. C. J. Very well; and how came thy name there?

Banister. This is the very deed I looked upon at that time.

L. C. J. Where did you first see that deed?

Banister. I was at the finding of it in a garret at Mr. Knowles's house.

L. C. J. That was in Sept. 1682; you say.

Banister. Yes, in Sept. 1682. I never saw it before.

L. C. J. Pray, who are parties to that deed?

Mr. Williams. My lord, it is the purchase of the inheritance.

L. C. J. It is so; and how should that come to be in the possession of Knowles?

Banister. I never saw it before that time.

L. C. J. Read it again.

Clerk reads.—This is dated the 16th of April, in the sixth year of Edward the sixth. To all faithful—

Sol. Gen. Certainly, my lord, he is under a mistake.

L. C. J. Ay, so is he sure enough, but a very foul one upon my word. But let us see if we can bring him out of it. Mr. Banister, let me ask you a question.

Banister. Yes, my lord, if you please.

L. C. J. Then pray mind what I say, and consider of it. The 16th of September, 1682, was the time that you went on purpose to look for deeds at Mr. Knowles's house?

Banister. I was there on the 7th of September, and that was the first day that ever I came into Mr. Knowles's house in my life.

L. C. J. There were some deeds, it seems, that Mr. Knowles had found before?

Banister. So Mr. Knowles said.

L. C. J. What became of those deeds he had found before?

Banister. As he told me he had mislaid them.

L. C. J. And when did you come to have an account that he had found those deeds first?

Banister. It was after I had paid him 3*l.* for water.

L. C. J. When was the first time that he spoke of it?

Banister. It was the fifth or fourth of September.

L. C. J. And when did you first go thither?

Banister. On the 7th of September, he desired me to come and help him, and assist him in finding out the deeds that he had mislaid.

L. C. J. What do you know of this deed?

Banister. We found one deed—

L. C. J. Look upon that carefully, is that your hand?—*Banister.* That is my hand.

L. C. J. Do you remember when you put your hand to that deed?

Banister. The paper I have in my hand was written at the same time.

L. C. J. Look upon that paper, and consider it well; and now tell us whether you found that deed first or Mr. Knowles?

Banister. Mr. Knowles.

L. C. J. Now look upon it, and look upon it carefully, when was it?

Banister. This deed came into my hands the same day that I writ this note.

Att. Gen. My lord, we desire we may go on with our evidence, and not have them break in upon us to examine any such thing till their time comes; if they have any thing to object against our witnesses, let them take their time.

Serj. Pemberton. Mr. Attorney, we are very regular sure in what we do; you produce a deed, and we desire an account how you came by that deed; and finding Mr. Banister's name, who is your witness, and sworn by you, we would know of him what he knows of it.

L. C. J. Ay, ay, let truth come out, in God's name. Look upon it, Mr. Banister, once more. What say you to it?

Banister. This is the same deed, and my hand.

L. C. J. Upon your oath, Sir, when did you first see that deed?

Banister. This deed I saw the 7th of September, 1682.

L. C. J. Where?

Banister. In the garret at Mr. Knowles's house.

L. C. J. Did you find it first, or Mr. Knowles?

Banister. I cannot tell, it may be I might.

L. C. J. Are you sure you then put your name to that deed?

Banister. I did put my hand upon this same deed the 7th of Sept. 1682.

L. C. J. Prythee look upon it again, and look very carefully upon it. [Which he did for a good while together.]

L. C. J. Now look upon your note again.

Att. Gen. Pray do so, and peruse it carefully, and see whether that deed be in your note.

L. C. J. Nay, good Mr. Attorney, let us have no directions. What say you?

Banister. I set my hand to several deeds that I found there, to some writings on the 7th of September, and to others on the 16th.

L. C. J. Now tell us, which of them it was that thou didst put thy hand upon this deed?

Banister. I believe it might be the 7th.

L. C. J. Didst thou not see that deed before the 7th of September, 1682, upon thy oath?

Banister. No, never.

L. C. J. Who was with you when you first found that deed?

Att. Gen. Pray my lord, let this note be read, and that will clear all.

L. C. J. No, by no means, Mr. Attorney; he may make use of what notes he pleases, to refresh his own memory; but we will never support or prop up a perjury at that rate, I assure you, by a note. Was Mr. Knowles with you when you found that deed?

Banister. He was.

L. C. J. Do you take it upon your oath that that deed was found the 7th of September, 1682, in the garret at Mr. Knowles's house?

Banister. I cannot tell which of the two it was, the seventh or the sixteenth.

L. C. J. Was it one of the two, upon your oath?

Banister. It was one of the two.

L. C. J. Now call Mr. Knowles again.

Mr. Williams. There he is, my lord; if your lordship please to look upon the deed—Knowles's name was to it likewise, but scraped out.

L. C. J. Well, we will ask him about it, but, Mr. Banister positively swears he was at the finding of this deed. What say you, Knowles?

Knowles. I know nothing of it, my name is not to it.

Mr. Williams. Was your name ever to it, or not?—*Knowles.* No, never.

Mr. Dobbins. But it was to it, at the trial in Michaelmas term.

L. C. J. Did you set your name to all the deeds you found in the garret?

Knowles. Yes, I did.

L. C. J. Upon your oath, Banister, did you set your name to any deeds that he did not that were found there?

Banister. I believe I might do so, I would not swear punctually to it.

L. C. J. Was he with you?

Banister. He was with me in the very same chamber.

Knowles. I do not know that ever I put my hand to that deed in my life.

L. C. J. Did you ever see that deed?

Knowles. I cannot say I did; I remember nothing of it.

L. C. J. I ask you once again, when you found this deed, was he with you?

Banister. Yes, Sir.

L. C. J. You, Knowles, did you ever trust him to look and search any deeds in your garret, but when you were by yourself?

Knowles. No, my lord.

L. C. J. Then I would ask you upon your oath, because you are the persons that had these deeds in your custody; was there any deeds delivered out of your hand that you did not set your hand to?

Knowles. I believe there was never any one.

L. C. J. How came this deed; which he swears was found there, not to have your hand to it?

Knowles. I do not know that ever I saw it.

Att. Gen. Did Mr. Knowles say he was looking for deeds of his own concern, when he found the first deed?

Banister. He did say he had looked before, and had found some of these deeds, and then mislaid them, and desired my assistance to find them again.

L. C. J. What did he say to you at first?

Banister. He said he had been spoken unto by my lady Ivy, to look for deeds that might concern her ancestors, and he had found some; but finding some also that concerned himself, he had mislaid my lady's, and desired me to help him to find them again.

L. C. J. What employment have you under my lady Ivy?

Banister. I am her rent-gatherer.

L. C. J. Her bailiff, I suppose: But now

you speak of what my lady Ivy desired of Knowles, I would ask you a question, but it slip out of my memory, were you present at any time when my lady Ivy spoke to Mr. Knowles to look after any deeds?

Banister. Yes, I was.

L. C. J. Pray tell us whose deeds she desired him to look for?

Banister. The deeds he said he had mislaid.

L. C. J. What were they?

Banister. The deed of Richard Hill, and the deeds belonging to Stepney and Shadwell.

L. C. J. What names did she mention to him, that she would have looked after?

Banister. She did mention some.

L. C. J. Upon your oath, did she mention any deeds made by Dr. Donne, dean of St. Paul's?—*Banister.* No.

L. C. J. By one May, dean of St. Paul's?

Banister. No.

L. C. J. Was one Lun named?

Banister. No.

L. C. J. Or one Holder?

Banister. Not that I know of.

L. C. J. Did she mention one Joan Hall?

Banister. I do not know that my lady Ivy gave particular order for any of these names.

L. C. J. Did she, upon your oath, name Marcellus Hall to you?

Banister. No, my lord.

L. C. J. Upon your oath, Knowles, was not he by when my lady named Marcellus Hall to you?—*Knowles.* He was, my lord.

Banister. I did not hear my lady name that name at all.

L. C. J. No; he heard her give order for no particular deeds, neither for Holder, nor Lun, nor Marcellus Hall, but only concerning Stepney and Shadwell.

Sir Edw. Herbert. Banister, did he say he had before found them, and mislaid them?

Banister. Yes.

Att. Gen. Upon your oath, what deed do you take that to be which is produced?

Mr. Powis. Can you read it, yes, or no?

L. C. J. Mr. Powis, do you think my lady Ivy sent Banister to look after deeds that he could not read? that were very pretty!

Att. Gen. What deed do you take it to be?

Sol. Gen. Let me ask you one question, Mr. Banister; Did you ever set your hand to any deeds that were not found at Mr. Knowles's?

Banister. Yes, I have.

Mr. Lutwich. Upon what occasion did you put your hand to them?

Banister. Because they were ancient deeds, and I was to look out where the hands were that they did concern.

Att. Gen. Pray now answer my question; look upon it, and tell me what deed do you take it to be?

Banister. It is a deed of sale to Stepkins.

L. C. J. It is so, you are in the right of it; and now upon your oath, where did you find that deed of sale?

Banister. My hand is to it, and this is one

of the deeds, I take it to be so, that was found in the garret at Mr. Knowles's house.

L. C. J. He has said so, I know not how often.

Att. Gen. He is not himself.

L. C. J. How can I help that, Mr. Attorney? But what he says, is plain.

Sol. Gen. Pray read over the note you have in your hand to yourself, and remember all the deeds that are particularly therein contained.

L. C. J. Let him read his note, (which he did), and now ask him what you will.

Att. Gen. Is there any deed of the 16th of April, 6 Edw. 6. from Hill to Stepkins, in that note?

L. C. J. That is no fair question, Mr. Attorney.

Att. Gen. With your favour, my lord, I conceive it is; for that will make it plain that he is mistaken.

L. C. J. I believe he is; but with your favour, it is not a fair question; you are only to ask him, whether that deed given in evidence be there?

Sol. Gen. I would ask him one short question, my lord, and I think it is a fair one.

L. C. J. Ay, in God's name, ask what fair questions you will, but no leading ones.

Sol. Gen. Your witness is drunk, Madam.—(To my lady Ivy.)

Serj. Lutwick. My lord, he does not understand what he says, that is plain.

L. C. J. Brother, all knaves are fools in one kind too.

Sol. Gen. Have you read the date of that deed?—*Banister.* Yes.

Att. Gen. My lord, if you please, we will go on with our other evidence a while, and let him reflect himself, and consider of it.

L. C. J. With all my heart; but I think the more he considers, the worse he is; and so he will be to the end of the chapter.

Att. Gen. They have called to us, my lord, for an account of this deed; we shall now prove that Mr. Neale knew of this deed before. *Swear Mr. Butler,* (which was done.)

L. C. J. What is your name?

Butler. William Butler.

Att. Gen. Pray, Sir, will you tell the court and the jury, what discourse you had with Mr. Neale, and what he said about a deed, and when?

Butler. I never saw the lease; but as I was here at the last trial, when there was a verdict for this estate to be my lady Ivy's; and afterwards, the 22nd of December last, I had an opportunity of being with Mr. Neale, he being with Mr. Bryan, my lady's husband, since dead, at the King's-head tavern, with whom I had some business. Mr. Bryan was there first, (I suppose it was by appointment they met) and in half an hour Mr. Neale came up stairs. After they had changed two or three compliments, they came to talk about meeting at Mr. Attorney-General's chambers, in the Temple, to treat about their controversy. Says Mr. Neale, let there be a forfeiture upon it of 50*l.* to be paid

by him that fails. No, says Mr. Bryan, I will make no forfeiture, but I will certainly meet there. Says Mr. Neale again; And I question not but to give such satisfaction, as whereby to convince you and my lady, that this is not her estate. I should be glad to hear that, says Mr. Bryan: why I hope you do not think the deeds are forged? No, says Mr. Neale, I do not think they are forged. Mr. Knowles offered me a long time ago, to shew me that deed, and I might have had it in my possession; but I would not: for if I had, I should have been the aptest man in the world to burn it. This is all I can say.

L. C. J. And what is this to the purpose, gentlemen? Alack-a-day, this is very thin; a slight discourse in a tavern: how can any answer be given to such an evidence? though indeed it does not need any. Pray let not our time be taken up with such trifling stories of a cock and a bull; go on to that which is material.

Att. Gen. Now we shall produce a Lease from Marcellus Hall to one Roper, of part of this eleven acres and an half.

Clerk reads.] 'This indenture made the 13th day of November, in the 2d and 3d years of the reigns of our sovereign lord and lady Philip and Mary, by the grace of God king and queen of England, Spain, France, both the Sicilies, Jerusalem, and Ireland; defenders of the faith, arch-dukes of Austria, dukes of Burgundy, Milan, and Brabant; countess of Hapsburgh, Flanders and Tyrole; between Marcellus Hall of Ratcliff, miller, of the one party, and Richard Roper, citizen and salter of London, of the other party, witnesseth, That the said Marcellus Hall, for the sum of six pounds of good and lawful money of England, to him by the said Richard Roper in hand paid; whereof the said Marcellus Hall clearly acquitteth and dischargeth the said Richard Roper, his executors and assigns, and every of them, by these presents; hath granted, demised, and to farm letteth, and by these presents granteth, demiseth, and to farm letteth, to the said Richard Roper, a parcel of marsh-ground, lying and being in Wapping marsh, at the east end of the marsh, beginning at the west side of the well, which lieth by the way that leadeth up to the Lynches, called Shadwell, measured by a strait line from the Lynches, by the west side of the well, to the Thames wall, and reacheth west to the way that leadeth up into Ratcliff high-way, containing by estimation of measure seven acres, little more or less, and the pond; all which marsh-land abutteth north upon the Lynches of the dean and chapter of the cathedral church of St. Paul, and south upon the Thames wall; and also all the Thames wall belonging to the seven acres, with the foreland and soil, down to the low-water mark of the river of Thames; all which marsh-lands are lying in the parish and manor of Stebunheath, alias Stepney, in the county of Middlesex: to have and to hold the said

parcel of marsh-ground, wall, foreland and soil, with the appurtenances, to the said Richard Roper, his executors and assigns, from the feast of the annunciation of our blessed lady St. Mary the virgin, next coming, unto the end and term of four-and-twenty years from thence next ensuing, and fully to be completed and ended; yielding and paying therefore yearly, during the said term, to the said Marcellus Hall, his executors and assigns, three pounds of good and lawful money of England, at four terms of the year.—

L. C. J. What date is that deed of?

Clerk. The 13th of November, in the 2d and 3d years of king Philip and queen Mary.

Att. Gen. Now we shall read Stepkins's license to Hall, to alien his term.

Clerk reads.] 'To all manner of people to whom this present writing shall come; I Thomas Stepkins, alias Stipkins of the parish of Stebunheath, alias Stepney, in the county of Middlesex, beer-brewer, send greeting in our Lord God everlasting. Whereas I the said Thomas Stepkins on the 16th of April, in the sixth year of Edward the Sixth, have betaken eleven acres and a half of marsh-land with all the bank with the foreland and soil, down to the low-water mark of the river of Thames that he should not alien or assign the said lease or term of years, without the special license or consent

Now know ye, That I the said Thomas Stepkins, for divers good causes give leave and licence to the said Marcellus Hall, to the right worshipful Mr. dean of the cathedral church of St. Paul with the wall, foreland or soil under such covenants, as is reserved and contained—'

Mr. Williams. I would ask Mr. Banister something about this deed; look upon it, Sir.

Att. Gen. We have not done with him yet. Pray take that deed out of his hand.

Serj. Pemberton. You will let him give some account of it first, Mr. Attorney.

Att. Gen. You would fain confound him.

Serj. Pemberton. He is confounded enough already.

Sol. Gen. Now, Mr. Banister, you have considered of it; pray once more look upon the deed again—(which he did).—Was that deed one that you signed then or no?

Banister. This is my name, but I cannot find the date of this deed in my paper. I cannot tell now whether it be one I found then or no.

Sol. Gen. Did you set your hand to any deeds that were found there, which you did not set down in your paper?

Banister. No, not that I know of, I do not know I did.

L. C. J. Prythee where didst thou set thy hand to that deed?

Banister. I set my hand to the deeds that were found there at the house.

L. C. J. Did you set your hand to none else but what were found there?

Banister. I have set my hand to divers deeds beside, but they are none of those deeds that are in my paper.

L. C. J. Where did you set your hand to any deeds besides?

Banister. To divers deeds I have set my hand at home.

L. C. J. Have you to any relating to the lands in question?

Banister. I do not know that I have set my hand to any deeds relating to the lands in question, but at Mr. Knowles's.

L. C. J. To what purpose did you set your hand and name to the deeds you found at Knowles's.

Banister. To the same intent to testify that I was at the finding of them.

L. C. J. To what end did you set your hand to any other deeds?

Banister. To the intent that I knew better where the lands did lie than she did; and when my lady found any deeds, I set my hand to them, and then found the places where the lands lay.

L. C. J. Thou hast had a fair time to consider of that deed; canst thou see here to what place that deed relates, by this mark?

Banister. I cannot find the date of the deed in my paper.

L. C. J. But where do you think you did put your name to that deed?

Banister. I cannot tell whether I did it at that time or no; but this is my name.

L. C. J. I know thy name is there, man; I read it two hours ago: but did you put your hand to that as one of the deeds that you found in September, 1682, when you were at Mr. Knowles's or not?—*Banister.* I cannot tell.

L. C. J. Doest thou believe thou didst not?

Banister. I cannot tell.

L. C. J. Canst thou tell the reason why thou didst set thy hand to it?

Banister. Certainly because I was at the finding of it; I know no otherwise.

Serj. Pemberton. Now pray look upon this deed (shewing him another) and see whether that be your name or not?

Banister. Yes, my lord, I will.

Serj. Pemberton. Is that your name?

Banister. Yes, it is; this is one of the deeds that was found at Mr. Knowles's.

Serj. Pemberton. You said so as to the other two.

Att. Gen. But he was not so positive in it.

Banister. This is rat-eaten, and so I know it again; and there is a rat-eaten deed set down in my paper.

L. C. J. Let him be as positive as he will, he has been forsworn five times.

Sol. Gen. He was confounded with a mistake of the deeds, he having set his hand to so many.

L. C. J. They are perjured both of them plainly; that is the truth of the matter.

Att. Gen. I hope the folly of our witnesses in such circumstances, shall not rob us of our own land, and that it appears to be plainly.

L. C. J. God forbid but you should have your own land; but by the grace of God, if I can help it, you shall never have a foot of land by forswearing and perjury.

Mr. Williams. When did you find that deed?

Banister. The 16th of September.

Mr. Williams. Where?

Banister. In the garret at Mr. Knowles's.

Mr. Williams. Are you sure of it?

Banister. Yes, I am sure of that deed, because it is rat-eaten.

Mr. Williams. Knowles, pray, do you look upon it, what say you to that deed?

Knowles. This is my hand, and this is one of the deeds that was found there at that time.

Mr. Williams. Pray read the date of that deed there.

Clerk reads.] 'This indenture, made the 13th day of November, in the 2d and 3d years of Philip and Mary—'

Serj. Pemberton. That is a deed from Marcellus Hall to Roper; how should that come to be at Knowles's?

L. C. J. They have sworn it.

Att. Gen. They go about to blemish our deeds by the folly of our witnesses, which we cannot help. We however leave the deeds to the jury, and let them see if those seals and other things look like counterfeit.

L. C. J. Well, go on, the jury will have the deeds with them.

Att. Gen. My lord, we did before produce a conveyance from Richard Hill to Stepkins. It rested not there, that conveyance had no legal execution; thereupon there was a fine and recovery by the heir of Hill; and what was the occasion of that, will appear by the deed.

Clerk reads.— 'This indenture made the 13th day of November, in the 5th and 6th years of the reigns of our sovereign lord and lady, Philip and Mary, by the grace of God king and queen of England, Spain, France, both the Sicilies, Jerusalem, and Ireland, defenders of the faith; arch-dukes of Austria, dukes of Burgundy, Millan and Brabant; counts of Haspurg, Flanders and Tyrol: between Jasper Hill, son and heir of Richard Hill, late citizen and mercer of London; of the one party; and Macheline Stepkins, late wife and executrix of the last will and testament of Thomas Stepkins, and John Stepkins, son and heir apparent of the said Thomas, of the other party, witnesseth, That whereas the said Richard Hill, father of the said Jasper amounting in the whole to the sum of 2,000*l.* by the said Macheline

And where variance concerning all that parcel of marsh-land unto St. Katherine's, which the said Richard Hill bought of Cornelius Vanderdelf for the securing all that Wapping-marsh, the said Richard Hill stands bound in an obligation of which condition, that he should make by a certain day, a good, sure, sufficient, indefeasible of and in all those parcels of

marsh-land, lying in Wapping-marsh; that is to say, all that with six acres of marsh, now in the tenure or occupation of one Kuevett, or his assigns, and all those lying in the east and in the tenure of one Miller; that is to say, all the bank, containing by estimation three acres and an half; and all those next adjoining, by measure six acres or more and two acres by estimation of measure lying in the bottom of the Lynches, and reacheth from the Lynches to the island by the pond; and also that parcel divided into twain six acres; and also that holds in his own hands; that is to say, all that parcel with the island and pond, containing by estimation of measure, five acres and of, and in all those parcels lying on the west side of the pond, containing in the whole sixteen acres by measure; all which said sixteen acres to Gravel-lane, the said Robert Hill had in his own occupation reaching to Gravel-lane, sometime plowed and sown by one Richard Clayton, and now in the occupation of one Cooper, butcher, and lying on the east side of Gravel-lane towards London fields, which was conveyed to him from one Richard Tyrrell; and also all that marsh in the tenure of one Clayton, butcher, one William Cound, butcher, seventeen acres and of Edward Ash, four acres; and also all the lands, tenements, rents, houses, ponds, fishings, mills, to the low-water-mark of the river Thames, and all trees For the appeasing all variances and suits, the said parties to this indenture have fully condescended and agreed in form following; that is to say, the said Jasper Hill, for the sum of 1,200*l.* of lawful money of England, in which he acknowledgeth himself to be truly indebted to the said Macheline and John Stepkins, doth give, grant, bargain, sell to the said Macheline and John Stepkins all the said marsh ground lying in Wapping-marsh, with all manner of lands, tenements forelands, ways, trees to the low-water-mark with the appurtenances lying and being in without or elsewhere within the parishes their heirs and assigns for ever, all the right, title together with all evidences and writings discharged of all former charges, incumbrances by the said Jasper Hill.'

Att. Gen. Next we shall shew that Marcellus Hall, that had this long lease, and had demised the seven acres down from Shadwell to Roper, doth on the 14th of November, in the 5th and 6th years of Philip and Mary, surrender the remaining four acres to Thomas Stepkins; and then we shall shew it was demised to Fox, who was the first builder and made Fox's-lane.

Sol. Gen. Your lordship doth observe, that the license was to assign the whole eleven

acres and an half; but he did assign but seven.

Clerk reads.] "This is dated on the 14th of November, in the 5th and 6th years of king Philip and queen Mary.

To all whom this present writing shall come; I, Marcellus Hall, of Ratcliff, miller, send greeting in our Lord God everlasting.

Whereas Thomas Stepkins hath by his indenture, dated the 20th day of April, in the 6th year of king Edward 6, let to me the said Marcellus Hall on the west side

with the Thames wall thereto belonging, with the foreland and soil for

one hundred and twenty and eight years: know ye that I the said Marcellus Hall, for

the sum of 30*l*. of good and lawful money of England in hand paid have

by these presents remised, released, and absolutely confirmed, to the said John Stepkins,

his heirs, executors and assigns, all such estate, right, title, interest, term of years,

estate, property, claim and demand, which I, or any person to my use, have, or ought to

have, or at any time shall to have in, or to four acres of marsh-ground, abut-

ting east on the green bank, or way through, six acres leading up to Ratcliff way, which

way adjoincth to the west side of the lands in the occupying of Roper; which said lands

was made over with the leave and licence of the said Thomas Stepkins, to the right worshipful

three years; and west on the field, in the occupying of John north on the

Lynches, and south of, in, or to the Thames wall abutting east

on the south-west way, as aforesaid down to the low-water-mark of the river of

Thames So that neither I, my executors or assigns, any right, claim,

demand or any part thereof but from all shall be utterly excluded and

debarred for ever—

Att. Gen. Here is a fine levied, Quin' Trin' 3 Eliz. they had best ask where that was found too! Is not that forged?

[The Fine was read.]

Sol. Gen. Here is a recovery also, and a deed to lead the uses: in which recovery the tenants vouch Jasper Hill, who voucheth over the common vouchee.

[The Recovery was read.]

L. C. J. Read your deed to lead the uses.

Clerk reads.] "This indenture made the 13th day of May, in the fourth year of the

reign of our sovereign lady Elizabeth, by the grace of God, queen of England, France and

Ireland; defender of the faith, &c. between Macheline Stepkins of the

one party, and Edward Buggin and agreed between the parties to this inden-

ture, that they the said Edward Buggin should in the term of the Holy Tri-

nity recover to them

by writ of entry sur disseisin in le post, to be had against the said Macheline and

John, before the queen's majesty's justices of the Common-Pleas at Westminster, for

that time, being according to the use of former recoveries one hundred acres of

fresh marsh, within the parishes, townes fields And it was fully agreed

between the said parties, that the said recovery should be to the uses—

Mr. Williams. Mr. Banister, pray, Sir, look upon this deed, and see whether your name be to that deed or no? (Shewing him the Surrender of Hall.)

Banister. This is my name. *Mr. Williams.* Was Mr. Knowles's hand to that deed?—*Banister.* I cannot tell.

Serj. Pemberton. Did not he and you put your hands together to it?

Banister. I did not make it, I did not forge it. *Serj. Pemberton.* No, I do not think you did, you have not brains to do it.

Mr. Williams. Where did you find that deed?

Serj. Pemberton. How came you to put your hand to it?

L. C. J. Is it one of the deeds of purchase? *Serj. Pemberton.* Yes, it is; and therefore we would know, since Mr. Knowles's name is to it, how it came there.

L. C. J. Is it the surrender made by Marcellus Hall to John Stepkins?

Mr. Williams. Yes, my lord, it is.

L. C. J. Let me see it—his name, I believe, has been there.

Mr. Williams. Do you know any thing of the rasing of it out?—*Banister.* No, not I.

Mr. Williams. You, Knowles, were you at the finding of that deed?

Knowles. I set my hand to none but what I found.

L. C. J. But what do you say to that deed? *Knowles.* I do not remember this deed at all; I cannot say any thing to it.

L. C. J. Was your name to it? *Knowles.* Here is my name, but I do not know who put it there.

L. C. J. Is that your writing, Banister? *Banister.* That on the backside is

Mr. Williams. Look into your note, that you may not out-run yourself. Why did you set your hand to it?

Banister. I suppose it was one of the deeds found there.

Mr. Williams. How should it come there? It belonged to the purchaser.

Att. Gen. Now we shall go to matter of record again. Richard Hill, it seems before the lease made to Marcellus Hall, entered into a recognizance in 4 Eliz. this is extended, and that will shew it to be Richard Hill's estate.

Mr. Pavis. Can you object any forgery of records, pray?

Sol. Gen. Pray Sir, look upon that (to the Witness); where did you examine that?

Witness. I examined this at the Rolls.

Mr. Williams. Is it a true copy, upon your oath?—Witness. It is.

L. C. J. Read it.

Clerk. This is tested at Westminster, 17 Jan. 4 Eliz. And here is an inquisition taken the 6th of April, in the same year.

Att. Gen. We will read that part of the inquisition that concerns our question; for the east bound is only in question now. (It was read.)

Att. Gen. Was this produced at the former trial, the first trial?

Sutton. No, I think not in Michaelmas term.

Sol. Gen. Then we shall shew an inquisition upon a commission of sewers.

Att. Gen. The land in question is every foot of it in the marsh; and that they must acknowledge they have no title to.

Mr. Williams. This is an inquisition which they produce, taken a commission of sewers. I desire to know how that comes to lie in a private hand, for it is the original inquisition, and ought to remain with the officer.

Att. Gen. The whole interest of the marsh was ours, therefore it might well be left with us.

Serj. Pemberton. Under favour, good Mr. Attorney, such things should be kept by the clerk to the commissioners.

Att. Gen. How many trials has this been produced at?

Serj. Pemberton. With submission, my lord, this that they produce being an original, may very well come under great suspicion, in regard it ought to be brought in by the officer, to whose custody it ought to remain.

Mr. Williams. It is not a thing of bare interest between party and party, but a thing that concerns the public, and therefore should be brought in the officer's custody.

L. C. J. Read it *de bene esse*; let us see what it is.

Att. Gen. My lord, I would ask Mr. Sutton was not this produced and read before the trial in Michaelmas-term last?

Sutton. It was produced in court twelve years ago.

Sol. Gen. Was it allowed as evidence?

Sutton. Yes, constantly.

Att. Gen. Pray read it.

Mr. Williams. Pray who has had it in keeping all this while?

Sutton. My lady Ivy brought it to me among her writings at first.

L. C. J. Read it.

Clerk reads.] 'The verdict and presentment of us the jurors, as well of all defects, annoyances, within the limits or bounds of Wapping, and Wapping-marsh from Grash-mill to the mill at Ratcliff, that is to say, the 20th of December, anno dom. 1572, and in the 14th year of the queen's majesty's reign that now is.

'The names of the freeholders within Wapping-marsh, and the number of acres contained within the said marsh, with all the names of the occupiers thereof.

'First John Stepkins, gent. freeholder, for a parcel containing twenty-two acres, in the tenure of Richard Ew Benedict Gent.

Att. Gen. You may skip over a great deal and read only that which conduces to the question.

Clerk. No one can read it very well, I think. (Reads) 'On the west side of Gravel-lane, containing 68 acres'—Is that it?

Att. Gen. No, go to the east side.

Clerk reads.] 'Freeholders; one parcel containing ten acres, in the tenure of John Hodges and John Gee, John Stepkins, gent. two parcels, containing twenty acres, in the tenure of John Cooper, and John Harding, John Stepkins, gent. One parcel, containing four acres, in the tenure of John Stepkins. One parcel, containing twelve acres, in the tenure of John Roger James, freeholder.

'Two parcels, containing six acres, Robert Hemmings and John Stepkins. One parcel, containing one acre and an half, Richard Roper. One parcel, containing six acres, in the tenure of Richard Roper.

'All which parcels be on the east part of Gravel-lane, containing sixty acres.' Then here is somewhat interlined and struck out again.

Mr. Williams. This doth not concern the church.

Att. Gen. No more it doth not, as you say, indeed; for they cannot claim any of the marsh. Now we shall shew a warrant three years after, from the commissioners to survey.

Clerk reads.] This is dated the 18th of July, in the 17th year of the most prosperous reign of our sovereign lady Elizabeth, by the grace of God, &c. And it is directed

'To our well beloved John Stepkins and John Osborn, surveyors. Whereas, the queen's majesty by a commission of sewers, bearing date the 23d day of April, in the year of her reign; hath authorized us to survey and view from Buttolphs-wharf by St. Katherine's, near the Tower of London unto Ratcliff-mill not

only to consider of the decays and ruins of the same, but also to take order for the speedy repairing as to our discretions shall seem good We, therefore, sufficiently informed of your wisdom and discretion, appoint you surveyors willing and commanding you, by virtue of the said commission to see whether the work

be accomplished according to such ordinances and decrees as we have appointed, and from time to time shall make and appoint; and to see who we have made expeditor for such sums of money for the payment of workmen may by your warrant be disbursed and payed accordingly; and further, we give you power and authority to give to provide for a competent and salary, at reasonable prices, all workmen boats, lighters, carts, carriages, trees, pales

as to your good discretion shall seem meet; and for your so doing, this shall be your sufficient warrant.'

Att. Gen. We shall now go a step farther, as I opened in the beginning, and shew that this was mortgaged by Stepkins to the queen, and a fine was levied upon that mortgage.

Clerk reads.] 'This indenture made the 4th day of June, in the 15th year of the reign of our sovereign lady Elizabeth, &c. between the right honourable sir William Cecil, knight, lord Burleigh, and lord high treasurer of England; the right honourable and one of her highness's most honourable privy-council; sir Gilbert Gerard, knight, her majesty's attorney-general, for and on behalf of the queen's majesty, and to her use, of the one party, and John Stepkins

Whereas William Pat one of the tellers at and upon the determination of his account, made and ended at the 25th day of December is indebted in the sum of 7,928*l.* 7*s.* 11*d.* ob. And whereas our said sovereign lady the queen

the 16th day of June, in the 9th year of her reign, hath commanded the said sir William Cecil sir Gilbert Gerard, and sir Thomas Bromly to take order from time to time

with so many of the debts owing, or that after should be owing and for the sure payment and contentation of the said sum of 7,928*l.* 7*s.* 11*d.* ob. covenanteth

with them the said that he the said John Stepkins, his heirs, executors shall and will not only satisfy and pay the said sum into the receipt aforesaid but also for the better settlement shall and will make, and

cause to be made by one fine in good form of law of, and in one close within the parish

manor of Yewel and one great garden And of, and in one tenement, with the appurtenances in now in the occupation of John Stout; and 19 acres of meadow in Wapping-marsh, parcel of the said manor. Richard Roper.'

Att. Gen. Where is the copy of the fine?
Sutton. Here.

Clerk reads.] 'This is the final concord, &c. Mens. Mich. 14 Eliz.'

Sol. Gen. This was afterwards re-granted from the crown; and there is the re-grant.

(Which being under the great seal, and tested 6 Julii, Anno 7 Jacobi Regis, was read.)

Att. Gen. Part of this marsh was by our ancestor conveyed to one East.

L. C. J. Ay, I have the note of such a conveyance in my notes of the last trial.

Att. Gen. Mr. Sutton, is that a true copy?
Sutton. Yes, it is.

Mr. Williams. A copy of what? Where did you examine it, Sir?

Sutton. At the Rolls Chapel.

Att. Gen. It is a deed enrolled, and I hope you do not think the record is forged, Mr. Williams.

Mr. Williams. I know not what you forge or do not forge; pray read it, let us see what it is.

(The copy of a deed enrolled, dated 27 July, 3 Eliz. was read.)

L. C. J. Then the next thing that you produced, was a bond, dated the 25th of January, 4 Eliz. wherein Stepkins was bound to Spinola, who was administrator of Vivold and Salvago, upon the recognizance of Hill to them.

Att. Gen. We did so, my lord; but that we cannot now readily find, I think: here however is Spinola's discharge.

Clerk. 'This is signed by me Benedict Spinola, and dated the 25th of Feb. 1561.'

Att. Gen. Here is the bond, read the condition of it, though it is not material.

L. C. J. That is true; but it was read the last time, I find by my notes.

Clerk. This is a bond of 300*l.* 'The condition of this obligation is such, That whereas one recognizance, made and entered by Richard Hill 3 Dec. in the 32d year of the late king Henry 8. taken and acknowledged.'

Att. Gen. There is enough, for it makes not all to the purpose, but to confirm the belief of our purchase. Here is also Jasper Hill's receipt of the purchase-money.

Clerk reads.] This is dated the 28th of January, in the 13th year of queen Elizabeth. 'Be it known unto all men by these presents, that I Jasper Hill, of Wortnley have had before the enscaling hereof, of Macheline and John Stepkins for the discharge of a certain statute the full sum of 1338*l.* of lawful money of England, in full satisfaction and payment of all such purchase-moneys.'

Att. Gen. Then the 16th of August, 13 Jacobi, Fox conveyed to John Stepkins; but that is left at home.

L. C. J. Well, then there is an end of that; what do you do next?

Att. Gen. We have done with our evidence by deeds and by records, and now we shall come to our evidence by witnesses, *viva voce*. And first we shall begin with Mr. Knowles; who will prove the value of the land by the rents, and particularly what the rents are of Dernick Hills.

L. C. J. Prove what you will.

Att. Gen. Mr. Knowles, have you received the Dean's rents?

Knowles. For the use of Mr. Neale I have.

Att. Gen. What are the rents of the east side of Cock-hill?—*Knowles.* About 100*l.* a year.

Sol. Gen. What are they?

Knowles. Houses.

Att. Gen. All houses?

Knowles. Some houses, some ground-rents.

Att. Gen. What is the rack-rent?

Knowles. About 100*l.* a year.

Mr. Williams. Which houses do you speak of, Mr. Knowles?

Knowles. On the east-side of Cock-hill.

Att. Gen. Do you know the Lynches?

Knowles. Yes, I do.

Att. Gen. Who receives the rents of that ground?—*Knowles.* Mr. Neale did.

Att. Gen. Have you received the rents of the twenty acres?

Knowles. Yes, for Mr. Neale I have.

Att. Gen. These three together, what are they all?—*Knowles.* About 2000*l.* a year.

Att. Gen. All this the church of Paul's has, besides the lands in question.

Mr. Williams. You say that part is worth 100*l.* a year?—*Knowles.* Yes.

Serj. Stringer. How much land might it contain?

Knowles. It is a matter of the length of the hall.

L. C. J. And how broad is it?

Knowles. Not very broad.

Att. Gen. Now then to come to the lands in question; do you know Mariner's-street?

Knowles. Yes.

Att. Gen. Who is in possession of that, and receives the rents of it?—*Knowles.* Mr. Neale.

Att. Gen. What say you to Griffin's-alley?

Knowles. Some of it is in mortgage; Mr. Babington had it, but for Mr. Neale's use.

Att. Gen. What say you to the water-house?

Knowles. That Mr. Neale himself has.

Att. Gen. These are the things in question; do you know that which is called New—?

Knowles. That is Mr. Neale's toq.

Sol. Gen. Our lease of 128 years expired but in the year 1680; and we could not come at it till then, and we had it not till 1682; and that answereth their possession.

Att. Gen. Now we shall call our witnesses to prove it marsh-ground. Swear Thomas Hughes. (Which was done.)—Do you know Wapping-marsh?—*Hughes.* Yes.

Sol. Gen. Do you know the houses in question?

Hughes. Which houses?

Sol. Gen. The houses now in suit for?

Hughes. Yes, I do.

Att. Gen. How long have you known them?

Hughes. There was no houses when I knew it first.

Att. Gen. Do you know Cook-hill?

Hughes. Yes.

Att. Gen. Do you know Foxe's lane?

Hughes. Yes; I did know it before it was built.

Att. Gen. Did you know the houses that lay on the east side of Foxe's-lane?

Hughes. What houses there?

Att. Gen. Did you know any houses there formerly?

Hughes. I know not what you mean.

Att. Gen. I ask you again, do you know Foxe's-lane?

Hughes. Yes; it was a bank before it was built.

Mr. Powis. Do you know the Lynches?

Att. Gen. Nay, let us ask: but one at once, pray. I will ask you a plain question; did you know the marsh before it was built upon?

Hughes. Yes, Sir, that I did.

Att. Gen. How far did the marsh-ground go?

Hughes. To Cock-hill eastward, as far as the broad bridge; westward, as far as Foxe's-Lane.

Att. Gen. Was all that marsh-ground?

Hughes. The river of Thames did flow round about it, and there were bogs, trees and bushes, and such things.

Serj. Lutwich. Did you know the place where Ratcliff mill stood?

Hughes. According to report I did.

Serj. Lutwich. Ay, where was that?

Hughes. Just at Bell-wharf.

Serj. Lutwich. Upon which side of Cock-hill?—*Hughes.* In Shadwell Hamlet.

Att. Gen. That is right.

Mr. Powis. Was that like the other end of the marsh?

Hughes. The river came in there wholly.

Serj. Lutwich. At high flood does the water come in there at this time?

Hughes. It did at every tide high and low formerly, now it is dam'd up.

L. C. J. Did the tide come up to that you call Foxe's-lane?—*Hughes.* Yes.

L. C. J. Then that makes an end of the question: it cannot be as you say.

Att. Gen. How so, my lord?

L. C. J. How could it be an overshot-mill? How could the mill be turned but with the tide?

Att. Gen. Their evidence makes it appear such by the leaden trough, which is an instrument belonging only to an overshot-mill?

L. C. J. Tell not me of the leaden trough, Mr. Attorney; look you upon the survey you produced, and take notice of the last paragraph, and there you will find the words, 'Prox' adjacent' cuidam tenemento,' &c. what make you of that?

Att. Gen. Pray, my lord, let it be read.

L. C. J. I will in the mean time ask your witness a question. Friend, thou seemest to be a man that understands something. Thou sayest Foxe's-lane was a bank before it was built, and the tide before that time came up to that bank, both high and low. Now suppose there had been a mill in that ground, how should it have been driven?

Hughes. I will tell your honour: My lord, by report, and I suppose if may be true, the mill stood all the tide of flood, and when the flood was at high water, there was a dam which kept it in, and it went out again at ebb-tide, and so the mill was drove.

L. C. J. There is your overshot-mill gone then, Mr. Attorney.

Att. Gen. If ever seven or eight acres of ground can be the appurtenances of a mill, I should much wonder.

L. C. J. Mr. Attorney, I can tell you of a mill over against this place, which I myself, and we all can remember. All the estate about it was in the Traps family, he was a gentleman of our house; all the water that drives that mill, and two or three mills that serve that side of

the river, is taken in as the tide comes in, and is pent in as he says by a dam; and when they open that, the mill turns back again. For I would fain have all these things, that seem to be dark, cleared by the way as they go. I will suppose all the records you have read to be right, and that it is called Ratcliff-Mill, and then there is the Mill bank, and the Hilly-bank, and the Hilly-way; it is plain then, there was a Mill-bank, or a Hilly-bank, or whatever you call it. It so falls out that the thing now in question is made plain upon your own evidence, there was really ponds and gutters, and those things that were to satisfy the mill. This mill comes to be plucked down and the ponds and all the sluices come now to be built upon: this is not like your marsh-ground that is on the western part of the bank, but it is a parcel of meare or marsh, as the pond and the rest stified up by those things, that till such time as the mill was taken away were receptacles for to pen up the water that came in with the tide. What is the meaning of those words in the survey that I spoke of before, and the several tenements and orchards, and ponds, and sewers, &c. and all those things? Would you have it that this should all point to the scite of the mill, as though all the boundaries should extend to the east-end of the mill?

Serj. *Stringer*. That was the reason why I asked but now, how big the whole was?

L. C. J. And will, what you would have, Mr. Attorney, a ditch or two, ever answer the words in the survey?

Att. Gen. Ner will all their words amount to divers closes of ground, as this must make in the whole.

Sol. Gen. Their twenty acres elsewhere answers all they can claim.

L. C. J. But this you yourself say is the Derricks-hills, in the survey; and you do take it, as soon as the mill was pulled down in one place, it was set up in another.

Att. Gen. After he had taken our long lease he erected one, we say, upon our ground; for he had pulled down the old mill, and lett that to Carter.

Sol. Gen. My lord, it is plain, that the old mill and the new mill were not upon the same ground, from Carter's lease.

L. C. J. Mr. Solicitor, you indeed agree among yourselves that it is plain, but alas! the fact is quite contrary.

Serj. *Maynard*. My lord, we do make our argument for the defendant's title as your lordship does apprehend it. The boundaries towards the east is made the mill and Ratcliff-Town. This place that contains seven acres, though it had passages for the water, is not the mill, and it can never be, that so much ground can be reckoned to be lands belonging to the mill: it is the mill itself that is the east bound.

L. C. J. No, it is the mill and the mill-bank, brother.

Serj. *Maynard*. With submission, my lord, it is Ratcliff-Mill.

L. C. J. Is there no Mill-bank in any of the deeds?

Serj. *Maynard*. Not that I remember.

L. C. J. At the peril of my discretion be that, brother.

Serj. *Maynard*. Take it to be so as your lordship says, that there is mention of a Mill-bank, that cannot lie east, for it lieth in a little pond.

L. C. J. Good brother, let us not puzzle that which is as plain as that the sun shines. The controversy is about all the west part of Foxe's-lane.

Att. Gen. No, it is the east bound that we contend for.

L. C. J. Mr. Attorney, if you will mistake the point, I cannot help it, I assure you I do not. Pray take notice of it, it is called 130 acres in your act of parliament.

Att. Gen. Yes, my lord, 130 acres.

L. C. J. Now then the east of your land by your own shewing is Mill-bank; the east of Mill-bank is the mill, whereas the west part is St. Katherine's, so all your deeds and records say; but the east part of the land is Mill-bank.

Serj. *Maynard*. No, my lord, Ratcliff-mill.

L. C. J. But I say, Ay, brother. Then how broad doth Foxe's-lane extend?

Att. Gen. It is reckoned 30 foot in Carter's lease, I think.

L. C. J. That is a lease that I perceive there is some controversy about, therefore I do not so much mind that; it is a perch of land, I think, in some of your evidences.

Att. Gen. Where Foxe's-lane is, is the four acres that were surrendered; now that being the west bound of the eleven acres, where then are the other seven?

L. C. J. Read the deed-poll again, the particulars and bounds only.

Clerk read. [All those my four-and-twenty acres and an half—]

Att. Gen. The East bound your lordship sees is the mill; now your lordship makes an objection, that if it were as we say, an overshot mill, it could not have been driven—

L. C. J. Do not, pray, make any silly objection for me, and then think to answer it. I tell you I do say, that it is impossible there could be any mill there but a tide-mill: the thing is as plain. Mr. Attorney, as any thing in the world can be; go on with your evidence.

Sol. Gen. Pray swear John Somerly.— [Which was done.]—How long have you known the place in question?

Somerly. I have known it about 37 or 28 years.

Att. Gen. Do you know where the mill stood, or was reported to stand?

Somerly. I know where it was reported to stand, but I never knew the mill myself, it was demolished before my time.

Att. Gen. Where was it reported to stand?

Somerly. As it was reported it stood about half the length of the hall off the bank, rather leaning to the river of Thames than the high-way.

Att. Gen. Where was the way to the mill?

Somerly. At Cock-hill.

L. C. J. That your own evidence say was on the West-side of the mill.

Att. Gen. Did you know Shadwell?

Somerly. I know that that is called Shadwell. Do you mean the well?

Att. Gen. Yes; how far is the well from Cock-hill?

Somerly. Half the length of the hall.

Mr. Williams. How far is it East of Foxe's-lane.

Somerly. Truly I cannot well tell.

L. C. J. The question is, whether that be the well that is mentioned in the evidences?

Somerly. I never knew any other well; I paid for filling of it up.

Mr. Williams. What was it? Was it not a pond formerly?

Somerly. It was a well.

Att. Gen. What was it called?

Somerly. Shadwell it was called, I knew no other name it had; and that well was wharfed about, and there was a piece of wood about six foot long put into it, and it was on the side of the hill; a cooper had it in his possession, and he used to put his hoops into it.

Att. Gen. Do you remember the ditch that run under the Lynches?

Somerly. I remember there was a ditch that run a long way; there were three or four bridges over it.

Mr. Williams. Was that a wide ditch?

Somerly. It had planks to go over, and it was a deep ditch.

Att. Gen. When you knew it, did cattle feed there?—*Somerly.* Not in my time.

Sol. Gen. When you first knew that well, was it reputed an ancient well?

Somerly. I knew it not till I came to buy it.

Att. Gen. What do you know of the raising of Fox's lane?

Somerly. I lived there 26 years ago, and in the time since I lived in it, it is raised the length of my stick and more: for when the tide came in strong, it used to drive stones and planks in at the windows. There was a water-house erected upon Wapping-wall, and they went to lay pipes along the street, but they could not lay them there, for they found great pieces of timber, and other things in the ground that hindered it; and upon that they raised the ground.

Mr. Williams. Was not there a dam made at the end of Fox's lane to keep out the tide?

Somerly. I never knew of any.

L. C. J. Was not Fox's-lane reputed an ancient way?

Somerly. I suppose they were continually paving it to raise it higher and higher.

Att. Gen. When you knew it first, was it higher than the marsh?

Somerly. It was all built when I came thither. It is six yards higher at one end than the other.

Att. Gen. Swear John Holmes.—[Which was done.]—Do you know the houses in question, between Fox's-lane and Cock-hill?

Holmes. Yes.

Att. Gen. How long have you known it?

Holmes. I have known the place a matter of 28 years or more.

Att. Gen. Did you know it before it was built?

Holmes. No, I did not take notice of it, to say notice.

Att. Gen. Do you know that place that is called Shadwell?—*Holmes.* No.

Sol. Gen. What do you know of the raising of Fox's-lane?

Holmes. I never did know of raising the lane.

Att. Gen. Not at all?

L. C. J. Was it not all the time you knew it a common passage?

Holmes. Yes, a common highway.

L. C. J. Shew, if you can, that there was any highway from North to South, but Fox's-lane.

Att. Gen. Do you know Cock-hill?

Holmes. That is quite off from it.

L. C. J. Let me ask you a question. Suppose you were to go for the purpose from Shadwell down to the river of Thames, would you go to Cock-hill or Fox's lane?

Holmes. If I had occasion to go down to Pelican-stairs, then I would go to Fox's-lane; but if I were to go to Bell-wharf, I would go to Cock-hill.

L. C. J. That is quite another way.

Sol. Gen. It is southward of Cock-hill, where the mill stood.

Att. Gen. That adjoined just upon the way.

Sol. Gen. Doth not Cock-hill lead to the Thames?

Holmes. Cock-hill is the first beginning of the going down to Bell-wharf.

Sol. Gen. Swear Eleanor Barefoot, and Mary Day. [Eleanor Barefoot was sworn.] Do you know Fox's lane?

Barefoot. Yes, I know it very well.

Att. Gen. How long have you known it?

Barefoot. Threescore and almost six years.

Att. Gen. Then you knew it before it was built?—*Barefoot.* Yes.

Att. Gen. Did you know the old mill?

Barefoot. Who, Sir?

Att. Gen. Do you remember who first built there?—*Barefoot.* I cannot tell.

Att. Gen. Pray, when you knew it first, what was it, and who's?

Barefoot. It was a marsh-ground from Cock-hill to Fenner's field, it was counted and known to be Mr. Stepkins's; he was a great freeholder, and owner of all the ground up to East-Smithfield.

L. C. J. How? Why is not the Lynches between Cock-hill and St. Katherine's?

Barefoot. The upper ground was only belonging to the dean of St. Paul's.

L. C. J. Do you remember that which is now called Fox's lane?—*Barefoot.* Yes.

L. C. J. Was it a lane at that time?

Barefoot. Yes, it was.

Att. Gen. Do you remember how the water came in there?—*Barefoot.* Yes.

Att. Gen. Did it come up to the bank?

Barefoot. At high tides it came over, so that none could pass.

L. C. J. But at common tides?

Barefoot. It came at common tides till it was raised.

L. C. J. But it was an usual passage for carts and carriages?—*Barefoot.* Yes.

Att. Gen. How was the mill driven that was there?

Barefoot. There was a mill in my time that went with the tide, and all the water that came down from that mill came into a pond, and so to the mill-dam, and so drove this mill.

L. C. J. Which mill dost thou speak of? Didst thou know Ratcliff-Mill?

Att. Gen. Did you know Cock-hill mill?

Barefoot. Yes, that I speak of.

L. C. J. And how was it driven, dost thou say?

Barefoot. It was driven by the water that came from the river in a sluice.

L. C. J. It came out of the Thames?

Barefoot. Yes; with the tide.

L. C. J. How did it run?

Barefoot. It had a great huge sluice.

Mr. Williams. Was that in the Lynch-ditch, or other way?—*Barefoot.* It ran into a pond.

Att. Gen. Where did that pond stand?

Barefoot. In New Gravel lane.

Att. Gen. Where was the head of the pond?

Barefoot. It went out with the tide.

Mr. Williams. Where?

Barefoot. Between the street and the mill.

Att. Gen. How near was the pond to Fox's lane?—*Barefoot.* A quarter of a mile off.

Mr. Williams. West of Fox's lane.

Barefoot. Yes.

Att. Gen. Do you know Green-bank?

Barefoot. Yes.

Att. Gen. How far is that from Fox's lane?

Barefoot. Half a mile off.

Att. Gen. Did you know the well called Shadwell?—*Barefoot.* Yes, I did.

Sol. Gen. On which side of Fox's-lane did Shadwell stand?

Barefoot. It was between the mill and Broad-Bridge; eastward of Broad-bridge.

Att. Gen. How far was it from the mill?

Barefoot. A pretty way.

Att. Gen. How far do you think?

Barefoot. About 40 or 60 foot: the well was between the mill, I say, and Broad-bridge; Fox's-lane stood west.

L. C. J. When you knew Fox's lane first, what was it between the Lynches on the north, and the Thames on the south?

Barefoot. A place for carts and horses to go.

Att. Gen. And you say it was all marsh-ground from Cock-hill to St. Katherine's?

Barefoot. Yes, it was all a low ground.

Att. Gen. Whose ground was it counted to be?—*Barefoot.* Mr. Stepkins's.

Att. Gen. Had the dean ever any thing to do there?

Barefoot. The upper ground was the dean of Paul's, but the lower-ground was Mr. Stepkins's.

Mr. Williams. Was there a bridge over the Lynch-ditch at the end of Fox's lane?

Barefoot. There was a bridge and a cart-way.

L. C. J. Do you know it was marsh-ground on the east side of Fox's lane? Did it ever lie under water?

Barefoot. At high tides and such as that it was overflowed.

L. C. J. But at common tides did it use to go over Fox's lane?

Barefoot. I cannot tell that truly, it is now raised very high, it was much lower; but I am sure the tide sometimes came beyond.

Att. Gen. When the water was in the great pond, did not it come by the Lynch ditch?

Barefoot. It came out of the Thames.

L. C. J. Do you remember any way that led up to the Lynches by the well?

Barefoot. The Lynches did not belong to Mr. Stepkins; there was the mill.

L. C. J. But answer me, was there any way that went up to the Lynches by the well?

Barefoot. There was no passage to go through but at Fox's-lane.

Att. Gen. Was there not a way at Cock-hill?

L. C. J. That is farther east than the mill.

Att. Gen. Shadwell is the bounds of our land.

L. C. J. But where is that? That is the question, Mr. Attorney. I remember what the woman said indeed the last time, if there were as many wells as there were panes in the glass-window here, that was the right well. But that will not decide the controversy.

Att. Gen. Swear Austin Cope.—[Which was done.]—Do you know Cock-hill?

Cope. Yes, I do.

Att. Gen. Did you not know a mill that was at Ratcliff?

Cope. There was one at Bell-wharf.

L. C. J. How long ago is it, that you remember it?

Cope. Threescore years ago.

L. C. J. How was that mill driven?

Cope. With the tide.

Att. Gen. Where did the tide come in?

Cope. At Frying-pan stairs.

Att. Gen. Whither did it go?

Cope. It went into the dam, and so drove the mill. There was an iron-mill built by one White twenty years after.

L. C. J. How far did the tide go up from Ratcliff-mill westward?

Att. Gen. As near as you can remember, what was it that stopped the tide?

L. C. J. Ay, how far did the tide go before it stopped?

Cope. Almost as far as New Gravel-lane.

L. C. J. Did the tide come up as far as Fox's-lane?

Cope. It flowed over at some tides.

L. C. J. What did it at usual and common and ordinary tides?

Cope. It never came so high.

Att. Gen. How high did it come then?

Cope. Hard by it came.

Att. Gen. How near?

Cope. Within forty foot upon reasonable tides.

Att. Gen. And did that help to turn this mill?

Cope. Yes; it went to the dam, and so it drove it.

L. C. J. Where was your way from north to south?—*Cope.* At Fox's-lane.

Att. Gen. Was there a bridge there, over which the carts went into the lane, under which the water did run?

Cope. Yes, there was.

L. C. J. What is it that lies beyond the mill?

Cope. Ratcliff-town.

L. C. J. Which was further eastward, Cock-hill or the mill?—*Cope.* Cock-hill.

L. C. J. So it is by your own map; and then where can the mill-bank be but Fox's-lane?

Att. Gen. Shadwell is our bounds.

L. C. J. Robin Hood upon Greendale stood; therefore this must be your land: that is all the argument I can make of it. Your boundaries do make it as plain as the nose in a man's face.

Att. Gen. Swear Mr. Holwell.—[Which was done.]—How long have you known this place, the lands in question?

Hol. Not above a year.

L. C. J. He is your surveyor, I think.

Att. Gen. He is so, my lord. Pray, you *Cope*, which way did the water go?

Cope. Westward.

L. C. J. But which way did you use to go to the river from the Lynches?

Cope. We sometimes went the lower way, and sometimes the higher way.

L. C. J. Which was the higher way?

Cope. Ratcliff-Highway.

L. C. J. And which was the lower way?

Cope. Through Wapping and Shadwell: Shadwell is the lower way.

L. C. J. Thou talkest of the north-west way; but if you were to go directly from north to south, which way would you have gone?

Cope. Down Cock-hill, or down Broad-bridge.

L. C. J. Where is that?

Cope. Beyond Cock-hill.

L. C. J. Whereabouts is it?

Cope. Within a little of Fox's lane.

L. C. J. When you went down Cock-hill, upon which hand did you leave the mill?

Cope. If I went the lower way, I left the mill on the left-hand.

L. C. J. But when you went the higher way down Cock-hill?

Cope. Then we left the mill behind us.

L. C. J. What dost thou mean by behind thee?—*Cope.* I left it north.

L. C. J. That could never be, man.

Att. Gen. Yes, my lord, he is right.

L. C. J. But I say he is not right, Mr. Attorney, for Cock-hill is north of the mill.

Att. Gen. *Cope*, do you know Fox's-lane?

Cope. Yes, very well.

Att. Gen. Is it raised?

Cope. Yes; eight or nine foot.

Att. Gen. What was the reason of its being raised?

Cope. It was not fitting for carts to go over.

L. C. J. Why so?

Cope. The water came upon it.

Att. Gen. And then to come to the admeasurment, taking in the place in question, it makes just 130 acres, which is our number, and no more.

L. C. J. Then you will leave the dean nothing.

Att. Gen. Yes, he has 2000l. a-year.

L. C. J. Where?

Att. Gen. In the east, beyond this place.

L. C. J. Why, would you have any of the land that belongs to the mill?

Att. Gen. We claim this as marsh-land; which they have nothing to do with, and the number of acres will not be answered without it. Mr. Holwell, have you admeasured the marsh?—*Hol.* Yes; I have, Sir.

Att. Gen. From whence did you begin?

Hol. From Hermitage-Dock.

Att. Gen. Within what bounds?

Hol. That which they call the Lynches and the marsh to St. Katherine's from the well?

Att. Gen. And how much doth it make?

Hol. Besides the well and the Lynches, I find it something above 130 acres.

L. C. J. Somewhat above, how much pr'y-*thee*?—*Hol.* Not an acre above.

Mr. Williams. Pray, Sir, how many acres lies east of Gravel-lane?

Hol. Besides the well and the Lynches, I can make but fifty acres and an half.

L. C. J. Where did you reckon up the whole?

Att. Gen. To make up the 130 acres, he took in the mill and all.

L. C. J. That is very well.

Att. Gen. Why, my lord, it is no more than 130 acres, and so much we must have.

L. C. J. Look into the survey that you produced, and see what that says; besides all—

Att. Gen. Those lie eastward of the mill.

L. C. J. Pray, did you measure the wall?

Hol. Wapping wall is 20 acres.

Att. Gen. If they will consent, the jury shall have the survey with them.

Mr. Williams. With all our hearts, let them have it.

L. C. J. Gentlemen, both sides consent, you shall have the survey with you; but without that consent you could not have had it, it not being under seal.

Att. Gen. Then we desire our last verdict may be read. Mr. Sutton, was it a verdict upon full evidence?—*Sutton.* Yes, Sir.

Att. Gen. How many hours did it last?

Sutton. Five or six.

Att. Gen. Was there a view in it?

Sutton. There was so.

L. C. J. Read it. (Which was done). Mr. Holwell, how much, pray, is the land between Fox's-lane and the mill?

Hol. Below the Lynches I find it to be seven acres and an half.

L. C. J. Can you expect then that all those words of gardens, orchards, &c. should be answered under seven acres and an half? Besides, the first and ancient reservation of rent was 10*l.* a-year; after, it was increased to 16*l.* a-year, and it doth appear the mill turned to so little account, that it was pulled down, and so the land was to answer the rent; which, for a ground-rent upon a church-lease, in those days, was very great. Have you done now?

Att. Gen. We have done for the present, my lord.

L. C. J. What say you to it then for the plaintiff, gentlemen?

Serj. Stringer. May it please your lordship, and you gentlemen of the jury; if we should give no further evidence at all than what we have already given, but leave it upon this, I dare affirm it plainly appears that they have no title at all to this land. As to their last piece of evidence I would first give an answer to that, and that is their verdict; and that which I would observe upon it, and say to it, is this; it was a verdict obtained upon forged deeds: deeds found, as is pretended, and as you have heard from their two special witnesses, in a very extraordinary manner, found in a garret. But by what art prepared, and that they are forged, I question not but we shall give you satisfaction. But besides, as to their admeasurement, it seems as they would have it, 130 acres is the question about the extent of the marsh. So much they claim; and we shall bring two surveyors that will give you an account upon their oaths, that between Fox's lane, which we say is the west boundary of our land, and the east of theirs, and Hermitage Dock, where the marsh ends, there is above 130 acres; and so they do not want their number. For all the evidence that they have given out of records, we agree them to be as they say; and by that agreement shall do ourselves no harm at all, for they all do confirm our assertion. They place the eastern bound of the marsh at Ratcliff town; now at Fox's-lane doth Ratcliff-town begin. The art has been to confound the cause by puzzling boundaries, when it is a plain, apparent mistake they run upon; and indeed I may very well say, a wilful one too. They would have us confine all to a mill and a little ditch, when there are at least seven acres always enjoyed with it, and all called the mill; which had a pond, gardens, orchards, tenements, &c. And now there are very large drains necessarily made, to keep the water from annoying the inhabitants, and to carry it away. But for a further evidence of our title, we shall first prove, that upon a bill exhibited in the Exchequer by Mr. Attorney General, against Stepkins their ancestor, to know what incroachments had been made, what belonged to the dean of Paul's, and what to Mr. Stepkins, are fully set out. There it is proved, that the bounds of the marsh were Wapping-wall, alias Fox's-lane. The

marsh was continually overflowed with water; but now in our ground there was a great many ditches and places to keep the water for the service of the mill. When we came to build upon our ground, which was 15 Jacobi, (then it began) then he brought an action, and did pretend that we did incroach the wall somewhat into the marsh; there we had a verdict upon a view, and after a non-suit upon full evidence. There was likewise a bill exhibited in chancery against Stepkins the father; wherein the bounds are set forth, and he in his answer particularly enumerates the boundaries. And it has been constantly the reputation of the place, that this was the dean's lands, surveyed as the dean's lands, sold in the late times of usurpation as the dean's lands. The first thing, my lord, which they produced, and that we did then, and do now controvert, is Carter's lease: this, they say, was found in the garret; and they bring two witnesses for it: but how they have behaved themselves! What confusion there is in their evidence! You see—

L. C. J. Brother Stringer, if you have any evidence to give, pray give that first, and leave your remarks till the last; you shall then say what you will; but first give your evidence.

Serj. Stringer. My lord, we shall pursue your direction: we say, upon Fox's building, Stepkins surmising that the wall belonged to him, comes and brings an action of ejectment against Fox's tenants for this wall, and upon trial the verdict went against him. Then there was another action brought, and he was non-suited upon that. Afterwards there was a bill preferred against him, and in his answer he confesseth that his wall-marsh bounded upon Fox's-lane. Here are the bill and answer. (Which were read.)

As likewise copies of two records, one in the Common-pleas; the other in the King's-bench.

Hil. 12 Jacobi ejectment; George Boswell, plaintiff, against Thomas Fox, defendant; not guilty, pleaded a verdict for the defendant.

Mich. 14 Jacobi, ejectment; William Sorrel, plaintiff, against Tho. Fox; Not guilty pleaded, and the plaintiff became nonsuit.

Sir John Trevor. My lord, we have this further piece of evidence; we have here a lease made by Stepkins, of seven acres of lands, westward of Fox's-lane, which divides the marsh from the mill ditches, and there is a covenant, that if he recover any part of the wall, marsh-wall, the tenant shall have the advantage of it, and increase his rent.

(Which lease bearing date, 16 Aug. 13 Jac. A. D. 1615, was read.)

Mr. Williams. This was in time between the non-suit and the verdict.

Serj. Stringer. My lord, as I did open it, there was an information exhibited by Mr. Attorney General Noy, 7 Car. 1, against our

tenants and theirs, and upon that information there were examinations of witnesses, and all the bounds of both parties particularly set out; which make it all as plain and clear as can be. This cannot be set up to serve a turn; it was in 7 Car. 1, so long ago; and when that shews the wall to be the inheritance of the dean of Paul's, it answers all their pretence of a lease—

L. C. J. Look you, brother, that cannot be given in evidence, and I will tell you why; if it were an information against Stepkins himself, he being the party under whom they claim, no doubt it were evidence; but it is against the tenants of the one, and the tenants of the other; who only could support their own tenancies, but they could not know their landlords particular titles, and then this cannot be evidence to bind their inheritance.

Serj. Stringer. We submit it to you, my lord. Then we shall offer you a survey. In the year 1649, this was exposed to sale as church-lands, and a survey taken, and found to be the inheritance of the church of Paul's; and as such sold for 9,500*l.* and enjoyed by the purchasers till the restoration.

Mr. Williams. Yes, and to that very person sold from whom they say they had these leases which they have produced: that is, to Winterburn, whose executor Knowles was, as he says; and if he had such a lease, which then had been forty years in being, would he have given so much money, or ventured to purchase it as the inheritance of the church?

Serj. Stringer. Here is the survey then taken.

Att. Gen. We oppose the reading of your survey, because it had not any authority to warrant it.

L. C. J. Nay, Mr. Attorney, though there was no sufficient authority, yet such things have always been allowed as evidence. You cannot but remember it was done in the case of Finsbury Rotten-row, as they call it, Whitecross-street.

Att. Gen. Then let them read the commission it was made upon.

Serj. Pemberton. We have none; there were many things done then of this nature, without commission under seal.

L. C. J. Ay, they did them by orders from committees. Read it.

(It was read, dated Dec. An. 1649.)

Serj. Stringer. Now we will shew the deeds of purchase, which was by deed enrolled.

Dated 22 Nov. An. 1650, for 9540*l.*

Serj. Stringer. My lord, because they pretend this to be an over-shot-mill, as they call it; though it be plain it could not be by the place, yet we have three tide-millers that we would trouble you with a little: but first here are some others, Bland, Marr, and Leyburn, who will give an account of it.—(They were sworn.)—*Bland,* do you know the houses in question?—*Bland, Yes.*

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Mr. Williams. How long have you known them?—*Bland.* Thirty years.

Serj. Pemberton. Pray, what is the common reputation whose the lands were?

Bland. It was always taken to be the dean's lands.

Mr. Williams. Who were the tenants?

Bland. Mr. Whitwick and Mr. Winterburn.

L. C. J. Prithee, canst thou tell what was taken to be the East boundary of Wapping-marsh?—*Bland.* Fox's-lane.

L. C. J. Was that the reputation, upon your oath, in all your time?

Bland. Yes, ever since I knew it.

Mr. Williams. Bland, pray, do you know the pond?

Bland. The ponds were filled up; but there were ditches in my time.

L. C. J. How near were the ditches to Fox's-lane?—*Bland.* Within ten foot.

Mr. Williams. What was the use of those ditches?

Bland. The water came in at Bell-wharf, and filled up the ditches with the tide, and so it went back again.

Serj. Stringer. Can you tell who purchased these lands of the state in the late times?

Bland. Whitwick and Winterburn.

Sir John Trevor. Swear William Kemp, and Curtlett. (Which was done.)

Mr. Williams. Hark you, Mr. Curtlett, we would ask you a question. My lord, your lordship observes, there is a well called Shadwell, that is at the East end of their marsh: We shall shew where that well is: there was a well very lately just by Wall-marsh, hard by the place where the church is now built, which was called Shadwell, and from which the church has its name. Curtlett, do you know Fox's-lane?—*Curtlett.* Yes, I do.

Mr. Williams. How long have you known it?

Curtlett. I have known it sixty years.

Mr. Williams. When you first knew it, whose land was it?

Curtlett. I am ignorant of the original title, or the derivative title, I know not whose it was, or is.

Serj. Pemberton. But whose was it reputed to be? That we mean.

Curtlett. Sometimes it was reputed Mrs. Moor's, sometimes Winterburn's, sometimes one's, sometimes another's.

Mr. Williams. Do you remember the mill that was in this ground in question?

Curtlett. Yes, very well.

Mr. Williams. How was that mill driven?

Curtlett. The water came in at Bell-wharf, Eastward, out of the Thames, into the pond, and so run beyond Broad-bridge, and vented itself into divers ditches; and when the tide went out, it returned back again, and employed the mill.

Mr. Williams. How far went the ditches?

Curtlett. Some of them to Fox's-lane; and one principal ditch turned up half way the lane, that people were forced to have boards and planks to go over it.

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L. C. J. The thing is very plain; had it been, as they say, an overshot mill, this provision that was made of water for it, for aught I see, would have drowned all the ground round about it.

Curtlett. When I was a boy, we used to swim in that place that was near Shadwell, in the eddy; there I have seen the water as it went out, and the mill wrought with it as it went back again.

L. C. J. Was there not a way, when you knew it first, from North to South?

Curtlett. I cannot well tell.

Att. Gen. Was there not a way from Rat-cliff-high-way, at Cock-hill, to the river of Thames?

Curtlett. There was a common way for carts and horses down to the Ballast-wharf, and there was a great vacant place.

Att. Gen. Pray let me ask you, did you ever hear these lands reputed to be Stepkins's when you knew them first?

Curtlett. We have heard talk of that gentleman.

Att. Gen. How long ago?

Curtlett. I have not heard of him this twenty years.

Att. Gen. Have you above twenty years ago?

Curtlett. If I did hear of him, I do not believe then it was in his possession; I cannot tell whose title is best: You have, I suppose, both of you better witnesses than I, conveyances and deeds.

Att. Gen. He is a wise witness, he will not swear whose it is.

L. C. J. He is so, Mr. Attorney; I wish your's were so too.

Mr. Williams. Pray, what was it beyond Shadwell, and how near was Shadwell to Marsh-wall?

Curtlett. Shadwell was on the further side, near Fox's-lane.

Mr. Williams. To the East or West of Fox's lane?—*Curtlett.* To the West.

Mr. Williams. Did you know the well that is called Shadwell?

Curtlett. I know there was such a small spring.

L. C. J. Did it lie east of Fox's-lane, or west, do you say?—*Curtlett.* West, it lay.

Mr. Williams. Pray, did the place where you used to swim come up as far as the wall?

Curtlett. Oh, no.

L. C. J. I believe that was within the Thames only:

Mr. Williams. How near have you swam to Fox's-lane?

Curtlett. It was in the Thames, in an eddy, there the water went underneath the mill.

Att. Gen. In whose ground was that well that you call Shadwell?

Curtlett. I cannot tell in whose ground it was.

Att. Gen. Was it in the Lynches, or in the marsh-ground, upon your oath?

Curtlett. I cannot tell indeed whose ground it was in.

Att. Gen. Did it rise very high?

Curtlett. It was out of the high ground where the church is built.

Serj. Lutwich. Did you ever hear of any well but what lay between Fox's-lane and the mill?

Curtlett. Sir, I can only give an account where that well lies that was called Shadwell, where the church is now.

Att. Gen. How many wells have you known?—*Curtlett.* None but that, Sir.

L. C. J. He does not know as many as there are panes of glass in the window, Mr. Attorney.

Mr. Williams. And this, he says, lay west of Fox's-lane; and there is your Shadwell bounds for you!

Att. Gen. I ask you again, that spring which you mentioned, did it lie in the dean and chapter's Lynches, or no?

Curtlett. I tell you I know not whose the ground was; the church stands there now.

Serj. Lutwich. Did it lie in Upper Shadwell?

L. C. J. He answers as plain as any man can, it was where the church now is.

Mr. Williams. Where is Kemp? Do you know the houses in question?

Kemp. The houses in Shadwell I do know, between Bell-wharf and Fox's-lane; I knew them before they were built as they are now; there were some small houses built here and there all along. There was a pond and ditches to receive the water of the tide; but at Broad-bridge especially, there were houses along to the northward; among the rest, Mr. Craven's house, who had a large orchard and garden.

L. C. J. Where was that?

Kemp. Eastward of Fox's-lane, and several other houses there were.

Mr. Williams. Whose inheritance was it?

Kemp. Mrs. Moor was my master's landlady, and Shadwell was reputed her land and ground.

Mr. Williams. She was lessee under the church.

Serj. Pemberton. Did you know the cuts and ditches in that ground?—*Kemp.* Yes, Sir.

Serj. Pemberton. How far went they westward?

Kemp. The ditch ran all in one till it came to Broad-bridge, where it parted to the northward and the Westward.

L. C. J. How near Fox's-lane?

Kemp. Within a dozen or twenty yards of Fox's-lane.

Att. Gen. What sort of ground was it? Was it not marsh-ground?

Kemp. A man that builds boats in winter-time put his shallops into the pond, otherwise it was very good ground to the northward; there were very many good houses built, and since Mr. Neale had to do with Shadwell, they have built in Mr. Craven's, and built a water-house, and two other houses there.

L. C. J. Read the survey again, that mentions Craven's house there. [Which was done.]

Kemp. That was bending northward that way.

Mr. Williams. It is part of the seven acres now in question.

L. C. J. Do not you contend for the brew-house?

Att. Gen. For the water-house we do, *L. C. J.* Is not the water-house built upon part of Craven's ground?

Kemp. Yes, my lord, it is.

Mr. Williams. When did you know this first?—*Kemp.* Fifty years ago.

Mr. Williams. Was this ground orchards or gardens then?

Kemp. Several places of it were gardens and orchards; some places had houses, chiefly to the northward, some good houses and orchards, especially Mr. Craven's.

Att. Gen. Do you speak of the hilly or the low ground?

Kemp. The middle ground chiefly, that that lay Northward.

Att. Gen. Did you know the Lynches, the hilly ground?

Kemp. Up higher to Ratcliff-high-way, I did.

Att. Gen. Did you know the ditch that came under the bottom of the Lynches?

Kemp. The stream did run in several places, but the ground was good ground, Northward especially.

Att. Gen. Were there any houses built on the South side of that ditch?

Kemp. There were a great many built between the ditch and the Thames, between Bell-wharf and Fox's-lane.

Att. Gen. What, fifty years ago?

L. C. J. Your own survey says so.

Mr. Williams. Call Daniel Hams. Swear him.—(Which was done).—Do you know the mill and lands in question?

Hams. I knew it when it was a mill.

L. C. J. How long is it since you first knew it?—*Hams.* Forty years.

L. C. J. Prithee, what kind of a mill was it?

Hams. A ground-shot mill; she took in water at Bell-wharf, and it ran towards the West to Fox's-lane, in several branches and ditches.

L. C. J. How! a ground-shot mill sayst thou? Why, these gentlemen say it was an over-shot mill.

Hams. My lord, it could be no over-shot mill, for the water will not rise high enough to drive such a mill; it ran in several ditches to preserve it from rising to overflow the ground. Besides, my father, who was a mill-wright himself, told me he had known it three-score years, and knew it always a ground-shot mill: he told me of all the mills about London, what they were.

Att. Gen. Pray, how old was your father when he told you so?

Hams. He had known them, he said, sixty years and he has been dead twenty years.

Att. Gen. Why the mill was removed; he could not know it so long.

L. C. J. I know no proof of it but your deeds.

Hams. My lord, there it was, he said.

Att. Gen. Was there not a pond and ditches?

Hams. There must be ditches to receive the water as it came in; but still the more the tide came in, that filled up the ponds; and as it went back again, it drove the mill.

Mr. Williams. What profession are you of, pray?—*Hams.* I am a mill-wright.

Att. Gen. Pray do they make use of a trough in such a mill?

Hams. They do for an over-shot mill.

Att. Gen. Here is a trough of lead in their lease. Do not they use a trough in an under-shot mill?

Hams. No, if it be by the tide a ground-shot mill, there is no necessity of a trough.

Mr. Williams. We have a great many witnesses to this point. Swear Grindy. (Which was done.) Are you a mill-wright?

Grindy. I am only a miller.

Mr. Williams. Did you know the mill in question?

Grindy. I cannot remember it, Sir.

L. C. J. How long have you known the place?

Grindy. Thirty or forty years: but I had no acquaintance with that mill they speak of; but I know it to be impossible for any over-shot mill to be there: For I kept part of a Tide-mill myself, and have done so this forty years; and I know the water must rise at least ten, twelve, or fourteen foot higher than it needs in a tide-mill. For we take in our water as the tide comes in, and we have a pair of gates that are hung with hinges at the top, which open as the tide comes in; but the water, as it goeth out, shuts it again, and that keeps the water to stand three or four hours in some mills, and then we have only guts that belong to the wheel, and when we draw up the gates, the water goes out. We have no water that comes above the shaft, which is half the height of the wheel, which is sixteen foot high. To talk of an over-shot mill, the water must rise so high as to go over the whole marsh.

L. C. J. And most drown all the town and country too. It is plainly so, Mr. Attorney, talk as long you will.

Att. Gen. Friend, I ask you but one short, plain question: I would know, can they use a leaden trough with those tide-mills, as you call them?

Grindy. We can use none, nor do we make any such thing.

Att. Gen. Would not the springs in the Lynches carry an over-shot mill?

Grindy. Sir, I have seen the place all about many times; and I will lay any man 20*l.* to 20*s.* that all the springs thereabouts shall not produce a quarter enough water.

Mr. Williams. Where is George Care? Swear him.—(Which was done).—Do you know Fox's-lane?—*Care.* Very well.

Mr. Williams. How long have you known it?—*Care.* Eight-and-fifty years.

Mr. Williams. Did you know Shadwell, the well so called?—*Care.* That I did, Sir.

Mr. Williams. Where stood it, pray?

Care. At the upper end of Fox's-lane as we go westward, and just at the side of the church-yard there is one now, and brick'd over head where they used to fetch water; I never knew any other.

Mr. Williams. Was that called Shadwell?

Care. I never knew any other but what I tell you of.

Serj. Stringer. Pray, what was usually taken to be the east-bound of Wapping-marsh?

Care. The west-side of Fox's-lane was called Marsh-wall, or Wall-marsh, and that was the boundary to Stepkins's lands; and eastward was always the lands of the dean of Paul's, and I have known it this eight-and-fifty years; nay, I was the first that ever built an house in Fox's-lane.

Att. Gen. Do you know the Lynches, or the high ground northward?

Care. I know it not by that name.

Att. Gen. This well you speak of, did it not rise out of that ground?

Care. It was by the church-yard that is now.

Att. Gen. You have claimed the inheritance of it.

Mr. Williams. Sir, we hope we shall not need to be taught which is our inheritance; where is Mr. Marr? We shall now, my lord, answer the admeasurement made by her surveyor Holwell. Pray, will you, Mr. Marr, tell the court how many acres it is?

Marr. The land which is counted Wapping-marsh, which is bounded on Fox's-lane east, on the dean's land west, upon Grash-mill, Well-close, Nightingale-lane, &c. if we take it to the upper ground, doth contain 130 acres; but take in that which is in question too, and it makes 141 acres.

Mr. Williams. Did you measure it too, Mr. Leyburn?

Leyburn. I did so too, Sir; and it is as he says.

L. C. J. How much is it?

Leyburn. I took the whole, from St. Katherine's to Fox's-lane, and it makes 130 acres besides the upland and foreland, and the like between Grash-mill and Wall-marsh-wall: it is at least so much: it is, I think, somewhat more, the ditches being undermined.

L. C. J. Well, what is it all this while you keep my brother Gregory for?

Mr. Williams. If your lordship please, we have only a short question to ask Mr. Baron Gregory; if he please to be sworn—[Which was done]—Where is Mr. Knowles? Sir, you were pleased to say that the writings were carried to Mr. Neale's counsel in Gray's-Inn, and that that writing was among them?

Knowles. They were so, and I believe it was among them.

Mr. Williams. My lord, Mr. Baron Gregory had the perusal of the writings.

L. C. J. But, Mr. Williams, my brother Gregory was not named to be the counsellor in Gray's-Inn.

Knowles. No, one Gage, or some such name.

L. C. J. I suppose it was to Mr. Gage's chamber, that married Okey's widow.

Serj. Stringer. I believe it was, and I am sorry we have kept Mr. Baron Gregory so long. Knowles, pray, did you know they were with Mr. Baron Gregory?

L. C. J. Did you know that they were with my brother Gregory?

Knowles. No, my lord, that I remember.

L. C. J. Well, brother, we cannot help your staying now; but remember you had an offer made you at first, and you are punished for refusing it. Go on, brother Stringer.

Serj. Pemberton. My lord, that which we were surprised with the last trial, was the newness of these deeds to us. It looked to us to be so strange a thing, so amazing a thing to us, that we knew not how to give an answer to it. We have since considered of these things, and your lordship doth see what account they themselves have given of them; and what an improbability it is that these deeds should be found, as they say. Here was a possession which we have proved under the dean of Paul's lease for so long; this they would strip us of: these deeds they have trumped up. It made us look into it more warily, and we cannot conceive it probable, or any thing likely, that the deed of purchase, whereby this land is pretended to be purchased into the family of the Stepkins's, should be found in the hands of the dean of Paul's lessee, who likewise purchased it of the state, as the inheritance of the dean of Paul's. How could the deed of purchase from Hill be in our lessee's house?

Att. Gen. It was not, that is a mistake.

Serj. Pemberton. Good Mr. Attorney, do not interrupt me. We must rely upon it, that they swore it the last time, and that the deed of inheritance was made four days before our deed, on purpose to warrant the trick. Here is likewise a surrender made between Hall and Stepkins produced. How should the dean's lessees come to have that deed of surrender? But to satisfy your lordship in this matter, we shall give a full and fair evidence that these deeds are forged.

Mr. Bradbury. My lord, we have had a violent suspicion, that these deeds were forged. But we suspect it now no longer, for we have detected it, and will shew as palpable, self-evident forgery upon the face of these deeds as ever was. I desire to see the deed of the 13th of November, in the 2d and 3d years of Philip and Mary, from Marcellus Hall to Roper; and that of the 22d of December, in the same years, from Marcellus Hall to Carter, I desire to see too. Your lordship sees the use of these deeds. The one is grafted upon our lease from dean Fecknam, where it is recited, that the mill is demolished, and a new one erected in another place (says their deed); and upon that they set up the notion of an over-shot mill, and all the puzzling matter brought into this cause. But I dare undertake to prove them plainly forged.

Att. Gen. That is an undertaking indeed.

Mr. Bradbury. It is an undertaking indeed to detect the defendant's artifices; but I will venture upon it, and shall demonstrate it so evidently, that Mr. Attorney himself shall be convinced they are forged.

Att. Gen. Come on, let us see this demonstration.

Mr. Bradbury. The deeds have brought that evidence upon their own faces, that is 1000 witnesses.

Mr. Williams. Prithee open the exception.

Mr. Bradbury. If your lordship please to look upon them, the stile of the king and queen in both runs thus: the one is, 'This indenture made the 13th day of November, in the second and third years of the reigns of our sovereign lord and lady Philip and Mary, by the grace of God, king and queen of England, Spain, France, both Sicilies, Jerusalem, and Ireland, defenders of the faith, archdukes of Austria, dukes of Burgundy, Milan, and Brabant, counts of Haspurg, Flanders and Tyroll.' The other is, 'This indenture made the 22d of December in the same year.' Now in November and December, second and third of Philip and Mary, it was impossible for any man in the world to draw a deed in this form that those two writings are—

Att. Gen. Is that your demonstration?

L. C. J. Pray let him go on, methinks it is very ingenious.

Mr. Bradbury. My lord, I had the hint from my lord Coke in his first Institutes; not as to this particular stile, for I know he is mistaken there, but for the detecting of forgeries in general.

L. C. J. It is very well; pray, go on.

Mr. Bradbury. My lord, at that time king Philip and queen Mary were among other stiles, stiled king and queen of Naples, princes of Spain and Sicily; they never were called king and queen of Spain, and both the Sicilies then; and lastly, Burgundy was never put before Millan. Now to prove all this that I say, I have here all the records of that time, which will prove their stile to be otherwise. First, we shall shew the acts of parliament of that time. The sitting began the 21st of October, in that year, which was before their deeds, and ended the 9th of December after. We shall first read the titles of the acts of parliament, and you will find them just as I have opened them. Read the statute-book.

Clerk reads.] 'Acts made at a parliament begun and holden at Westminster, the 21st day of October, in the second and third years of the reign of our most gracious sovereign lord and lady Philip and Mary, by the grace of God, king and queen of England, France, Naples, Jerusalem and Ireland, defenders of the faith, princes of Spain and Sicily, archdukes of Austria, dukes of Milan, Burgundy and Brabant, counts of Haspurg, Flanders and Tyroll; and there continued and kept

'until the dissolution of the same, being the 9th day of December then next ensuing.'

Mr. Bradbury. Here in the acts made by the public council of the kingdom, the stile is in the ancient manner. And your lordship observes these no small differences. Here first Spain is left out in the enumeration of the kingdoms, and so Sicily and Naples is instead of them. In the deeds, Spain is put in before France, and the Sicilies made a kingdom too. Secondly, Here in the stile of the act they are called but princes of Spain and Sicily, that in the deeds is quite left out. And then in the acts of parliament, Millan is put before Burgundy; in the deeds Burgundy before Millan. And how this great alteration of the stile should come to be put in a miller's lease, is strange. We have next an account of all the fines of Hillary term, which was the next term following; for their first deeds happen to be in Michaelmas term, and then the parliament sate too. (Many of which were read.)

Mr. Bradbury. Here are likewise the fines of the Easter-term following, which shew that still the old stile continued in all the public records. And if we could as easily have brought all the enrolments of deeds, that would prove the same. (The fines of Easter term read.)

Mr. Bradbury. Now, my lord, we shall shew when the stile turned, that was in Trinity-term after. (The fines read.)

Mr. Bradbury. But I cannot see how these deeds could be truly made at that time, when they stand single, and none like them can be shewn, except they come from the same forge that these do. I cannot believe the miller alone, or he that drew his leases for him, could so long before prophesy what manner of stile should hereafter be used.

Mr. Williams. Your lordship has heard our deed of the 10th of December, in the same year, read already: but we having here the ledger-book of the church of St. Paul's, which cannot be made for a turn, but was written at that time; we desire the stile may be read there.—(Which was done.)—But to go a little further, to satisfy your lordship that they are very likely to be forged, we shall give some evidence that this is not an unusual thing with some people concerned in this cause. The witnesses will name them to you, and give you an account of it. Swear this lady and sir Charles Cotterel. (Which was done.)

L. C. J. Well, what is it you call these persons to?

Sir John Trevor. To speak plain, my lord, we call them to give an account of my lady Ivy's forging a mortgage from one sir William Salkhill for 1,500*l.* of a house in St. Martin's-lane, to which forgery Mr. Duffett, that lady's husband, was privy, and what benefit he should have by it, you will hear. Sir Charles Cotterel, pray, will you tell what you know of my lady Ivy in this matter?

Sir C. Cotterel. My lord, that which I have to say is this; my lord, I am tenant to my lady Salkhill, sir William Salkhill's widow, in

a house in St. Martin's-lane, and was so to her husband a year and a half before he died. The house hath been built backward, and the garden side they kept to themselves; but all the house that was first built, I took, and have it still. My lady Ivy did come to the house about three months before sir William died, parting from her husband sir Thomas Ivy: she came thither as a refuge; where she had been before, and was received very kindly. He died, as I said, about three months after, and my lady then desired to know how accounts stood between sir William and her about moneys he had lent her, and supplied her with. And upon the account she appeared to owe sir William 96*l.* she then took 4*l.* more out of my lady Salkhill's money, and told her, now, madam, I owe you 100*l.* She had been entertained as a guest there without paying any thing for it, and at his death she continued with my lady Salkhill three quarters of a year after. And being there (as she pretended), in great kindness to me, she persuaded my lady and me, that the lease of my lady's house should be turned over to me, in trust for a debt for fourscore pounds that was owing to me by sir William Salkhill. Said I to my lady Salkhill, madam, I am in no doubt of my money, I pay as much rent as this in a year and more, I can pay myself that way; pray let me not meddle with any such thing, Mr. Duffett will be persuaded I intend to cheat them if I should. But still my lady Ivy was at it, and prevailed upon my lady Salkhill to press me to it. At last, upon their importunity, said I, if it be necessary for my lady's service, let it be done what you think fit. She therefore gave direction to Mr. Sutton, and he came to me, and I directed him to draw a writing to turn over the house to me as a security. He asked me how much my debt was? Fourscore pounds, said I. Said he, I should see my lord of Salisbury's lease to my lady, for he must take out some things to draw this by. He did see it, and took as much by note out of it as he thought fit, to make the other by. Then a writing was drawn, this was in June 1670, or 1671, I am not certain particularly which; but she brings this writing, and my lady Salkhill signed it by her desire; and my lady Ivy and Mr. Sutton were both witnesses to it. About a year after I heard that she set on foot a mortgage of her own upon this house from sir William Salkhill. I wondered at it, because when the account was made up, she appeared to be in sir William's debt; and I told those that told me of it, I would believe it when I did see it. I was then informed the writing was at Malmesbury. She after went out of town, and comes back again in a little while, and this writing, as I heard, was shown to several persons of my acquaintance, that came to me and told me they had seen it; but said I, so have not I, but when I see it I will believe it. At last serjeant West, who was a relation of mine, I married his aunt, one day brought over this writing to me; and told me he had got this writing at

last, and leave from my lady Ivy to let me see it. I looked upon it, and there I did see at the bottom, where the seal was, William Salkhill, and then I turned to look upon the witnesses names. No, says he, you must not see that, who are witnesses to the deed; for my lady Ivy made me promise, before she let me have it to shew you, that you should not see the witnesses names. Then said I again, I have seen enough to give me satisfaction: I was a little the more confirmed that the thing was not a reality but fiction, and so I told him. My lady saw that would not pass; she offered, provided Mrs. Duffett, my lady's daughter, might have the advantage of the house, to release the matter.

L. C. J. Pray, Sir, for how much was the pretended mortgage?

Sir C. Cotterel. For 1,500*l.* that sir William Salkhill owed her; which I thought somewhat strange, seeing as I said, she owed sir William so much at his death. At last I came to produce my writing, (for she told me I might give Mrs. Duffett a right to the house.) Now I had not read over the writing made me; but now when I came to look upon it, instead of a mortgage for securing my debt, mine was a deed of sale from my lady Salkhill, whereby the house and the lease from my lord of Salisbury were sold me for fourscore pounds; at which I was a little amazed. My lady was then pleased to say I was a cheat, though I had no hand in it, nor indeed would have had any thing at all done; but upon my lady Ivy's importunity, and my lady Salkhill's, I gave direction only for a mortgage.

L. C. J. What was it that Sutton took out of my lord of Salisbury's lease?

Sir C. Cot. He was to take notes to draw a mortgage of that lease by.

L. C. J. He got the notes though, for aught I perceive, to draw another mortgage by. A very trick, it smells rank of the knave.

Serj. Stringer. Pray, sir Charles, did you ever pay any money by my lady's order?

Sir C. Cot. I did lend my lady Ivy 50*l.* she being in distress for money, afterwards it was made up 100*l.* About February 1671, it was made up 1250*l.* and by agreement among them my lady Ivy did relinquish that said mortgage she had thus set on foot: and there was a deed Tripartite made between me of the first, my lady Ivy of the second part, and some trustees for Mrs. Duffett of the third part, whereby the reversion was given to Mrs. Duffett, and my lady confirmed it, and gave my lady Salkhill a bond of 1000*l.* in which colonel Gravener was bound for her, that she should not trouble my lady about the house; yet notwithstanding did she afterwards write to Mr. Duffett, as I have heard, that she would set it on foot again, and she should have half of what she had recovered.

L. C. J. The inheritance of the house, it seems, is in my lord of Salisbury.

Sir C. Cot. Yes, my lord; Sir W. Salkhill had the original lease from my lord of Salisbury.

L. C. J. What direction did you give Sutton about it?

Sir C. Cot. To make a mortgage only to secure fourscore pound.

L. C. J. And what did he make?

Sir C. Cot. An absolute deed of sale.

L. C. J. Was there no proviso in it, to be void upon payment of money?

Sir C. Cot. No, nothing but an actual sale for so much money.

L. C. J. You say my lady Ivy afterwards did relinquish her pretended mortgage; pray had she nothing for it?

Sir C. Cot. Nothing that I know of; she joined in that deed Tripartite.

Mr. Williams. What should dispose her to give Mrs. Duffett 1500*l.* if it were really owing her?

L. C. J. Is that mortgage here among your writings, Mr. Attorney?

Lady Ivy. Indeed, my lord, I would have brought it, if they had given the least notice of what they now talk of.

Att. Gen. Sir Charles Cotterel, do you know that my lady Ivy forged that deed?

Sir C. Cot. Not I; but it did appear to me to be no true deed, upon what I found and knew.

Lady Ivy. You must give an account for what you have said here—

L. C. J. Nay, Madam, pray do not be in a passion: he has sworn what he has said here.

Lady Ivy. If he doth swear it, he is forsworn.

L. C. J. Nay, madam, you must be more moderate in the court!

Mr. Williams. My lady thinks she has occasion to be angry, but it may be we shall give her more exercise for her passion before we have done. Pray, swear that lady, Mrs. Duffett. Will you acquaint my lord and the jury, what you know has been done by my lady Ivy, or by her direction, in making and altering of deeds.

Mrs. Duffett. My lord, I did see Mr. Duffett forge and counterfeit several deeds for my lady Ivy.

L. C. J. Do you hear what she says, Mr. Attorney?

Att. Gen. Yes, my lord, we shall give an account of her anon.

L. C. J. Truly, I hope I mistook her, and did not hear right what she said. Pray mistress, speak it over again, and consider well what you say.

Mrs. Duffett. I say, my lord, I did see Mr. Duffett forge and counterfeit several deeds for my lady Ivy. The first thing that I do remember was in the trial between her husband and she; Mr. Duffett did by her order counterfeit a bond from him to some third person for 1,000*l.* and several letters pretended to be written from sir Thomas to my lady Ivy were counterfeit. The next thing that I remember: Mr. Duffett was writing upon a parchment; I asked him what he was writing? He answered me, He was counterfeiting one Glover's

lease, by which my lady would get many hundreds of pounds, and for which he should have 500*l.* I desired him to consider what he did, for before that time he had been accounted a very honest man. Some time after that, my lady Ivy did, upon pique to my mother, my lady Salkhill, set a-foot a mortgage she pretended to have of the house in St. Martin's-lane for 1500*l.* from my father. She did once tell me she had such a mortgage, as she pretended real, but that it was drowned in a trunk of writings coming from Malmesbury. Said I, my mother and sir Charles Cotterel will not believe it, if you do not let them see it. I am satisfied as to my concern in it, and would not have you proceed in it, for she pretended she did it for my advantage. But afterwards Mr. Duffett and she did agree to make a writing, in my sight, of a mortgage.

L. C. J. Was my lady Ivy by when the writing was made, as you say?

Mrs. Duffett. She was by, giving him order how to make it, and what ink he should use to make it look old; and they forced me to make the ink, and to fetch saffron to put in it to make it look old.

Serj. Stringer. Now will be the time to shew my lady's letters.

L. C. J. Mistress, I would ask you one question by the way, whether while these things were doing at any time, any body did come in and give you any interruption?

Mrs. Duffett. My lord, Mr. Duffett and my lady made me oftentimes stand at the door (for we were but lodgers) that no one might come and disturb them, and I never remember any that came in thither but one Mr. Sutton an attorney, my lady's attorney.

L. C. J. Did he see any of this done?

Mrs. Duffett. I cannot say he helped to do any thing, for when he came in, they sometimes sent me out to see that nobody should come upon them; and so what he did, I cannot say. But he was let in when Mr. Duffett was counterfeiting for my lady Ivy.

L. C. J. When was this; about what time?

Mrs. Duffett. Of the day, my lord?

L. C. J. No, how long ago is it?

Mrs. Duffett. It might be about 1670, or 1671.

L. C. J. You are my lady Salkhill's daughter, I think, and married Duffett?

Mrs. Duffett. I did so, my lord, I am her daughter.

Serj. Stringer. Pray what did they do to the deeds they made; to make them look like ancient true deeds?

Mrs. Duffett. For the making of the outsides look old and dirty, they used to rub them on windows that were very dusty, and wear them in their pockets to crease them, for some weeks together, according as they intended to make use of them.

Att. Gen. My lord, as it happens, we have that deed she talks of, called Glover's lease, here.

L. C. J. Ay, I suppose you have such a

deed; it is a famous deed in Westminster-Hall.

Att. Gen. Here it is, we desire she may look upon it. [Which she did.]

Mrs. Duffett. As for this deed, I cannot swear this is the deed, there have been so many made by them. But he did counterfeit a deed that he told me was one Glover's lease.

Mr. Williams. Mistress, you were going on to tell how they did use their deeds they made. Pray tell us how they used to lay them in the balconies, and all you know of the art.

L. C. J. Ay, how was it?

Mrs. Duffett. When they had been rubbed upon the window to make them look dirty, and they were to pass for deeds of a great many years standing; it was used to lay them in a balcony, or any open place, for the rain to come upon them and wet them, and then the next sun-shine day they were exposed to the sun, or a fire made to dry them hastily, that they might be shrivelled.

L. C. J. Is your husband dead or alive?

Mrs. Duffett. Dead, Sir.

Att. Gen. How long has he been dead?

Mrs. Duffett. I was not at his death with him, he died beyond sea.

L. C. J. Was your husband alive when Mr. Johnson's business was?

Mrs. Duffett. Yes, he was.

L. C. J. Yes, I know he was in court; though I asked the question, I remember all that business.

Mrs. Duffett. I was subpoenaed in at that time, but my lady Ivy would not let me swear.

L. C. J. Pray, Mistress, what had your husband for his pains?

Mr. Williams. Had he any share of the money lent by sir Charles Cotterel?

Mrs. Duffett. My lady Ivy gave him in my sight 200*l.* of sir Charles Cotterel's money.

Mr. Williams. Do you know any body else that had any of that money?

Mrs. Duffett. The attorney had 200*l.* of the same money too.

L. C. J. What attorney do you mean?

Mrs. Duffett. Mr. Sutton.

L. C. J. Had he so, how came he to deserve it?

Mr. Dobbins. Pray, Madam, what do you know of counterfeiting any seals?

Mrs. Duffett. Mr. Duffett once had the impression of a seal in his hand, with which he said he was going to owe Mr. Dryden, to have it counterfeited; but I do not remember what the seal was.

Mr. Williams. When the deeds were written, how did he use to put the names to them?

Mrs. Duffett. I have seen my lady herself write some great letters of the names first upon other papers, which Mr. Duffett could not so well hit, and he has writ the rest.

Mr. Williams. Can you tell the names?

Mrs. Duffett. Truly, I do not remember what names.

Mr. Williams. We have another witness who will give you an account of some letters

of my lady's, which we shall desire to be read. Swear Mrs. Elizabeth Rycott. (Which was done.)

Att. Gen. She talks of Glover's lease.—

L. C. J. She says, she doth not know whether that be the deed, there were so many forged, Mr. Attorney. But she swears thus, my husband did forge a writing he called Glover's lease.—

Mrs. Duffett. She had two or three mortgages forged.

Mr. Williams. Come, mistress, where had you these letters?

Mrs. Rycott. I had these letters from Mr. Duffett.

Mr. Williams. Pray, where had you these bottles?

Mrs. Rycott. This is the ink I saw Mr. Duffett write for my lady Ivy with, at Mrs. Lee's house, at the table in the kitchen.

L. C. J. Who did he write for?

Mrs. Rycott. For my lady Ivy; I did not know what they were that were written, but he said they were forged; and with ink out of these bottles he said he could make new-written writings look like old ones very soon.

Mr. Williams. Did you ever speak with my lady Ivy? Do you know her hand?

Mrs. Rycott. I do not know these letters to be her hand; but Mr. Duffett gave me them as her letters.

Mr. Williams. Sir Charles Cotterel, pray, will you look upon them; you know my lady Ivy's hand.

Sir Ch. Cotterel. I do so—they are all of a hand, and I think they are my lady's: I believe it truly.

Clerk reads.] This is signed T. I. [All the letters were read.]

Mr. Williams. Your lordship sees one of these letters tells Mr. Duffett, she intends to set sir William Salkhill's mortgage on foot, and he should have half what she recovered. If it were a true mortgage, why should she have given him half?

L. C. J. They were very great together, that is plain; they were very familiar. What were Mr. Duffett's merits towards my lady, I cannot tell. Will you go on? It is late.

Mr. Williams. This is all we shall offer at present, until we have occasion further from them.

L. C. J. Well, what say you to this, Mr. Attorney?

Att. Gen. If they have done—

L. C. J. They have, they say.

Att. Gen. Then may it please your lordship, and you gentlemen of the jury, I shall begin to answer their evidence about the first. They have produced some argumentative evidence out of many records, to convict our deeds of forgery. In truth, if they had not bragged of this very thing, it had been a shrewd objection, because we could not have been prepared to have given an answer to what we could not have foreseen we should have been accused of. But upon their boasts they have

put us upon the search as well as they, and we can give as good an account of it. They tell you they had their hint from my lord Coke; but that hint has led them into a great error; for he is mistaken himself in the computation of this time, as he is in a great many other things.

Mr. Bradbury. I know he is mistaken; but I depend not upon his remarks of that time. I said only, I had the general hint about detecting forgeries from thence.

Att. Gen. But yet for all your confidence of the demonstration, your foundation fails: for, my lord, to settle the fact, we shall shew that the king of Spain, Charles 5, who was likewise emperor, resigned his crown the 25th of October, in the 2d and 3d years of Philip and Mary. It is true, the parliament-rolls, in the title of them relating to the first day of the session, there the stile that was used at first could not be altered. But the fact of their being the king and queen of Spain, was so notorious to all the world, that we shall shew you in multitudes of the rolls of that year, the stile was as in our deeds; so that the use might be various: but that will not prove our deeds forged. It may be, the courts of law might not take notice of it, as to alter the stile until Trinity term; though we have not searched so far among them, but in the common conveyances which are upon record in the rolls, there it is altered. And as to the time of their becoming king and queen of Spain, we have an History that tells you the very day when the king resigned, which was the 25th of October.

L. C. J. I tell you, gentlemen, methinks *Mr. Attorney* has been very fortunate to-day, in giving very satisfactory answers to two objections: first, they would quite destroy *Mr. Neale's* title to this land, by a piece of evidence that they had never had, but that *Mr. Neale* had bragged of it; and that was the survey, which, with much confidence of the victory, was produced: and yet, when it was so, to me it seemed the stabbingest enemy the defendant's cause had; but that you are to have with you, and must judge upon it. Now he tells you again, *Mr. Neale* has been a blabb of his tongue, and could not keep the secret to himself, but must brag that the deeds were forged, for the stile of the queen's reign is changed; and by this bragging they have smoked the business, and can shew records for it. But now instead of records, the upshot is a littlelousy history. Can that be an answer to those great numbers of records brought by the other side? Is a printed History, written by I know not who, an evidence in a court of law?*

Att. Gen. My lord, besides that; which we must submit to your judgment, whether, upon such a point of fact in a foreign country, to be done such a day, a foreigner's history, not printed for this purpose, shall be a sort of evi-

dence; but I say, besides that, here is ^{one} gentleman, *Mr. Clerk*, that searched the roll, and he will tell you what they are in this point.

Mr. Clarke. I did search in the rolls, and find many in that year like these. And my lord Coke is utterly mistaken; he says it was not altered until the 4th and 5th years of Philip and Mary.

L. C. J. I care not what my lord Coke says, but what the records say, let us see them.

Mr. Clerk. I saw a great many in that year.

L. C. J. Lord, gentlemen, what do you make of us, to keep us here with I do not know what! *Mr. Attorney*, he tells us that *Mr. Neale* was so great a blockhead to brag of this, and so we were prepared for an answer; but all the answer is, my lord Coke is mistaken, and there are many records, but we have none of them, *Præmoniti*, *Præmoniti*. If he did brag so, and you knew it, and would not bring records to wipe off the objection, it is ten times worse than if it had been answered only with the unexpectedness of it.

Mr. Bradbury. My lord, I dare affirm that there are none of the Rolls of that year so, till after Easter term.

L. C. J. Lord, Sir, you must be cackling too; we told you your objection was very ingenious; but that must not make you troublesome; you cannot lay an egg, but you must be cackling over it. The objection is now upon them, let them answer it if they can. Have you any of the records here?

Sol. Gen. We have not, it seems, my lord.

L. C. J. Then this must pass unanswered, and must be left to the jury.

Sol. Gen. But, my lord, they have gone a little farther in this case, and indeed farther than becomes them, I think, to lay aspersions upon my lady Ivy, as if she were frequently guilty of forgery. And for that sir Charles Cotterel swears, that she did pretend she had a mortgage of a house in St. Martin's-lane for 1,500*l.* and this mortgage, he says, he was told of by some that did see it; whereupon he did likewise desire to see it; and without seeing of it, he declared, he would never be satisfied of the reality of the thing: and thereupon *Mr. Serjeant West* brought it him, and he saw it, but was not permitted to see the witnesses names, and thereupon he was more dissatisfied than before about it. But if sir Charles Cotterel had given any the least intimation of such a thing, now we would have gratified them with a sight of it in court, where he should have had his full view; for my lady has it still, and it is a true mortgage, and for a real consideration. But he says this is released, and she did that, as is supposed, to suppress any inquiry after it. But with reverence to sir Charles Cotterel, the fact is otherwise. My lady Salkhill pretended to a debt from my lady Ivy, for nine years diet for four persons; and the reckoning being made according to my lady Ivy's quality, was made so high, that it paid off the mortgage: but she has the deed still—

L. C. J. But what say you to the deed?

* See *Mr. Peake's Observations* on this case in his *Compendium of the Law of Evidence*, chap. 2, sect. 2.

sale, and my friend Sutton's notes out of the lease; and the debt of 96*l.* and 4*l.* but a little before acknowledged by my lady Ivy—

Sol. Gen. My lord, in answer to that, we say, he has been pleased to give it a great deal of garniture; and as he is master of the ceremonies, to adorn the story with abundance of flourishes of his own kindness and interests—

L. C. J. Mr. Solicitor, you are not to judge of that, whether it be flourish only or substance; the court and the jury are the judges of that, and truly I think it very material to the cause; I assure you I do; let the dirt be taken off as it can, it sticks very much; I must speak my mind.

Sol. Gen. When I am over-ruled, I acquiesce in the judgment of the court.

L. C. J. Pray, Sir, apply yourself to answer the evidence.

Sol. Gen. So I do, my lord, as well as I can. The next witness is this gentlewoman, Mrs. Duffett; she swears, that she saw her husband, Mr. Duffett, counterfeit many deeds; she does not particularize them: and here have been likewise several letters read, that did import a transaction and correspondence between my lady Ivy and him.

L. C. J. Pray, Mr. Solicitor, remember she swears she saw that lease of Salkhill's, and that called Glover's lease.

Sol. Gen. My lord, this witness that swears this, is not only a person unfit to be believed, but is contradicted by a record; and for that, my lord, it stands thus: Mr. Johnson, as is well known, had his trial for the matter about which she now swears: for Mr. Johnson, on the behalf of alderman Ireton, undertook to pay 500*l.** to Mr. Duffett, to procure somebody to swear the deed, called Glover's lease, to be forged. Upon this there was an Information exhibited in this court against Mr. Johnson, for subornation; and upon full evidence Johnson was convicted for his endeavour. And the record of that conviction we have here, and desire to have produced and read.

L. C. J. And I tell you, Mr. Solicitor, that is no evidence in this case.

Sol. Gen. Why, pray, good my lord, did not they here just now swear her?

L. C. J. But the information put in by Mr. Attorney Noy, pray, remember, was not suffered to be read, because not against any of the parties, but third persons.

* Roger North says, "The lady prosecuted Johnson for this subornation by information in the King's-bench, and the cause was tried before Pemberton. It appeared that Johnson had no concern or words but by way of advice to his client; but he was borne down and convict; at which the fellow took despair and died. It was thought his measure was very hard and cruel: and that some mighty point of interest in her ladyship's law suits depended upon this man's suffering." *Life of Lord Keeper Guilford*, vol. 2, p. 123, 8vo. ed. of 1808.

Sol. Gen. But pray, my lord, give me leave to apply it to the objection here made in our case, to the credit of our deeds. They say it is suspicious, because my lady Ivy used to forge deeds; and particularly Duffett, they say, did once forge for her Glover's lease. Now to answer that, we come to shew that my lady Ivy did not forge Glover's lease; but there was indeed an art used to persuade Duffett to swear it forged, when indeed it was not; for which trick Johnson, that was the agent, or instrument, was convicted; and that conviction is, I think, a good evidence that it was not forged.

L. C. J. None in the world, Mr. Solicitor; and that from the very evidence that has been given in this cause this day: for it is plain, if you will believe this woman, (and I yet see no cause to the contrary) that she was coming into the court to have sworn the truth, which would have perhaps cleared Johnson; but my lady Ivy would needs keep her away. Now if Duffett were so great a rogue as to forge, he would not stick to swear, to protect that forgery: and then how easy a thing was it, had Johnson been the greatest saint in the world, to have got him convicted upon what Duffett came to swear against him; though, had she come then in, Duffett would have appeared one not at all fit to be credited.

Sol. Gen. My lord, I have then one thing more to offer; I cannot tell indeed whether it be material, for it seems I have been so unhappy as to offer some things that have not been thought material.

L. C. J. You have so indeed, Mr. Solicitor; I must speak the truth; there have been several things offered as evidence, which, in another cause and place, would not, I am sure, have been offered.

Sol. Gen. My lord, I submit what I offer for my client to the judgment of the court. But that which I would say now, is this: We have here the husband's oath concerning this matter, that this woman who now takes upon her to swear these forgeries and things, told him she could have 500*l.* if she would swear against my lady Ivy.

L. C. J. Is that evidence against the wife?

Sol. Gen. He is now dead, it seems; but here is his oath.

L. C. J. Pray, consider with yourself, could the husband have been a witness against the wife about what she told him upon an information for that offence of subornation?

Sol. Gen. No, my lord, I think not.

L. C. J. Could the wife be an evidence against the husband for the forgery?

Sol. Gen. No, my lord, she could not; and yet she swears it upon him here.

L. C. J. That is not against him, man; he is out of the case, but against my lady Ivy; and how can the oath of the husband be evidence here?

Att. Gen. Cryer, call Mr. Gibson, to give an account of this gentlewoman.

Sol. Gen. Suppose, my lord, that both hus-

band and wife were brought as evidence against my lady Ivy, were that good?

L. C. J. Certainly that were very good.

Sol. Gen. Why then, my lord, one of them says, that she saw such and such things done by lady Ivy, and by him for her; and the other says, such things were not done, but she confessed she could have 500*l.* to swear they were done: shall not this evidence be admitted, to contradict the other?

L. C. J. Why, good Lord! gentlemen, is the philosophy of this so witty, that it need be so confidently urged? is it good logic, that because they both were good witnesses against my lady Ivy, therefore either of them is a good witness against the other? shall the husband's oath be read against the wife, to fix a crime upon her? sure you do not intend this shall pass for argument, but to spend time.

Cryer. Here is Gibson now, Sir.

Att. Gen. Swear him (which was done).

Sol. Gen. We are not now, my lord, examining what Duffett swore about forgery or not forgery; but is not this confession of hers an argument against the credit of her testimony, who now says, she saw my lady Ivy do so and so, when she has confessed she could have money to swear against my lady Ivy.

L. C. J. But Mr. Solicitor, if you will not attend the question, I cannot help it; is it not the husband that swears against the wife?

Att. Gen. Do you know that gentlewoman there, Gibson?—Gibson. I have heard of her.

L. C. J. Nay, be not angry, Mr. Solicitor; for if you be, we cannot help that neither. The law is the law for you as well as me.

Sol. Gen. My lord, I must take the rule from you now.

L. C. J. And so you shall, Sir; from the court, as long as I sit here; and so shall every body else, by the grace of God. I assure you I care not whether it please or displease; we must not have our time taken up with impertinent things; for I must say, there have been as many offered in this cause to-day, as ever were in any cause that ever I heard of; and if all be not as some would have it, then they must be in passion presently. The court gives all due respects, and expects them.

Att. Gen. Have you any acquaintance with that woman?

Gibson. I have seen her a great while ago.

Att. Gen. What do you know of her? What reputation is she of?

Gibson. I know nothing of her reputation; I know she was Mr. Duffett's wife.

L. C. J. And so do we, she tells us so: what then?

Gibson. I have seen her a-bed with Mr. Frogmorton, and she told me she had then a frog in her belly.

Mr. Williams. It seems then by having this gentleman so ready, they were aware of this too: I suppose Mr. Neale bragged of this too, or else the guilty conscience put them upon preparing for it. But yet I think they do us no great harm by it.

Att. Gen. You will give our evidence an answer I suppose by and bye: but we will go on to the rest of yours. As to the bill and answer in the year 1629, in that of John Stepkins, it is said, he makes the bounds eastward to be Fox's-lane; but it is plain, he that gives in that answer was not acquainted with the transactions of the estate before his own time. And if you consider the time of that answer, there was near fourscore years then past since the lease made, and so long it had been out of the family, rendering a pepper-corn rent; and so the profitable interest was only the four acres surrendered to him by the tenant, before the licence to aliene: and it appears not that he had any notice of the reversion. But I observe in the answer there is one passage remarkable; that there was a way, time out of mind, that did part this land, and that which was reputed the dean and chapter's land. Now that doth not tie it up to make Fox's-lane that same way, but only says generally, there was an old way, which must be understood of the way down from Cock-hill to Bell-wharf: so that I take it, that this is no conclusion upon us. Nor upon the same ground is that lease made 13 Jacobi, by John Stepkins, where he abuts his land upon that wall which is called Wall-marsh-wall, and covenants to have the rent increased, if any thing beyond that be recovered; for there was near threescore years to come then of this lease, and he had no pretence of title to contest it at that time; and so the verdicts are all answered that way, the lease expired not till the year 1680.

Sol. Gen. Then, my lord, for the survey that they produce of the late times, by the order of the committee of parliament for sale of church-lands, how that should give a title, I do not understand. It is the first time I ever heard of a particular of dean and chapter's lands to be an evidence, when at that time there was no dean and chapter. But that which is a clear answer to it is this: Winterburn, who had the lease from the Church, did also claim under Marcellus Hall, who had a lease for ninety years: that in time expired in the year 1640. That interest being then determined, he gets these put into the survey (which it was his interest to do) as the inheritance of the church, which would gain him a fee-simple upon his purchase, he concealing the long lease, and they being so long in possession; whereas otherwise he could only have an estate for years: and it appears all the deeds were in his custody at that time. For the other witnesses that speak to the wall, that we must leave to the jury's consideration, upon the balance of the evidence. For, with submission, my lord, taking the evidence as it stands together, if that lease of Marcellus Hall be a good lease, these several conveyances we produce are supported, and do explain that: He surrenders four acres, which are the lands that are afterwards conveyed to Fox, which is mentioned in the deed of his surrender to be the green Hilly-bank, and that was the boundary of

the four acres; but what becomes of the other seven acres and an half; they have given no account of it hitherto. But surely, my lord, upon that first survey, I take it, there is a strong evidence concurring with our assertion; For that saith, the south boundary of the dean's Lynchies is Wall-marsh. Now, then, if there be seven acres to go forward from thence, that just reacheth up to Cock-hill; and all the other bounds plainly concur with ours; and upon the perusal of the survey, which it is consented to on both sides the jury shall have with them, I believe they will be satisfied our bounds and that agree. Upon the whole evidence I submit it for the defendant. We have done, my lord.

Att. Gen. Only I would ask Mr. Sutton a question; whether the bill and answer now given in evidence, were not given in evidence at the last trial?—*Sutton.* Yes, it was.

Att. Gen. And yet the verdict went for us then, as I hope it will now.

L. C. J. Have you all done, gentlemen? Will you say any thing for the plaintiff?

Mr. Williams. No, my lord, we will leave it to your lordship and the jury.

L. C. J. Then, gentlemen of the jury, this evidence has been very long: I think the trial has held us as long as any cause that ever happened in Westminster-hall, of this nature; I mean, except one, these many years. I think we meet with but one in all our books, that held near so long: That indeed was rather something longer, the famous cause of Colt, in this court; but besides that, I never heard of a cause of this length before.

But, gentlemen, it is a cause of value, and a cause of great weight and consideration: it hath depended in the evidence of it upon abundance of circumstances, so that it may be impossible for me to remember all the evidence that hath been given. But as near as I can, I will give you what assistance I am able, in recollecting what has been said on both sides. Some of you I have observed have taken notes, and that will save me and you some trouble: I will give you a scheme fairly of that which is the question. And it will be very much more easy to you, because you have had a view of the matter, than can be thought I can make it by any direction of mine.

The question in short is, Whether seven acres and a half of land, now built upon to a very great value, as the witnesses say, 2,000*l.* a year lying on the east side of the lane, that is called by the name of Fox's-lane, betwixt that and the mill, called Ratcliff-mill, be part of the marsh that formerly belonged to the family of the Stepkins's? or whether or no that be not part of the dean and chapter of Paul's inheritance? If it belong to the dean and chapter of Paul's, then the issue is with the lessor of the plaintiff: but if it be the inheritance of the Stepkins's; and part of the marsh-land, and was so according to the ancient boundaries, then the issue is with the defendant.

The plaintiff comes and shews for his title,

first that this was all along enjoyed under the church of Paul's leases. Knowles, who formerly did receive the rents of the very thing in question, till (1677), before this question, says, in his testimony, he received them in the right, and on the behalf of Mr. Neale, who claims by lease from the dean of St. Paul's.

That is not sufficient to maintain his title, but they come and shew the original; and in point of time, 5 H. 8. they say that one dean Collet made a lease of the lands in question, for 45 years. And to prove this, a book is produced to you, wherein there is a short entry made, which takes no notice at all of any thing more, but that there was such a lease of a mill in Shadwell, with the appurtenances. But upon their producing that writing, it is found to be a paper writing; and there was an objection, and a material one, made upon the face of the thing itself: for there were two places that seemed to be suspicious, as made directly to humour an evidence of such a lease in 5 H. 8. having Dr. Collet's name inserted, who happened to be dean of Paul's at that time, whereas Nowell was originally the name that was set there, with the same hand that the other part of the writing was. Thereupon it came to be enquired into, how it came to pass that Nowell's name was struck out and Collet's put in? That seemed to insinuate, as if this was contrived on purpose to shew up an evidence, and humour the time. For it could not be imagined that Nowell should come to be dean when that lease was made, who was not dean till so long after, in queen Elizabeth's time, as I take it. Now had this objection met with this book alone, it would have made the evidence lame, and they would have been thought to have set an ill leg forwards. But to take off that, they come after and shew a parchment scroll, which takes notice likewise of such a lease: and their officer, Spencer, says he has seen that scroll many years, and so it could not be a new thing for this purpose: it is an old rental, or some such thing; in time, in some short time after, where is mention made of a lease by dean Collet, 5 H. 8. for 45 years, which humours the time exactly, and supports the credit of the other evidence. This is that they give as an answer to that objection. It might be a mistake as to the name, but this will shew that it was not a contrived matter for this purpose.

The next piece of evidence they go to, is 5 E. 6. and for that time they come and produce leases, those that are at least in law evidences of leases; and those are the church books, ancient books that have been always read and allowed for evidence. And thereby they shew that one Dr. May, then dean of St. Paul's, viz. 23 Feb. 5 Ed. 6. did lett the lands in question to Joan Hall and Marcellus Hall; and he lett it as the dean and chapter of Paul's lands, for 45 years, at the rent of 10*l.* a-year.

Then they tell you in the 2d and 3d of Phil. and Mar. 10 Dec. one dean Fecknam takes notice of the former leases, and lettis it to Mar-

cellus Hall, and that is for 90 years; wherein there is the old rent taken notice of, and some increase made; and there is in that lease a covenant to repair the mill, and that has given a rise to something that makes part of the present question; which they that are for the defendant, call a licence to remove the mill. You, gentlemen, will have the deeds with you, and are to judge of them.

The leases from 5 H. 8. to this dean Fecknam are only leases made for years; and by reason of these leases for years, and the long lease which they pretend to, the defendant's counsel insist upon it, that they could not be let in to controvert the plaintiff's title; for the last lease for 128 years, from Stepkins to Hall, expired in time but in the year 1680.

Now say the plaintiff's counsel, (and they produce that which is very material in the case) 5 Aug. 1636, this was then lett to one Mary More, the relict of one Adrian More, formerly the assignee of the lease that came from dean Fecknam to Marcellus Hall. And there, instead of continuing it a lease for years, he lets to Mary More, in consideration of the former leases, and turns it into an estate for three lives. So far then was the dean of Paul's from apprehending himself to be but lessee for years, that he takes upon him to create freeholds, which only he that has the inheritance can do.

They go on further, and tell you, that in 1640, the same dean of St. Paul's, she having sold her interest to one Whitwick and Winterburn, there is a new estate made to them for three lives. These continue in possession under that lease, till Mr. Neale purchased in their interest: and his grace of Canterbury, then dean Sancroft, he made another lease to the said Mr. Neale for three lives; and there is a great increase of rent, 80*l.* during the life of one of the former surviving lives, and then to 100*l.* Then comes the lease made to the now lessors of the plaintiff, by this reverend divine that is here, now Dr. Stillingfleet, the present dean of St. Paul's, at yearly 240*l.* And this is the substance of the evidence first given by the plaintiff, for his title which is underneath that last lease of dean Stillingfleet, which they say is a good title: and in case it doth appear that the lands are the inheritance of the dean of Paul's, it is not controverted by the defendants, but that the plaintiff must have a verdict for him.

But say they which are for the defendants, this is not their inheritance, but the defendant's: and to prove their objection, they produce abundance of deeds, of which, as well as I can, I will give you a punctual and particular account. For with all the faith and fidelity I can, I will give you the substance of what has been said on both sides.

First, It is not to be doubted, for it is beyond all contradiction plain, there were 130 acres of marsh-lands, lands covered with water, which one Vanderdelf, a Dutchman, undertook to drain, and had an act of parliament made, anno 27 H. 8. to encourage him for his endeavours to drain it, giving him the one half.

That act of parliament is produced, and it is there said to be 130 acres.

Now you are to take notice of the boundaries of this marsh-land, as making the state of this question. The act of parliament bounds the marsh upon the Hermitage, or such a mill called Grash-mill, upon the West. It is bounded on the high-way leading to Ratcliff, on the North, which is called Ratcliff high-way to this day: it is bounded to the river Thames on the South; and it is bounded upon the town of Ratcliff towards the East.

Afterwards, in H. 8th's time, comes in Richard Hill, who was owner of some part of this marsh (Vanderdelf's moiety,) and he in time, 23 H. 8, became indebted to one Salvago and another, and there he comes and acknowledges a statute to them for their debt. And (because I would have you have all things before your view that were done at one time) in the same year there is a mortgage made of the lands of Richard Hill, (among which, they for the defendant apprehend, are comprized the lands in question, as marsh-land, to Salvago, for the payment of their money) and in that mortgage the same words are made use of for the boundaries, as are in the draining act. This, to derive their title, they produce to shew, that there was such an ownership, and such a mortgage.

Then they tell you, that in 37 H. 8, the same Richard Hill, he goes and divides some part of these lands, that is to say, eleven acres and an half, and that he conveys away by lease for 34 years to Marcellus Hall; whom I name the more particularly, because it is a name that has been much canvassed, and gives a countenance to the title on both sides. Now in that deed, whereby this is thus conveyed to Marcellus Hall, there is no notice taken particularly of the eastern boundary to be the mill, or the mill-bank, or the hilly-bank. Now, say they, the mill was just upon the point, hard by that place that is called now by the name of Cock-hill; and so that boundary doth take in the thing in question, the seven acres and a half, because that deed takes notice of the mill, hilly-bank, or way.

In the next place they offer you this for evidence, that in 6 Ed. 6, the same Richard Hill, for 130*l.* sells his land to Thomas Stepkins. And when it comes to convey the inheritance to him, it is laid to be under the same boundaries as are mentioned there, bounded on the hilly-bank or mill-bank, eastward. Now, say they, that sheweth plainly, that still the mill was the thing that was intended to be the boundary; and there being seven acres and an half of land between the mill and the western bounds, those seven acres cannot be construed to extend to a mill with the appurtenances, but rather it is to bound upon the mill and include the lands, than to have the lands go with the mill.

They proceed further and say, that Thomas Stepkins, the same year, did for 50*l.* lett this to Marcellus Hall, for 128 years, at a pepper-corn rent, which lease expired but in 1680, and till now we could not come to litigate that

matter, because he had made such a lease. But then I am to take notice by the way, and so must you into the bargain; there is another boundary made there, abutting on the well there, called Shadwell, and the way leading from Shadwell to the Lynches.

After this they come to tell you further, that Marcellus Hall, 22 Dec. 2 and 3 Phil. and Mar. lett a lease to Carter, and that was for 20 years. Now you are to take notice, that in this lease of Carter's, there is notice taken of a mill, and about an acre of land thereunto belonging, very carefully put in; and that, say they, sheweth that your boundary could not extend to so much as seven acres.

And to back that evidence, they shew you a certain survey, taken in Queen Elizabeth's time, concerning the manor of Stepney, which you are by consent to have with you; and you will do well to consider it well in your perusal of it.

And now comes the main deed. Say the defendant's counsel, it falls out that you are but lessee under Marcellus Hall, who was lessee under us, and was obliged in a particular covenant, that he should not lett any part of this land without the licence of our ancestor Stepkins, who made him such a long lease. But it happened he had a mind to lett some part of this land to the dean of Paul's, from whom he had a lease of the mill. And accordingly he had a licence from Stepkins so to do; which say they, is the reason why they come to lay claim to our land. This they take notice to be in-time, 16 Nov. 2 and 3 Phil. and Mar. when I must tell you by the way, that the first lease pretended by them to be made to Marcellus Hall, is the long one, 6 Ed. 6, by Thomas Stepkins; so that Marcellus Hall came to be lessee under the dean and chapter, before he had any authority or interest from Stepkins, nay before he had any lease from Hill.

Att. Gen. My lord, if your lordship pleases to remember, Marcellus Hall did first take by lease from Rich. Hill, in 37 H. 8.

L. C. J. Pardon me, Mr. Attorney, I did not mis-repeat it; I say he first had a lease from the dean and chapter.

Att. Gen. That was of the mill only—

L. C. J. That is contested, and the very gist of the question; Mr. Attorney, how much is comprehended in that lease?

But to go on with the defendant's evidence. Then in Nov. 2 and 3 Phil. and Mar. is the deed to Roper, of which I shall have occasion to say more anon.

In 5 and 6 Phil. and Mar. comes Jasper Hill the son of Richard Hill, (the first owner of the land, and that entered into the statute to Salvage) he makes a conveyance to Macheline Stepkins, Thomas's widow, and John Stepkins, his heir, mother and son; upon which, afterwards there is a surrender made by Marcellus Hall to John Stepkins, son and heir of Thomas, of four acres; which say they was not assigned with the other seven to the dean of Paul's.

Then in 3 Elizabeth, pursuant to the con-

veyance made by Jasper Hill to the Stepkins's, there is a fine and recovery suffered; and 4 Elizabeth, a deed to lead the uses of that fine which are to John Stepkins and his mother, and the heirs of John: But still, in all these deeds and conveyances, there is mention made of the mill, mill-bank, or hilly-bank, or hilly-way, to be the boundaries; and likewise of Shadwell.

After that, they produced a bond, wherein Spinola is bound to Stepkins to take off the statute entered into 32 H. 8, by Richard Hill.

Then 14 Elizabeth, they produce a commission of sewers, where notice is taken of the several land-holders of Wapping-marsh, who were liable to make satisfaction for any want of repairs or defects in the marsh. There Roper is taken notice of as a tenant, and one James and Stepkins too: and they do infer from hence, that James and Roper's land is part of this, and was under Stepkins, and is enjoyed to this day under the title of the Stepkins's.

They go on further, and tell you, that 15 Eliz. Stepkins became indebted to the crown, by taking a teller's debt upon him, and had a mind to secure the debt, and therefore conveys his land to the then treasurer, attorney-general and solicitor-general, to secure a great sum of money; and this land they would have to pass among the rest.

Afterwards, 17 Eliz. the commissioners sit again, and there is a return made of all those that were land-holders, the same named before.

Then 7 Jacobi, was there a re-grant out of the crown made to Stepkins of all his land. Wherein, generally speaking, the bounds of the lands belonging to Stepkins are called the Mill-bank, &c. This must, say they, of necessity take in the lands in question, otherwise it is impossible that should be the boundary. And they make use of this further argument: Say they, we have taken a survey of all the lands, those in question and the other marsh-lands, from Hermitage-dock, alias St. Katherine's, even to this mill; and it doth just humour the number of acres in the act for draining Wapping-marsh; that is to say, it makes just 130 acres. All which, they say, plainly belongs to the Stepkins's.

They then come to examine their living witnesses, and they have produced them in this order as I name them: their witnesses have been as they are in my paper. One Hught, and Somerly, and Holmes, and Barefoot, and Cope, and Holwell. And the substance of what they say is this: The old woman, Barefoot, says, she has known the place in question these threescore and odd years, she remembers well the situation of it, and that the water drove another mill first, and did not come near to Fox's-lane by a quarter of a mile, but ran more to the north. And this land, she says, was always reckoned to be Stepkins's, and she never knew any one have any thing to do there but they. And in as much as there was some discourse concerning a well; she says, she

doth remember there was a well between Fox's-lane, and the mill, and that was half a mile off Fox's-lane, and was called Shadwell. She remembers it so well, that if there were as many wells as there are panes in the glass window before you, that was the right well, and there was no other well called Shadwell, but that.

Then Hughs tells you, he remembered the land before it was built upon; that at common ordinary tides the water used to come up to Fox's-lane, and at high tides over it; but the land has been raised much higher since that.

Then Cope, he gives an account of his knowing it above three score years ago; and he in general says, he did not know how far westward the water went that drove the mill; but Fox's-lane, he says, was the way from north to south, westward of the mill, and he knew not any way eastward of the mill but Fox's-lane; for Cock-hill is eastward of the mill. And much like to this was the testimony of the other witnesses; which being done, they concluded with the evidence of the surveyor Holewell, about the admeasurement. And this, as I remember, or can recollect, is the substance of the defendant's evidence, before the plaintiff's reply.

And then as to that which was offered by the defendants, as evidence of the boundaries, the plaintiffs give this answer; and it is that which will be the pinching question in this cause to all eternity: Whether or no, Mill-bank, or Mill-hill, or the Hilly-way, or whatsoever else it is called in their old deeds, be not that which is now called Fox's-lane.

Say they, first, by your own evidence, (that same ancient survey that you produced, and which, by consent, you gentlemen of the jury are to have with you) there is notice taken of 150 acres that belong to the marsh; there is notice taken of the Lynches, as belonging to the dean and chapter of Paul's. But then in the last paragraph of the backside of the leaf, (so we call the second side, for distinction sake) you will find this taken notice of; which said marsh doth bound on the lands hereafter mentioned on the east. And what are the lands thereafter mentioned? These you will find; Item, holden by the dean and chapter of Paul's, one messuage, called Derrick-hills, another tenement called so and so, and several orchards, gardens, ponds, &c. and a water-mill thereunto belonging. So that there was on the east part of the marsh-land, orchards, gardens, a messuage, a tenement, waters, ponds, fishings, and a mill, and several other things. Now, if in case the eastern boundaries of the marsh came up to the mill you speak of, how comes it to pass that you yourself, in your own survey, make the eastern bounds to be upon these lands, and all these belonging to the dean and chapter of Paul's? And when they come to read the particulars of what belonged to the dean and chapter, that survey bounds to the dean and chapter's land upon the marsh-land. You that have been upon the view, may the

better understand it; and you see the eastern part of the mill was the waste ground, and made a lane to carry down ballast, as the witnesses say. This doth just humour all the old boundaries.

Nay, to shew; that this is really so, they say, that in time, in the year 1615, there was an action commenced before my lord chief justice Coke, when he sat in this court, where-in this controversy arose. Fox, who was as well tenant to the Dean and Chapter of St. Paul's, as he was to Stepkins, he comes, and he builds upon that old wall, called Wall-marsh-wall, which begot a contest betwixt Stepkins, who was the ancestor of my lady Ivy, and this Fox; and upon that contest this was the question, Whether there had been any incroachment upon the marsh? Not but that the wall was reckoned, even by Stepkins, to be the boundary, though running, as Stepkins said, twenty foot into the East part of the marsh; and there Stepkins was non-suited. Afterwards it came into the common-pleas, and there was a verdict, whereby it was settled, that the whole wall belonged to the Dean and chapter of Paul's.

But afterwards Mrs. Moor, the lessee of the church, would not be quiet with this, but exhibits a bill against John Stepkins, and others, and to settle the boundaries, because he pretended incroachments upon his ground: they therefore require him to ascertain the matter upon his oath. He in his answer confesseth, he had heard of the verdict before-mentioned, but knew nothing of it himself; but when he comes to set forth the boundaries, he is so far from taking notice that the boundaries take in the lands in question, that he tells you there was an ancient bank, which was the ordinary bounds between his land and the land of the church; and this is a high-way, a common high-way. But it was true, as he believed, they had incroached, though such a verdict and nonsuit were obtained by them. Not that ever he pretended to any thing on the eastern part of that passage or bank, called Fox's-lane; but he pretended to twenty foot on the western part of it, as an incroachment.

They say further too, that notwithstanding all this, John Stepkins was not so confident of his title to even those twenty-foot on the west part; but that he comes and makes a bargain with another man: I will let you this east part of the marsh-land, and if I recover any of the wall, you shall pay such a rent for it; but if not, you shall hold it as you did before. So jealous he was of his title, even to that which he thought was incroached upon.

And they fix it thus, to humour and explain the particulars mentioned of orchards, ponds, gardens, &c. for here were a great many sluices and cuts for the water to be received in, and so all may well be comprehended under the name of a mill with the appurtenances; and that they say goeth a great way in the question. You are to consider of it, gentlemen.

Then they further shew, that whereas the

other side surmise the boundary to be Shadwell, which they would have to be placed a great way higher, by the place called Cock hill; here comes an old man that tells you, he knew the place sixty years ago and above, and there was no other well called Shadwell, but that which was where the church now stands, and that is on the west part of Fox's-lane. Now I must tell you, upon the evidence it is pretty strong, because he gives such an account of it that it was bricked over, and a common well to all people, which must make the thing very notorious; and he never heard of any other well called Shadwell. It is true, there might be a spring on the one side of this ground in question, and the other; you have heard the evidence on both sides, I must leave it at large to you.

Then to make the thing more plain, they offer to you that this was a tide-mill, and not as the defendant pretends, an overshot-mill; and that is notoriously plain it is so, and it is against sense it should be otherwise. Here was one that wrought at the mill, and his father before him, sixty years; nay, it appears that to have water to drive an overshot-mill in that place must drown the whole level, because it must be raised so much higher than the wheel; and if so, that stands higher than the place, were it raised never so high, of late called Fox's-lane. But there were tides that came within twenty foot of it; and you must give me leave to tell you, I understand so much of it, that a tide-mill is never suffered to have the water just swim up and back again; but they have cuts to retain the water a while, that it may go the easier off. And so the great number and length of the cuts and ponds, and ditches here, were but only receptacles and basons to receive the tide, which did not rise (as they tell you it should not) above half the wheel. The nature of the thing itself speaks against what they would have it to be; and to strengthen the argument, they have called five or six, or more witnesses, that have known it all along so to be: and yet this I apprehend, the other side take to be their most material point to make it marsh-ground.

But the counsel for the plaintiff say this further to you: They have a survey taken in Oliver's time, which they produced, but were opposed by the counsel of the other side; and I must confess I did wonder to hear the objection, that it was strange this should be surveyed as Dean and Chapter's lands, in a time when there were no Deans and Chapters; whereas it was surveyed as that which was so, while there were such things as Deans and Chapters, and it was in order to be sold as such. And upon my word, if the lands of the Dean and Chapter's inheritance were no bigger than the defendant would have them, there was a good round sum paid to the state for the mill only. But alas! you have a witness that tells you (there being in the survey mention of one Craven,) that there was a Craven on the east

part of the ground, that had a large orchard and garden, and ground. And upon this purchase made by Winterburn, who was lessee of the church, the plaintiff's counsel do raise a very considerable argument, that this was the church's inheritance: For say they, why should Winterburn, that had a lease in being which would have continued him to be sure in possession, and that too before all these houses were built, (for they talk all the fine houses were built since the king came in) give 9,500*l.* for the inheritance under the title of the Dean and Chapter, if he knew (as he must if he had the long lease in his possession, and so Knowles swears he had) it was not theirs; and he himself had a lease for thirty years to come, under a trivial rent of a pepper-corn. Especially considering that those times sold lumping penny-worths of other people's lands.

But then they come to the last point of evidence, and that you must very narrowly observe and weigh. Say they, because you depend so much upon Carter's lease, which takes notice of such and such boundaries; and also that of Roper, which you pretend to be made at such a time, these, we say, are forged. And for it they give this evidence.

The first part is a natural, legal evidence, and a proper evidence in things of this nature, to detect a forgery; an evidence that we learn out of our books of law, and it is an argumentative one. If you produce deeds made in such a time, when, say you, such titles were used, and such prefaces made to them in their preambles, when indeed there were no such titles used at that time, that sheweth your deeds are counterfeit and forged, and not true deeds. And there is *Digitus Dei*, the finger of God in it; that though the design be laid deep, and the contrivance sculk, yet truth and justice will appear one time or another; and though they may put some gull upon justice for a while, yet it will in time be discovered, to the confusion and shame of the undertakers. Say they, you have taken wonderful care to have both deeds carry the same flourish at the top of each of them, you call Philip and Mary king and queen of Spain, and both Sicilies; and you put Burgundy in the ducal stile, before Millan: this is the language of both deeds, but that sheweth them not to be true deeds, that carrieth forgery in the very face of it; for Philip and Mary never came to write themselves king and queen of Spain and Sicily, till Trinity term, in the second and third years of their reigns; whereas your deeds bear date in November before. Till Trinity term Naples was a kingdom, and they were but princes of Spain and Sicily. And besides, they used always before that time, to put Millan among the dukedoms first before Burgundy.

For instances and proofs of this objection, they shew you the titles of the acts of parliament in that year, in October, November, and December; they shew you the fines levied in Hillary-term, and Easter-term, and Trinity-term; till which term the records of the king-

dom, of fines and recoveries, bore all the old stile; and so do the conveyances enrolled and not enrolled of that time. And with great bravery they challenge the defendant's counsel to shew any one conveyance or record (except those of your own making) that is otherwise. And as a further evidence they say, we have some leases entered in our books, and so not calculated for this purpose, which have no other than the old stile of the king and queen.

And in truth this is a material evidence to prove these to be forged deeds: and it is made the more material by this circumstance, which Mr. Attorney was pleased to mention; and that is, the notice they had from Mr. Neale's bragging of this very objection to their deeds, and yet they should not come prepared to give it an answer. And I must deal plainly with you, that very one thing makes it an objection of very great weight and moment.

But still, say they, besides all this evidence we shall go a step further, and evince the likelihood that these deeds should be forged; for your client, the defendant, is apt to forge deeds. And to prove that, we produce this evidence.

First of all, sir Charles Cotterel gives you an account of a long story which doth not only reach the defendant, my lady Ivy, but it looks very bad upon my friend Sutton too; who, if sir Charles Cotterel swears true, is a very knave. Now sir Charles Cotterel, though he does not swear he saw her forge the mortgage she pretended to from sir William Salkhill, yet he gives a shrewd evidence to make it untowardly suspicious. For he tells you, upon sir William's death, my lady Ivy was so far from pretending to any debt from sir William, that upon accounts stated between my lady and her, she was indebted to sir William 96*l.* which upon her parting from her husband, and being under great want, sir William had lent her, besides his relieving her otherwise: and, says sir Charles Cotterel, I was present when she took 4*l.* more of my lady Salkhill's money, and then acknowledged herself to owe my lady 100*l.* After this, my lady Ivy, without the seeking or intreaty of sir Charles Cotterel, comes to him, and says she, does not my lady Salkhill owe you money? yes, said he, she does, fourscore pounds; but I live in her house, and can soon eat it out in rent. But, says my lady Ivy, she has a mind you should have the house made as a security to you. Good now, how comes my lady Ivy to be so concerned for sir Charles Cotterel's security, when he was not concerned for himself? Nay, and why should she be so earnest to have him have a security upon that house, which, if it were true, was mortgaged before to herself. If her mortgage were a true one, this practice carrieth no great face of honesty or virtue in it, I must needs say; I must crave leave to make that observation by the way. Ay, but into the bargain, when sir Charles Cotterel yielded to her importunities, Mr. Sutton is the man that must be intrusted to draw the writing, and to that purpose must see my lord of Salisbury's lease, who is the

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head landlord. What needed that? I suppose it was recited in my lady Ivy's mortgage before: but he must take notes out of it, forsooth, to make over the lease and house as a security to sir Charles Cotterel for 80*l.* and when it is brought as such, knowing no otherwise, sir Charles Cotterel takes it; and they two, my lady Ivy and Sutton, are witnesses to it. What it proved afterwards you hear, an absolute deed of sale; and yet all this while my lady Ivy (who, as sir Charles Cotterel understood it, was indebted 100*l.* to sir William Salkhill) has a debt of 1500*l.* owing from sir William, by mortgage to her on the same house.

Sir C. Cotterel. My lord, I am ready to make it all good.

L. C. J. First of all, I say, it was not well done, if there were such a security for 1500*l.* to persuade sir Charles to accept the house as a security for his fourscore pounds, without telling him of the prior mortgage. Then it is strange, she should acknowledge herself indebted 100*l.* upon her taking the four pounds from my lady Salkhill, if she had so great a sum owing her. And what a slovenly answer is that given by the counsel for my lady Ivy, that she and others were called upon for nine years diet? whereas sir Charles Cotterel swears, she owned herself upon the account indebted 100*l.* and there was no bartering for diet; but that she had gratis for three quarters of a year after sir William's death, as she had it several times before.

And now, while it is in my memory, I would remind you of one thing more before we come to the other witnesses, there is a thing that to me cramps this business very home upon my lady Ivy: how comes it to pass that my lady Ivy should be so wonderful kind to my lady Salkhill's daughter, as to part with 1500*l.* so secured, to have the house settled upon her, without any consideration in the world that I can hear of? That is such a melting piece of kindness, that they would do well to find out some sham to authorize it. It seems upon sir Charles Cotterel's desire to see this pretended mortgage, and its being brought him by my brother West, who is now dead, she was wonderful careful that he should not see the witnesses to it, it was so precious and tender a thing: but alas! it is all melted down and gone of a sudden, without any consideration at all whatsoever; and she can readily join with sir Charles Cotterel to settle this upon Mrs. Duffett, the lady Salkhill's daughter, and enter into bond not to disturb the enjoyment.

Then there comes another evidence, and that is the gentlewoman Mrs. Duffett, who it seems they would have to be a loose sort of creature; but methinks she has a good round oath upon her tongue: for she does directly swear that she was present, and saw Mr. Duffett her husband forge that very mortgage sir Charles Cotterel speaks of; that my lady Ivy directed it, and gave her order to put saffron in the ink to make it look old; that she saw him writing in a parchment, which he told her

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was Glover's lease and other things, and all for my lady Ivy. Nay, she tells you my lady Ivy was so extraordinary an artist at the managing of such an affair, that this master workman, Duffett, was not so dextrous at it as she; for he could not write the first great letters of the names that were to be put to the forged deeds, but she did that herself, and the rest he did. How far she is to be believed, I must leave to you; you hear what is objected against her about the frog in her belly:* and I do not know what; whether that will take off the credibility of her testimony, I leave to you. She doth give a very free and large account how they used to order their matters to make the ink look old, (as I said) they put saffron in it; then they rubbed the outides of the deeds in dirty windows, and after that used to lay them in a balcony for the rain to come upon them in the nights, and to dry them in the sun, or by the fire, to shrivel them up. And this she says was their method, and process they used. All which the plaintiff's counsel urge, to shew the probability that these deeds of theirs are forged.

Then they tell you, which is yet somewhat more to strengthen her evidence, there is a woman, that though she speaks out of Mr. Duffett's mouth, and that can be no evidence against my lady Ivy, yet says, she received from him a parcel of letters, which are sworn by sir Charles Cotterel to be all of my lady Ivy's own hand-writing; which letters have been read to you: and they shew a great familiarity between my lady Ivy and Mr. Duffett, a great care and concern for the promotion of this Duffett, the gentlewoman's husband; and of some deeds that were likely to be thought new and suspected. And she tells him at the latter end of one, that she is solicitous till the trouble be over: but she was resolved to set on foot sir William Salkhill's mortgage, and if that thing did go well, he should have half.

That supports the credibility of the woman's testimony: but besides that there is another thing that looks very untoward, because Mrs. Duffett doth directly swear, that out of the 1000*l*. paid my lady Ivy by sir Charles Cotterel, 300*l*. was paid and given to her husband, and Mr. Sutton forsooth had 200*l*. more: for what service, I wonder, must my lady Ivy be so liberal to Mr. Sutton and Mr. Duffett? Mr. Sutton shuffle and rouse himself as he pleaseth, it will stick upon him; and I must confess it looks untowardly, his getting my lord of Salisbury's lease to pick notes out of it, and then to have such a mortgage trumped up in this manner. It is very rank, I assure you.

* Concerning the operation which the fact that a female witness had passed a life of incontinency shall have upon her credibility, much was said in the House of Commons upon occasion of the Inquiry into the Conduct of the Duke of York, A. D. 1809. See 12 Cobb. Parl. Debates 129 et seq.

This is a substance of the evidence that has been offered by the plaintiff, to prove and induce you to believe these deeds forged.

Now, in answer to this, they on the other side would offer, that sir Charles Cotterel's evidence is a surprize upon them. They say they have such a writing, and such and such deeds, Glover's lease, and Salkhill's mortgage; but they are not prepared to give such an answer as they would have done, had they had notice. Here has been likewise great struggling and striving to have the verdict read to overthrow Mrs. Duffett's testimony; but that cannot be allowed to be given in evidence between these parties. Then they would have read her husband's oath, he being dead; but that is no point of evidence at all neither; for in case the man were alive, it would not be evidence what he should have heard his own wife say. If both of them indeed had been heard together, and testified against my lady Ivy, it had been good evidence; or they both might have testified for her. But by the law the husband cannot be a witness against his wife, nor a wife against her husband, to charge them with any thing criminal, except only in cases of high-treason. This is so known a common rule, that I thought it could never have borne any question or debate.

This is the substance of the evidence on both sides, as near as I can recollect it; save only that which indeed I should have mentioned before, the defendant had produced an exemplification of a verdict obtained the last Michaelmas term. To which they for the plaintiff answer, we were not then prepared to answer your deeds, which were very new, surprizing and unexpected to us: we have now given new evidence that we never gave then, and it was a verdict obtained by surprize: we now show our boundaries better than we could then; and so that they make to be the result of the whole matter.

Now upon the main, after this very long evidence, though the case has been darkened as much as ever any case could be endeavoured to be; and though the event of it be a matter of considerable value, yet the matter of fact is as clear as the sun at noon day; and a plain point of fact it is, and must depend upon. If we do admit all their deeds to be good deeds, without any consideration of the forgery, pro or con, yet if the mill-ponds, ditches, orchards, gardens, &c. can be taken to be seven acres; then the boundaries upon the mill or hilly-bank, which may well be Fox's-lane, that will answer both the deeds of the plaintiff and of the defendant, and though never so many houses be built upon it, it will signify nothing in the case. And that it is so, whereas the defendant's surveyor swears, that 130 acres will not be made up without the lands in question; the plaintiff has brought two surveyors, that swear there is full 130 acres, and more, without them. So you have two surveyors on the one side, and one on the other; and you yourselves have viewed it.

After this long evidence, gentlemen, you have had as good an account of the substance of it, as I can by my notes and memory recollect. If any of the gentlemen that are of the counsel for the plaintiff or for the defendant, do think I have omitted any thing that is material, on either side, they have free liberty to remind the court of it. You are the judges of this fact, whether this land do of right belong to the plaintiff or to the defendant: And I leave it to your consideration.

After which, the jury withdrew to consider of their verdict, and the court arose. That evening the jury gave in a private verdict before a judge: and appearing the next morning at the bar, were called over, and demanded if they did abide by the verdict they had given the night before; to which they answered, Yes: which being declared by the secondary to be "for the plaintiff," the jury were discharged.

Then a motion was made by the plaintiff's counsel, that several deeds produced by the defendant, that were detected of forgery, might be left in court, in order to have them pursued, and convicted of the forgery. The court, upon debate of the matter, and the plaintiff's counsel declaring they would prosecute an information of forgery, the deeds of the 13th of November, and the 22d of December, 2 and 3 Philip and Mary, were ordered to be left with the clerk of the crown till further order, and in the mean time the plaintiff to have copies of them from the Clerk; and by a rule of court a trial at bar is ordered in Michaelmas term.

In Trinity-term there was an information against lady Ivy, for forging and publishing the said two indentures, as follows:

REX versus IVY.

INFORMATION against the lady IVY, for forging and publishing two Indentures, Trin. 36 Car. Secund. Rot. 48.

a. Quod Theodosia Bryan, de, &c. alias dict' Theodosia Ivy, de, &c. vid. die anno, &c. Vi et Armis, &c. apud Westm. in Com. Midd' ex uno propr. capite et imaginatione subtilit' falso et fraudulent' fabricavit et fecit et fieri et fabricari causavit quoddam falsum factum continen'

materiam sequen' videlicet, ' This Indenture ' made the 13th day of November, in the 2d ' and 3d year of the reign of our lord and lady, ' Philip and Mary, by the grace of God, king ' and queen of England, Spain, France and ' Ireland; defenders of the faith, arch-dukes ' of Austria, dukes of Burgundy, Milan, and ' Brabant; counts of Hainburg, Flanders and ' Tynol: Between Marcellus Hall of Radcliff, ' miller, on the one part, and Richard Roper, ' citizen and alder of London, of the other part, ' witnesseth, &c. prout per pred' falsum et ' contrafact' factum plenius liquet et apparet ' Quod; pred' Theodosia Bryan alias dict' ' Domina T. Ivy postea, scilicet die, anno, &c. ' apud, &c. scient' subtilit' et falso pred' falsum ' et fabricatum factum publicavit et publicari ' causavit ut verum factum pred' Marcelli Hall ' sigillat' et deliberat' p. prefat' M. H. ubi severa ' eadem T. B. alias dict' Domina T. I. adtunc ' et ibidem bene scivit et intellexit dictum factum ' fore falsum contrafact' et fabricat' Anglice ' forged, et non fuisse factum pred' M. H. nec ' ipsum sigillat' et deliberat' Et ulterius pred' ' Coron' et Attern' dicti Dean' Regis pro eodem ' Domino Rege dat' Cur' hic intelligi et infor- ' mari quod eadem T. B. alias, &c. die et anno ' suprad' &c. vi et armis, &c. apud, &c. ex uno ' proprio capite et imaginatione scient' subtilit' ' falso et fraudulent' fabricavit et fecit et fieri et ' fabricari causavit quoddam al' falsum factum ' continen' materiam sequen' videlicet, ' This In- ' denture, made, &c. prout per pred' ult' men- ' tionat' falsum et contrafactum factum plenius ' liquet et apparet et pred' T. B. alias, &c. postea ' scilicet die anno suprad', &c. apud, &c. scient' ' subtilit' et falso pred' falsum et fabri- ' catum factum ult' mentionat' publicavit et pub- ' licari causavit ut verum factum pred' M. H. ' sigillat' et deliberat' per prefat' M. H. ubi se- ' vera eadem T. B. alias, &c. adtunc et ibid. ' bene scivit et intellexit dictum al' mentionat' ' factum fore falsum contrafact' et fabricat' An- ' glice forged, et non fuisse factum pred' M. H. ' nec per ipsum sigillat' aut deliberat' Ad gravem ' dampn' ejusdem G. B. in contempt' dicti De- ' rrami Regis nunc Legum; suar' in malum et ' pernitiosum exemplum omni' al' in tali casu de- ' linquen' ac contra pacem dicti Domini Regis ' nunc Ccesar' et Dignitat' suar', &c.

314. The Trial of ROBERT BAILLIE,* of Jerviswood, in Scotland, for High Treason: 36 CHARLES II. A. D. 1684.

CURIA JUSTICIARIE, S. D. N. Regis tenta in prætorio Burgi de Edinburgh vicesimo tertio die mensis Decembris, 1684, per Nobilem et Potentem Comitem Georgium Comitem de Linlithgow, Dominum Livingstoun, &c. Justiciarium generalem totius Regni Scotiæ, et honorabiles viros Dominos Jacobum Foulis de Colintoun Justiciariæ Clericum, Joannem Lockhart de Castlehill, Davidem Balfour de Forret, Rogerum Hoge de Harcarus, Alexandrum Seaton de Pitmedden, et Patricium Lyon de Carss, Commissionarios Justiciariæ dicti S. D. N. Regis. Curia legitime affirmata.

Intrat

Mr. Robert Baillie of Jerviswood, Prisoner,

INDITED and accused, That where notwithstanding by the common law of this, and all other well-governed nations, the conspiring to overturn the government of the monarchy,

* "Upon what was thus screwed out of these two persons, the earl of Tarras, who had married the duchess of Monmouth's elder sister, and six or seven gentlemen of quality, were clapt up. The ministers of state were still more earnestly set on Baillie's destruction; though he was now in so languishing a state, occasioned chiefly by the bad usage he met with in prison, that if his death would have satisfied the malice of the court, that seemed to be very near. But they knew how acceptable a sacrifice his dying in a more violent way would prove. So they continued even in that extremity to use him barbarously. They were also trying what could be drawn from those gentlemen against him. Tarras had married his niece, who was his second wife. So they concluded that their confidence was entire. Baillie's illness increased daily: and his wife prayed for leave to attend on him: and, if they feared an escape, she was willing to be put in irons: but that was denied. Nor would they suffer his daughter, a child of twelve years old, to attend him, even when he was so low, that it was not probable he could live many weeks, his legs being much swelled. But upon these examinations a new method in proceeding against him was taken. An accusation was sent him, not in the form of an indictment, nor grounded on any law, but on a letter of the king's, in which he charged him not only for a conspiracy to raise rebellion, but for being engaged in the Rye-plot; of all which he was now required to purge himself by oath, otherwise the council would hold him guilty of it, and proceed accordingly. He was not, as they said, now in a criminal court upon his life, but before the council, who did

or of the established government of this kingdom, or the concealing, and not revealing of any reasonable design, project, or discourse tending thereto; or the assisting, aiding, or abetting such as have any such designs, does infer the pains and punishment of treason. And by the third act of the first parliament of king James 1. The rebelling openly against the king's person; and by the threety-seventh act of his second parliament, The resetting, maintaining, or doing favours to open or notour rebellers against the king's majesty is declared treason, and punishable by forfeiture. And by the hundred fourty and fourth act of the twelfth parliament of king James 6. It is declared treason to reset, supply, or intercommune with traitors. And by the first act of the first session of his majesty's first parliament, It is declared, That it shall be high-treason for the subjects of this realm, or any number of them, less or more, upon any ground or pretext whatsoever, to rise, or continue in arms, to make peace or war,

only fine and imprison. It was to no purpose for him to say, that by no law, unless it was in a court of inquisition, a man could be required to swear against himself, the temptation to perjury being so strong when self-preservation was in the case, that it seemed against all law and religion to lay such a snare in a man's way. But to answer all this, it was pretended he was not now on his life, and that whatsoever he confessed was not to be made use of against his life; as if the ruin of his family, which consisted of nine children, and perpetual imprisonment, were not more terrible, especially to one so near his end as he was, than death itself. But he had to do with inexorable men: so he was required to take this oath within two days. And by that time, he not being able to appear before the council, a committee of council was sent to tender him the oath, and to take his examination. He told them, he was not able to speak by reason of the low state of his health, which appeared very evidently to them: for he had almost died while they were with him. He in general protested his innocence, and his abhorrence of all designs against the king, or the duke's life: for the other interrogatories, he desired they might be left with him, and he would consider them. They persisted to require him to take his oath: but he as firmly refused it. So, upon their report, the council construed this refusal to be a confession: and fined him 6,000*l.* and ordered him to lie still in prison till it was paid. After this it was thought that this matter was at an end, and that this was a final sentence: but he was still kept shut up, and denied all attendance or assistance. He seemed all the while so composed, and even so

without his majesty's special approbation. And by the second act of the second session of his majesty's said first parliament, to plot, contrive, or intend death, or destruction, or to put any restraint upon his majesty's royal person, or to deprive, depose, or suspend him from

cheerful, that his behaviour looked like the reviving of the spirit of the noblest of the old Greeks or Romans, or rather of the primitive Christians, and first martyrs in those best days of the church. But the duke was not satisfied with all this. So the ministry applied their arts to Tarras, and the other prisoners, threatening them with all the extremities of misery, if they would not witness treasonable matter against Baillie. They also practised on their wives, and frightening them set them on their husbands. In conclusion, they gained what had been so much laboured: Tarras, and one Murray of Philipshaugh, did depose some discourses that Baillie had with them before he went up to London, disposing them to a rebellion. In these they swelled up the matter beyond the truth. Yet all did not amount to a full proof. So the ministers, being afraid that a jury might not be so easy as they expected, ordered Carstairs's confession to be read in court, not as an evidence, (for that had been promised him should not be done,) but as that which would fully satisfy the jury, and dispose them to believe the witnesses. So Baillie was hurried on to a trial. And upon the evidence he was found guilty, and condemned to be executed that same day: so afraid they were lest death should be too quick for them. He was very little disturbed at all this: his languishing in so solitary a manner made death a very acceptable deliverance to him. He in his last speech shewed, that in several particulars the witnesses had wronged him: he still denied all knowledge of any design against the king's life, or the duke's; and denied any plot against the government: he thought it was lawful for subjects, being under such pressures, to try how they might be relieved from them: and their design never went further: but he would enter into no particulars. Thus a learned, and a worthy gentleman, after twenty months hard usage, was brought to such a death, in a way so full in all the steps of it of the spirit and practice of the courts of inquisition, that one is tempted to think that the methods taken in it were suggested by one well studied, if not practised in them. The only excuse that was ever pretended for this infamous prosecution was, that they were sure he was guilty; and that the whole secret of the negotiation between the two kingdoms was trusted to him; and that, since he would not discover it, all methods might be taken to destroy him: not considering what a precedent they made on this occasion, by which, if men were once possessed of an ill opinion of a man, they were to spare neither artifice nor violence, but to hunt him down by any means. I have been perhaps too

the exercise of his royal government, or to levy war, or take up arms against his majesty, or any commissioned by him, or to entice any strangers or others to invade any of his majesty's dominions, or to write, print, or speak any thing that may express or declare such

long in this particular, but the case was so singular, and my relation to the person was so near, and my value for him was so great, that I hope I need make no apology for it." 1 Burnet, 585.

About eight years before this trial, Baillie of Jerviswood had incurred the displeasure and experienced the severity of the Council of Scotland. Wodrow, (vol. 1, p. 421,) gives the following account of what occurred upon that occasion:

"About the middle of June this year, there fell in an attempt upon the reverend Mr. James Kirkton, before the restoration minister at Martin, and since the revolution a most useful minister for a good many years in the city of Edinburgh, well known to this church. This affair kindled a great flame, and was the occasion of some very considerable changes. I shall give an account of the matter of fact, from a narrative left of it by himself, who could only give the account of some circumstances relative to it, and whose veracity I know will be depended upon; and then I shall subjoin what I meet with anent it in the council-records: and my account of this is the larger, because this incident hath been very falsely represented to the public in print.

"Mr. Kirkton, about the time mentioned, one day walking in the street of Edinburgh about noon, was accosted very civilly by a young gentleman, (we shall afterward find him to be captain Carstairs) and another gentleman, and a lackey: he knew none of them, but came afterwards to know both to his cost. Carstairs desired to speak a word with Mr. Kirkton; to which he answered, He would wait on him, suspecting no evil. When walking off towards the side of the street, he asked at the other (James Scot of Tushilaw) who this young gentleman was; for he was perfectly a stranger to him: Scot answered him with silence and staring; and then Mr. Kirkton found he was trepaned, and a prisoner. However, he was glad when they carried him to a private house, and not to the prison, which was near by.

"The place they brought him unto, was Carstairs's own chamber, an ugly dark hole, in one Robert Alexander a messenger his house. As soon as Carstairs got him into his chamber, he sent off Scot and his footman, probably to bring some more of their companions. When they were gone, Mr. Kirkton asked what he meant to do with him. Carstairs answered, Sir, you owe me money. Mr. Kirkton asked him, whom he took him to be, and told him, He owed him nothing. The other replied, Are you not John Wardlaw? Mr. Kirkton said he was not, and ingenu-

their reasonable intentions, is declared treason and punishable as such. Likens, by the second act of his majesty's third parliament, It is declared high-treason in any of the subjects of this realm, by writing, speaking, or any other

ously told him who he was. Then Carstairs said, If you be Mr. Kirktoon, I have nothing to say to you. Then Mr. Kirktoon asked him who he was. He returned, He was Scot of Erskiltoun, whom indeed he did pretty much resemble; yet Mr. Kirktoon knew not what to make of him, he spoke things so inconsistent.

"After they had been about half an hour together, Mr. Kirktoon began to imagine Carstairs wanted money, and was just beginning to make some insinuations that way, when that excellent gentleman, whom we shall meet with afterwards, Mr. Robert Baillie of Jerviswood, a near relation of Kirktoon's, Andrew Stevenson, and Patrick Johnstoun, merchants in Edinburgh, having got some information of Mr. Kirktoon's circumstances, and, with some difficulty having fallen upon the house, came to the door, and called to Carstairs to open, asking what he had to do with a man in a dark dungeon, all alone. Mr. Kirktoon knowing the voice of his friends, took heart, and got up, saying, There be honest gentlemen at your door, who will testify what I am, and that I am not John Wardlaw: open the door to them. That, says Carstairs, I will not, drawing his pocket-pistol; which Mr. Kirktoon perceiving, thought it high time to act for his own safety, and grasped Carstairs close in his arms; so mastering both his hands and the pistol, they struggled a while on the floor. The gentlemen without, hearing the noise, one crying out murder, burst open the door, and parted them without the least violence to Carstairs, and as they and Mr. Kirktoon were going out, they met Scot and his companion returning.

"Thus Mr. Kirktoon escaped; but the others inclined not to quit their game so, but resolved to turn their private violence to state-service, and so go straight to Haltoun, and tell their own story, who presently calls the council, almost in time of dinner, as if all Edinburgh had been in arms to resist lawful authority. When the council got together, Haltoun tells the story, as the villains had represented it to him. That some of their public officers had caught a Phantic minister, and that he was rescued by a numerous tumult of the people of Edinburgh. The council made a diligent enquiry into the matter, and could find nothing in it to fix upon. Mr. Kirktoon had taken care to inform his friends that it was a real robbery they designed, and a little money would have delivered him, if he and Carstairs had got leave to finish their communing.

"Jerviswood was brought before them, and gave them a very candid account, as above; and when the council had gone their utmost, they could find no more in it; and many of them were of opinion it were best to drop it. This bishop Sharp violently opposed, and al-

manner of way, to endeavour the alteration, suspension, or diversion of the right of succession, or debarring the next lawful successor. Nevertheless, it is of verity, that the said Mr. Robert Baillie of Jerviswood, shaking off all

ledged, if Carstairs were not supported and encouraged, and Jerviswood made an example, it was not to be expected any would ever persecute Phanatics; and insisted with such vehemence, that he got over the most part of the counsellors in a prosecution, and the advocate is ordered to form a libel against Jerviswood.

"Next council-day, June 23d, The lords having considered the libel given in by his majesty's advocate against Mr. Robert Baillie of Jerviswood, for his rescuing of Mr. James Kirktoon, and deforcing captain Carstairs, who had orders to apprehend Mr. Kirktoon, find the libel relevant, and proven, by the warrant produced by the captain, and that Jerviswood is guilty of an insolent riot and deforcement, and fine him in 500*l.* sterling, and appoint him to lie in prison till he pay it. That day, I am told, the council were in a terrible rage, so that when several of the inhabitants of Edinburgh had got in to see what the council would do in so odious a case; the question was stated, whether all the people in the lobby should be imprisoned or not? they escaped confinement but by one vote.

"The council remit to the committee of public affairs, the examination of Andrew Stevenson, and Patrick Johnstoun, who are delated, as being art and part with Jerviswood in the deforcement: and in July they are fined, Mr. Stevenson in 1000*l.* Scots, and Mr. Johnstoun in 1000 marks; and they were to continue in prison till payment.

"This prosecution was mightily cried out upon. The reason given by the managers for this severity was, that Jerviswood and the others were guilty of resistance to lawful authority, because captain Carstairs was a commissioned officer, and had produced his commission for apprehending outed ministers; and suspect persons, at the council-board: but this reason could not satisfy impartial observers, who knew how matters stood. It was indeed true, that Carstairs, some time before this, had a warrant to this purpose, granted him by the archbishop of St. Andrews; but it was well known, that, I do not know from what cause, he burnt this warrant a month before this, in the earl of Kincardin's house, before several, and produced no warrant to Jerviswood and the rest, when they rescued Mr. Kirktoon, neither once so much as pretended any such thing.

"And his production of a warrant before the council was afterwards found to be a trick and contrivance of the primate, which will be the more easily credited, when the reader comes to the case of Mr. James Mitchel,* and to observe his carriage in that matter. The thing

* See Mitchel's Case in this Collection, vol. 6, p. 1207.

fear of God, respect and regard to his majesty's authority and laws, and having conceived most unjustly, a great and extraordinary malice and hatred against his majesty's person and government, and having designed most traiterously to debar his royal highness, his majesty's only

stood thus: After the alledged riot was committed, and the first meeting of the council over, the archbishop found it convenient Carstairs should have a warrant to produce, and accordingly one was provided, and the date was taken care of, so as to answer the time of the facts being committed. It was this Carstairs produced in face of council, so that really they went upon a base forgery.

"Further, it was reckoned a very odd step by onlookers, that a libel should be found sufficiently proven by the single testimony of an infamous accuser, here likewise a party, against the declaration of three unquestionably creditable witnesses, and the examination of all the witnesses who were called in this process: But Sharp and Haltoun must have their will, and so the sentence past, though reasons strong and many were offered against this illegal procedure, by several members.

"Notwithstanding of all these, the sentence as above was carried, and this worthy and pious gentleman Jerviswood continued about four months in close prison. I find him, August 3d, by order of council sent from Edinburgh to Skirling Castle, under a guard. He paid three thousand merks of his fine to Carstairs, as a reward of his zeal against presbyterians, and because he was an active agent to the archbishop in his persecution. It was with no small difficulty this gentleman was at length liberate, and passed as to the rest of his fine, and not till the court, upon better information, had discovered some dislike at this unrighteous procedure. Some years afterward Jerviswood will come in again in this history, when he met yet with harsher treatment. Within two months Mr. Stevenson and Mr. Johnston got out of prison, but not till Haltoun was presented with a piece of good wine, and a parcel of curious lace, and then justice was permitted to be done them.

"In the mean time Mr. Kirktoun thought proper to try what he could do at court, and since the dutchess of Lauderdale had not long ago professed very great kindness to him, he presumed to write to her grace, and sent up a true information of the affair, complaining heavily of the wrong done him and his friends. The information was indeed shown to the duke, who seemed mightily surpris'd at it, and owned he never met with two informations more different than his brother's and Mr. Kirktoun's. Within a little, by whom I shall not say, Mr. Kirktoun's letter and information were sent down to the council, to see what they could make of them for a new accusation. When Haltoun saw them, he foamed and raged, but it was not in his power to reach Mr. Kirktoun at this time; only Mr. Kirktoun, as we have

brother, from his due right of succession, did, amongst many other traiterous acts, tending to promote that wicked design, endeavour to get himself elected one of the commissioners for negotiating the settlement of a colony of this nation in Carolina, in one or other of the days

heard, is put in the front of the letters of Intercommuning in August this year.

"This spark raised a great flame, and was followed with very considerable consequences. After the council had come to an issue, Haltoun dispatched an account of this affair to his brother the duke of Lauderdale, and misrepresented all who had spoken any way favourably of Jerviswood, as if they had agreed to subvert lawful authority, and were in a combination against the king, and for the phanatics. A new nomination of council came down from court, as we have heard, and all who would not bow to Haltoun and the primate were left out, such as duke Hamilton, who had spoken much and freely against the act of fining Jerviswood and the others, the lord Privy Seal, the earl of Kincardin formerly Lauderdale's great friend, the earl of Dundonald, and some others."

It was the second imprisonment of Baillie, of Jerviswood, which induced sir Patrick Hume (created earl of Marchmont by king William) first to conceal himself at Polwarth, and afterwards to escape to the Continent. Mr. Rose, in the Appendix to his "Observations on Mr. Fox's Historical Work," has published a most interesting narrative (composed by lady Murray, who was grand-daughter of sir Patrick and of his friend Baillie), in which are related many particulars of her grandfather's concealment and escape, and of the privations which he and his family underwent during their absence from their country. Lady Murray represents, that from London he went to France, and travelled from Bourdeaux to Holland on foot. Sir Patrick, in his own Narrative (published in the same volume) says, that so soon as he got upon the Continent he staid but short in France, spent some weeks in Flanders and Brabant, and so went on to Holland. Mr. Rose himself (Observations, &c. p. 209) relates, that sir Patrick escaped to Ireland, from whence he retired first to Geneva and then to Holland. In reporting the second escape of sir Patrick from Scotland (which took place after the discomfiture of the expedition commanded by Argyle) Mr. Rose says, that he escaped to the coast of France, and travelled through the whole of that country in the character of a physician to Bourdeaux, compelled by the inopportunities of the people as he passed to practise, from their confidence in the skill of a British physician, which he was obliged to continue to do at Bourdeaux till he could get a passage from thence to Holland a second time. Lady Murray mentions his passing for a surgeon during the course of his first escape. In fact, her Narrative notices not the expedi-

of the moneths of January, February, March, April, or May, one thousand six hundred, and eighty three years; and that he might thereby have the freer and better access to treat with the earls of Shaftesbury and Essex, the lord Russel and others, who had entered into a con-

tion under Argyle or its consequences. It appears, that the incidents attending the former of sir Patrick's escapes, are occasionally confounded with those which attended the other.

See more concerning Baillie of Jerviswood in 4 Laing's Hist. of Scotland, 72, 133, 137, et seq.

The entries in Fountainhall's Decisions concerning this Case are as follows:

"July 26. et dieb. seq. 1684. Mr. William Spence, late servant to the earl of Argyle, by order of the Privy Council, is tortured and put in the boots, to force him to reveal what he knows of the earl's, and other persons, accession to the late English fanatic plot, and the association and design of rising; and in regard he refused to depone upon oath, if he had the key whereby he could read some letters of the earl's, produced by major Holmes, written in cyphers; and seeing he would not say upon oath that he could not read them, and that they offered to secure him by a pardop for his life, it rendered him very obnoxious and suspect of prevarication; so that after the torture, he was put in general Dalziell's hands; and it was reported that by a hair-shirt and pricking, (as the witches are used,) he was five nights kept from sleep, till he was turned half distracted. He eatd very little, of purpose, that he might require the less sleep; yet all this while he discovered nothing, and though he had done it, yet little credit was to be given to what he should say at such a time.

"August 7. At Privy Council, Spence is again tortured, and his thumbs crushed with thumbikins: It is a new invention used among the colliers when transgressors; and discovered by general Dalziell and Drummond, they having seen them used in Muscovy. After this, when they were about to put him again in the boots, he being frightened, desired time, and he would declare what he knew; whereon they gave him some time, and sequestered him in the castle of Edinburgh, as a place where he would be free from any bad advice or impression; to be obstinate in not revealing.

"August 22, Mr. William Spence, mentioned 7th current, to avoid any farther torture, reads these hieroglyphic letters; and agrees with Mr. Holmes's declaration, that Argyle, Loudon Campbell, the late president Stair, sir John Cochran and others, had formed a design to raise an army in Scotland, and to land at such convenient places as they hoped the people would join with them, and hoped, if they once gave the king's forces a foil, they would get many to flock into them; and had advanced money to this purpose; and

spiry in England against his majesty's person and government, and with colonel Humsey, _____ Walcot, _____ West, and Ferguson, and others, who had likewise conspired the murder of his majesty's sacred person, and of the person of his royal highness; and finding

that there were three keys, whereof he had one, and Mr. Carstairs another (which caused him to be tortured,) and Holmes a third; and they expected help from England; and also he approved of Gray of Crigie's reading them. On this, Campbell of Ardkinlas was apprehended, by John McNaughtan in Inverary; and Spence got the liberty of the castle, and his remission was recommended to be past by the king; and Gordon of Earlstoun was sent for from the Bass, not to be execute, (as some said,) but to be tortured and confronted with Spence.—They resolved not to admit of his madness for an excuse, which they esteemed simulate; as the late chancellor had done.

"September 4. Mr. Robert Baillie of Jerviswood, having got his citation before the Privy Council, on a libel for resetting rebels, &c. he gave in a bill craving a delay, in respect of his utter inability to come abroad through sickness and indisposition; they appointed the clerk-register, &c. to go to the prison, and to examine him upon oath, on the articles of the libel which they had now raised, fearing he might escape, and prevent firing, or any other punishment, if he should quietly die: And he declining and shifting to depone, and it being reported to the Privy Council, they fined him 6,000*l.* sterling, which differs little from a forfeiture.

"September 5 and 6. Mr. William Carstairs, son to Mr. John Carstairs, once minister of Glasgow, is brought before the Secret Committee of Council, and is tortured with the thumbikins. He confessed there had been a current plot in Scotland these ten years past: Some were for raising forces; others were only for associating with the English, for holding out the duke of York from succeeding, and to preserve the reformed religion. He named many that were upon the knowledge of it: as the earl of Tarras, Cesnocks elder and younger, with the other prisoners, Murray of Philiphaugh, Pringle of Torwoodlee, Home of Polwart, Home of Bassendean, Mr. Gilbert Elliot, Scot of Gallowshiels, Hay of Park, sir James Dalrymple, Mr. Robert Martine, Hamilton of Aikenhead, &c. and some gave out the duchess of Lauderdale as a resetter of Argyle since his forfeiture, and a furnisher of him with money; and who offered, in 1677, to procure the fanatics an indulgence from the king for a sum of money. Fame wrongously also named Ker of Cherietrees, Campbell of Caddel, Carnegie of Balnamoon, the Lords of Brodie and Grant, Crawford of Ardmillan, Elliot of Stobs, Murray of Spot, &c. Such of them as could be got are presently apprehended, and put in close prison; and then major Monro and Philiphaugh are first examined; and standing on

that he could not get himself elected one of the said commissioners, he resolved to go to London upon his own expences, and declared to several (whom he took great pains to draw in to be his accomplices) that his design was to push forward the people of England, who did nothing

their denial, they are threatened with the boots; which makes them ingenuous, and confess their accession. This did so discourage and confound Alexander Monro, to discover others, that he desperately offered money to the keeper of the Tolbooth's man to run him through with his sword, and reared, that he knew he behoved to do some base thing before he died; and regretted that he should have denied it before the king, by lying so obstinately, and should have been so instrumental in drawing so many gentlemen upon that which would stand them both their lives and fortunes, and he behoved to be a drudge and a witness against them. Philiphaugh cast himself upon the high treasurer's mercy and protection. Then Campbell of Ardkinglas is examined, and he freely confesses he sent to Argyle since his escape 100*l.* sterling; but, finding this draws to treason, he desires to correct his deposition, and avers it was only given by him to Argyle's children, and not to himself. Duke Hamilton opposed this torturing much; and alleged that, at this rate, they might, without accusers or witnesses, take any person off the street, and torture him; 'et nemo in aliorum caput est torquendus;' and he retired, and refused to be present, on this ground, that if the party should die in the torture, the judges were liable for murder, at least were severely censurable.

"It was doubted, how far thir testimonies extorted *per torturam* can be probative against third parties, seeing witnesses should be so far voluntary and spontaneous as to be under no impressions, or terrors of fear of life or limb; others judge them best to be credited then. Some thought our privy council would have been at some loss, and contracted some tash by this cruel torture, had they suffered it as they did the boots, (which they regarded not, their legs being small,) without discovering or revealing this conspiracy; but their confessing tends to justify the privy council's procedure.

"December 23 and 24. The trial, condemnation and execution of Robert Baillie of Jarviswood was upon thir days. On the 23d, he was brought to the criminal court, and pannelled as art and part of the treasonable conspiracy of joining with the discontented country-party in England, viz. Shaftsbury, lord Russel, &c. to persuade or force the king to redress their grievances, and to call a parliament, and pass the bill of seclusion against the duke of York, for securing the Protestant religion; and of carrying on this rebellious design of rising with England, under the blind and pretence of the Carolina company, and for his knowledge and accession thereto, which he had

but talk, that they might go on effectually; and after he had settled a correspondency here, he did go up to London in one or other of the said moneths, with sir John Cockran and commissar Monro, and did then, and there, transact with the said conspirators, or one or other of them,

presumed to conceal, and did not reveal the same: as also, he was an agent for getting the 10,000*l.* sterling, from the English to my lord Argyll in Holland to buy arms, and to raise dragoons and horses to land in the west-highlands, where others were to join with him.

"The king's advocate first produced the privy council's warrant to pursue him; which also commanded sir George Lockhart and me, upon our allegiance, to be assistant to him in that process. Then the warrant was produced for Sir Patrick Hume, Mr. Walter Pringle, and Mr. William Fletcher to appear for the pannel, (though the 38th act of parl. 1587 is warrant enough,) they always containing themselves within the bounds of law and loyalty: at which clause they scrupled as unusual; though they declared they would exceed neither.

"The 1st defence was on the shortness of the citation, that it was upon little more than 24 hours, and that the legal *inducia* was 15 days; as after debate was found in 1673, by the justices, in the case of one Robertson, though he was in prison, remarked by Sir George M'Kenzie himself, in his criminals, tit. of libels; at least, such a competent time ought to be allowed, in which the pannel may raise a precept of exculpation, conform to the regulations in 1672, to prove his defences of *alibi*, or the like, and to cite witnesses; which was impossible in this case; and if they may be cited on a day, why not on an hour? Answered, There was no law obliging to give pannels in prison any definite time, especially where it was not on a summons of treason, but only on an indictment; and that our custom and practices had allowed citations on 24 hours; and Rathist and others had been so cited, (only it was not objected against in these cases,) and here the pannel had not applied for an exculpation. The criminal lords repelled the defence, and sustained the citation.

"2do, Alleged, As to that article of harbouring and reset of Mr. Wm. Veitch, or other fugitives, and the corresponding with Argyle, it was 'res hactenus judicata,' in so far as he having been conveyed before the privy council, in September last, for these crimes, and the same being referred to his oath, and he refusing to depone, he was fined in 6,000*l.* sterling. Answered, They restricted to the crimes not insisted for, in that decret of council. Replied, By a scroll under the clerk of secret council his servant's hand, he was also then interrogate about Argyle's affair; and craved the king's advocate's oath thereon. Duplied, The decret of secret council contained no such thing; and it being a sovereign court, it should

to get a sum of money to the late earl of Argyle, a declared traitor, for bringing home of men and arms, for raising a rebellion against his majesty, and invading this, his native country; and so earnest was he, in the said design, that he did chide those English conspirators,

make more faith than any double; and the advocate could not depone in prejudice of his majesty's interest. The lords allowed the king's advocate to insist against the pannel for all crimes not judged by the said decret, and refused to convell it by his oath. Then, having no more to say against the relevancy of the dittay, the justices found it relevant to infer the pain of treason. Yet there were two other defences privately suggested. 1mo, That the king's warrant sending him down from London, bore only to try him for crimes done in Scotland; *ergo*, what he plotted in England should not be charged on him here. 2do, That in England, the sending money to Argyle was not treason; *ergo*, the concealing it by a Scotsman could not be treason, seeing 'accessorium sequitur summ principale, et non entis nulla sunt accidentia.' (But they were not clear to meddle with thir two.) And there is a strict act of parliament in England, since his majesty's Restoration, that no man who has committed a crime in England shall be sent prisoner for it to another kingdom, (but I think this act means native or naturalized English, now the Scots Postnati are such;) for in another country, they cannot plead the benefit of the Habeas Corpus; and for this reason it seems they could not prevail with Shepherd and the other English witnesses, to come to Scotland and depone against Jerviswood, what they knew of his accession.

"Then the witnesses were called, and Walter Scot earl of Tarras, the pannel's nephew by his lady, was first brought in; against whom it was objected, that he was not a habile witness in law, being not only 'consciens et socius criminis,' but also under process of treason, and also under the fear and apprehension of his life, and so 'sub potestate accusatoris; and, which was more, he was 'convictus,' in so far as he had confessed his guilt, and thrown himself on the king's mercy, 'et confessus habetur pro convicto;' and such witness was rejected by all laws, even in treason, as Anton. Mathæus asserts; Tit. de læsa Majestate, cap. 4. And Farinæus de Testibus, quest. 53, declares 'testem accusatum et incarceratum' to be incapable; and the 34. chap. statut. 2. Robert. 1, 'de his qui repellantur a testimonio,' expressly incapable 'vinculum infamem et carceratum,' and whose accusation is yet depending. Answered, Though the brevard 'regu-fariter' holds true, that 'socii consocique criminis non sunt admittendi in testes quis inhabiles,' yet 'exceptionem et deliquium patitur in criminibus privilegiatis et exceptis,' as is treason, and conspiracies for subverting the government, which cannot otherwise be proven but by accomplices; and to plead that

for not sending the same timeously, and lamented the delays used in it; and persuaded the late earl of Argyle, and others in his name, to accept of any sum, rather than not to engage; and amongst the many meetings that he had at London, for carrying on the said trait-

they are not receivable witnesses, is all one as to plead, that such plots shall not be discovered at all; and if 'particeps criminis' be not allowed, they cannot show a way how to reach such conjurators; and publick utility has introduced this relaxation, both for the atrocity, frequency and latency of the crime; and all lawyers are clear, that it may be proven 'per socios.' 2do, 'Con-fessus habetur pro convicto' only 'actiois juris;' and Papon, in his Arrests, lib. 24, tit. 8, shews sundry cases wherein complices make a full probation, viz. in læsa majesty, and conspiracies; and Anton. Faber in cod. lib. 9, tit. 6, says, it is 'privilegium criminis læsæ majestatis ut facilius probetur,' and that for obviating and discovering it, 'etiam socii criminis sunt testes habiles,' which though he confesses to be hard, yet it is necessary; and it imports not in law whether he be under process or not, for it still amounts to no more but his being a 'socius;' and his fear of death is much the same before his indictment as after. The criminal lords repelled the objection, and admitted Tarras.

"Then Commissar Monro being adduced, it was alledged against him, that he had betrayed his testimony already, by discovering what he could say against the pannel. 2ds, When he emitted that declaration, he was either threatened with torture, or in the very prospect and view of it; and Damhouderius and other criminalists reprobate that testimony. 3tio, That he had got promise of the greatest good deed, viz. his life. Answered, any declaration he has emitted, is not prodition; being to a judge and it was not on a pre-cognition, nor in relation to this pannel; and so needs neither be given back nor cancelled. 4do, It is denied, he was threatened with the torture; but, though he had, he is so far from being rendered thereby inhabile, that on the contrary he is a more pregnant and convincing witness, not being voluntary. 5tio, Promise of a remission non re-voat, unless it was broken with, and commuted, that he should for that cause depone against the pannel. The lords also received him.

"Then James Murray of Philipstoun, and Hugh Scot of Gallowhills, were examined; who said little to the pannel's case in particular, but cleared the tract and thread of the conspiracy, and the meetings with Pelwart and Mr. Robert Martine, at Pringle of Terwoodlee's house, and the chain by which it was linked with the English plotters and Spotsmen at London, viz. the lord Melvil, sir John Cochran, the two Cosnocks, commissar Monro, Jerviswood, &c. Their design seems to have been, to join with the English when they were ripe to draw to a body, and with arms in the one hand, and a petition in the other, to compel

cross design, there was one at his own chamber, where he did meet with the lord Melvil, sir John Cockran, and the Casnocks elder and younger, and amongst others, with Mr. William Veitch, a declared traitor, and there he did treat of the carrying on of the said rebellion, and

the king to quit his brother to the mercy of a trial in parliament, and to receive them to be his counsellors; and ambition had so blinded their eyes, that they had promised success to themselves, and were dividing the offices of state among them, and talked of seizing Berwick, and Stirling Castle, and of surprizing the chancellor, treasurer, and the dragoons horses where they were grazing; and to try where arms were to be got; and to let the project fall to their confident friends, to try their inclinations, and to keep up their cess for a time, and so know the strength of their party by a word; viz. 'Harmony,' and a sign, viz. the loosing a button of their breasts, and then closing it again.

"The king's advocate further adduced to the assize, in *modum probationis*, a printed double of Mr. William Carstairs's deposition, owned and adhered to by him on the 29d of December last, in presence of the whole privy council; whereon the two clerks of council were adduced as witnesses, to supply his absence; for he scrupled to appear as a witness against his friends, whom he had ensnared in the plot, and he had capitulated with the secret committee, before he would reveal any thing; two, to secure his life. 2do, That he should not be made use of as a witness. As also the king's advocate produced two depositions, taken before the privy council of England, of Shepherd the vintner, and Zacharia Burnes the brewer, ament the pannel's treating for the 10,000*l.* sterling which was to have been sent over to the late earl of Argyle, with sir Lionel Jenkins, then secretary, his subscription and attestation thereat; and for proving the verity of the subscriptions, there was produced a letter of sir Andrew Forrester's (our secretary's servant) which he sent along with these depositions, and sundry other letters and papers of secretary Jenkins for comparing the hand writ. Alledged, That by the common law l. 3. §. 3. and l. 4. D. de Testibus, it is clear 'non testimoniis sed testibus tantum est credendum,' and Novel. 90. cap. 5. in civil cases, the emperor allows the examination of absent witnesses upon commissions; but 'in criminalibus,' because of their great import, 'omnino presentari debent' 'testes eorum iudice et reo;' and our law is as positive, in the 90th act, parl. 1585, that all probation must be led in presence of the assize and pannel, who by confrontations may have great power to keep the witnesses from perjury; whereof we saw a signal instance, on the 24th and 27th March 1684, in Casnock's trial; for though Crawford and Ingram, the two witnesses, had clearly deposed against him at several times before the trial, yet when they

of the money to be furnished by the English for Argyle, for buying of arms; and that if the Scots would attempt any thing for their own relief, they would get assistance of horse from England; and from that meeting, he or one or other of them did send down Mr. Robert Martin

came into his presence, they resiled. Answered, it was notoriously known that Carstairs and the other two absent English witnesses had deposed these things, and did adhere thereto, and had no interest to lie or wrong the pannel; and so it imported not whether they were present or absent; but they used them only to inform the minds and consciences of the assizers, and left it to them to consider how far they should import. 3do. The 90th act of parliament itself made against them; for it only discharged the shuffling in of papers to the assizers after their inclosure, which the pannel had not seen, and therefore ordained all the probation to be led in presence of the pannel and the assize; which they now did, by adducing these testimonies before the pannel and assize, and a double of which papers were given him, with his indictment.—The criminal lords refused to sustain them as a full probation *per se*, (for that were a very dangerous preparative) but referred them to the assize, to be considered by them, *in modum administrandi*.

Then sir Patrick Mune, one of the pannel's advocates, spoke to the assize, and alledged there was not two witnesses agreeing in one fact. The advocate contended, that it needed not in treason; and he summed up the probation, (it being his privilege to be the last speaker in this crime of treason,) and aggravated it in all its circumstances. The assize enclosed about 12 o'clock at night, and sat till three in the morning, the earl of Strathmore being chancellor; and they found his being art and part of the conspiracy and design to rise in arms, and his concealing the same, proven by the writs and antidotes produced.

"The verdict was read the next morning, the 24th of December, and sentence pronounced against him, viz. that he should be taken that afternoon to the market-cross of Edinburgh, and there hanged on a gibbet till he be dead; his head to be affixed on the Nether-bow-port of Edinburgh, and his body to be cut in four quarters, to be set on the Tolbooths of Jedburgh, Lanerk, Air, and Glasgow; his lands and moveables declared forfeited to the king, his blood tainted, his posterity declared ignoble, and incapable of all offices; his arms reversed, and so affixed on the cross, and also to be delete and razed out of all the books of heraldry. His father was a son of the laird of St. John's Kirk, who is a cadet of Lamington, who say they are the old Balliols. He carried all this with much calmness and composure of mind; only he complained the time they had given him to prepare himself for death was too short, and huffed a little that he should be esteemed guilty of any design against the life of the king, or his bro-

to prevent any rising, till it should be seasonable for carrying on of their designs: which Mr. Robert, after he came to Scotland, did treat with Polwart, and others, for carrying on of the said rebellion, by securing his majesty's officers of state, his castles and forces, and by

that, of which he purged himself, as he hoped to find mercy; as also he denied any purpose of subverting the monarchical government, only he had wished that some grievances in the administration of our affairs might be rectified and reformed: But seeing he purged not himself of the rest of his libel, his silence as to these looked like a tacit confession and acknowledgment thereof. All seemed convinced that he had tampered in dangerous proposals, anent getting what was amiss redressed, by putting the king under force to yield to their demands, if they could not obtain it with fairness; and Tarras declared, the pannel regretted that the English only talked, but he would study to push them forward to take brisker and sharper measures, and to act something, (though Jerviswood complained much, that Tarras to save himself, sacrificed him, and that he never had used these expressions, and that in May 1683; he went to London on that errand; though Jerviswood himself, and the other Scots gentlemen who then went up, gave this reason, that they were terrified with the interlocutor against Blackwood, finding him guilty of treason for reset and harbouring, they knowing themselves not free; as who in the west were? Tarras, Philipbaugh, &c. minced and extenuated their design by several colours and palliations; as 1mo. That they detested the republican party in England, who were for totally changing the monarchy: But they were content to have had him limited to have followed their counsels. 2do, That Mr. Robert Martine was only sent down to stop a rising in Scotland. But it appears the reason was, they had not yet fully concerted with England, and they feared to marr the design by too much precipitation and haste;—and yet, when Mr. Robert returned, he reported that he found the country in such a temper, that very little would kindle the fire. 3do, That all they spoke was on remote suppositions and cautions, and was immediately rejected as unfit, and more consonant to popish jesuitical principles than to the casuists and divines of the reformed religion;—but under such a dangerous pretended covert as this, all the treason of the world may be hatched and carried on.

“The sentence was accordingly executed in the afternoon; so that there was not above five hours between his sentence and his death, which was much complained of; but the holy days of Zeile approaching, they would not delay him till they were ended; and their reputation in discovering this Scots plot was much concerned in finding him guilty of it; for if that had miscarried, it would have made the people believe it was but a sham forged plot. His martyring Johnston of Warriston's daughter

putting his correspondents here, and their associates, in readiness to assist the late earl of Argyll; and after the said Mr. Baillie had engaged many of his countrymen in England, and had assured his correspondents here, that the English were resolved to exclude his royal

first alienated his mind from the government; then he having rescued his brother-in-law Mr. James Kirkton, an outed minister, from captain Carstairs, by drawing his sword, he was fined in 1000*l.* sterling, and imprisoned for it; but he got his fine remitted. The beginning of discontents, though small, yet if cherished, will transcend all bounds, and keep no measure.—He died regretted by many, and with much resolution.

“What Carstairs and the rest have said, is but an imperfect narrative of this plot; for they have concealed many circumstances of it, and told no more than what was squeezed out of them by special interrogators, torture, and fear of more; but sober persons do not doubt that these foolish rash thoughts of winding themselves into the government were in their heads, though a thing very impracticable.—There were some doubles of a speech he had written, spread after his death, with the matter whereof our statesmen were very displeased, and were willing to give his lady his four quarters to bury, if she could suppress and bring in all the copies of it, that it might not fly abroad; yet others thought this was the high way to set curiosity on edge, to search for and propale it. But the reputation of our governors lay deeply at the stake, in convincing the world of the truth and reality of this plot discovered by them; so they were hugely concerned to obviate any thing that seemed in the least to infringe, invalidate, or take off the credibility of that plot in the minds of the people.

“This is now the less necessary, seeing his trial is since printed by order, with the key of the plot, and an account of the late discoveries and deciphering of the conspiracy against the king, compiled by Tarbet Clerk-register: but this abbreviate of his trial was written by me before the trial was given in to the press.

“*Eodem die.* After Jerviswood's execution, the privy council met, and convened before them eleven of the Clidesdale gentlemen, mentioned 4th December current, viz. Baanastyne of Corehouse, Stewart of Allanton, Stewart of Walwood his brother, Kennedy of Cloburn, Hamilton of Halcraig, Hamilton of Overton, James Young of Lusbank, Chamberlain of Evandale, &c. The libel was for their accession to Pentland-hill, or Bothwell-bridge rebellions, or their resetting such as were there, or contributing money for rebels, or harbouring non-conformist ministers, who preached or prayed in their houses; or sending money to Argyll, or refusing to take the oaths of allegiance and supremacy, &c. The king's advocate having declared, that he restricted the libel to an arbitrary punishment, he referred it to their oaths; whereon they having deposed, and

highness from his due right of succession, thereby to encourage them to concur in the said rebellion, and exclusion, he flew to that light, that he did particularly and closely correspond with Mr. Robert Ferguson, sir Thomas Armstrong, colonel Rumsey, and ——— Walcot, who were accessory to that horrid part of the conspiracy, which was designed against the sacred life of his majesty, and the life of his royal highness, and did sit up several nights with them, concerting that bloody massacre; at least the said Mr. Robert Baillie of Jarviswood was, and is guilty of having correspondence with the late earl of Argyll, and Mr. William Veitch, declared traitors, and of being art and part of an conspiracy, for assisting of these, who were to rise in arms against his sacred majesty, and for exclusion of his royal brother, and of concealing and not revealing the accession and proposals of others for that effect. Wherein he has committed, and is guilty of the crimes of high treason, rebellion, and others above specified, and is art and part of the same, which being found by an assize, he ought to be punished with forfeiture of life, land, and goods, to the terror of others to commit the like hereafter.

His Majesty's Advocat produced an act and warrant from the lords of his majesty's most honourable privy council, for pursuing and insisting against the said Mr. Robert Baillie of Jarviswood, whereof the tenor follows. Edinburgh, the twenty two day of December, one thousand six hundred and eighty four years: the lords of his majesty's privy council do hereby give order and warrant to his majesty's advocat to pursue a process of treason and forfeiture, before the lords of his majesty's justiciary, against Mr. Robert Baillie of Jarviswood, to morrow at two o'clock in the afternoon precisely, and the said lords hereby require and command sir George Lockhart of Carnwath, and sir John Lauder advocats, to concur, and assist in the said process with his majesty's advocat, from the intending, until the end thereof, as they will be answerable upon their alledgeance. Extract by me,

Sic subscribitur, COLIN MACKENZIE, C. S. C.

Pursuers.—Sir George Mackenzie of Roanagh, our sovereign lord's advocat.

Sir George Lockhart and sir John Lauder, advocats.

Procurators in Defence.—Sir Patrick Hume, Mr. Walter Pringle, Mr. James Graham, Mr. Will. Fletcher, and Mr. William Baillie, advocats.

The pannals procurators produced an act of his majesty's privy council, in their favour; whereof the tenor follows. Edinburgh,

refused the king's ecclesiastic supremacy, they were fined two of them in 12,000 merks, James Young in 10,000 merks, Overton in 9000 merks, and some of them in 5000 merks, and others in 8000 merks, and two of them sent to the plantations, besides their fine; and all of them to lie in prison till they pay them."

burgh, the twenty-third of December, one thousand six hundred and eighty-four years: the lords of his majesty's privy council having considered an address made to them, by Mr. Robert Baillie of Jarviswood, now indicted at the instance of his majesty's advocat, before the lords commissioners of justiciary, of treason, do hereby require and command sir Patrick Hume, Mr. Walter Pringle, Mr. James Graham, Mr. William Fletcher, Mr. James Falconer, Mr. William Baillie, advocats, to consult, compare, and debate for the petitioner, in the process of treason, mentioned in his address, without any hazard, as they will be answerable at their peril. Extract by me,

Sic subscribitur, WILLIAM PATERSON, C. S. C.

After reading of the Inditement, the lord justice general required the pannal to make answer thereto.

The said Mr. Robert Baillie, pannal, pleaded Not Guilty.

Mr. Walter Pringle, advocat, as procurator for the said Mr. Robert Baillie of Jarviswood, Pannal, alleadges that he ought not to pass to the knowledge of an assize; because he had not got a citation upon fifteen days, or at least on a competent time, which is usual, and absolutely necessary in all actions, and much more in criminal pursuits, especially, seeing; if a competent time be not allowed to the pannal, he is precludit of the benefit of an exculpation, without which he cannot prove his objections against witnesses, or assyzers, or any other legal or competent defences; and by the late act of parliament concerning the justice court, all pannals are allowed to raise precepts of exculpation, and thereupon to cite witnesses for proving the objections against witnesses, and assyzers, which necessarily presupposeth, that a competent time must be allowed to the pannal to execut his diligence, or otherwise, how is it possible he can prove a defence of *alibi*, or any other just defence? And as this is most consonant to that clear act of parliament, and to material justice, and to the rules of humanity; so this point has been already fully and often decided, and lately in the case of one Robertson, in July 1673, the instance whereof is given by his majesty's advocat in his book of criminals, and title of libels, where the lords found, that albeit Robertson got his inditement in prison, yet he behaved to get it upon fifteen days.

His Majesty's Advocat oppons the constant tract of decisions, whereby it is found, that a person incarcerated may be tried upon twenty four hours; and the late act of parliament is only in the case where a summons or libel is to be raised; but here there is no libel or summons, but only an inditement; nor was any exculpation sought in this case, before the trial, which is the case provided for by act of parliament.

The lords, Justice General, Justice Clerk, and Commissioners of Justiciary, repel the defence,

in respect the pannel is a prisoner, and that it has been the constant custom of the court, and that the pannel made no former application for an exculpation.

Sir Patrick Hume for the pannel alleadges (always denying the libel, and whole members and qualifications thereof,) that in so far as the libel is founded upon harbouring, maintaining, and intercommuning with the persons mentioned in the dittay, the pannel ought to be assoyzied, because it is *res hactenus judicata*, he having been formerly pursued before the lords of his majesty's privy council for the same crimes, and fined in a considerable sum; and therefore that crime cannot now be made use of as a ground of treason against the pannel.

His Majesty's Advocat answers, that he restricts his libel to the pannel's entering in a conspiracy for raising rebellion, and for procuring money to be sent to the late earl of Argyle, for carrying on the said rebellion; and for concealing, and not revealing; neither of which is referred to his oath; and consequently was not *res judicata*, there being nothing referred to his oath; but his converse and correspondence with some ministers, and others within the kingdom, and his own gardiner, and his writing letters to my lord Argyle; and opposes the decret of council itself, and restricts the libel to all the crimes not insisted on in the decret.

Sir Patrick Hume replies, That as to the corresponding with the late earl of Argyle at any time since his forfaiture, was expressly proponed as an interrogator to the pannel in that pursuit, at his majesty's advocat's instance against him, before the lords of his majesty's privy council, and that not only his own correspondence by himself, but also by major Holms, Mr. Carstairs, Robert West, Thomas Shephard, Richard Rumbold, and colonel Runsey, as the interrogator bears, as appears by a double of the act of council written by the clerk of council's servant, and is offered to be proven by my lord advocat's oath: and as to any correspondency with Mr. Veitch, it is not relevant, since he was not declared rebel.

Sir John Lauder for his majesty's interest, answers, that he opposes the decret of privy council, where no such interrogator was put to the pannel; and the decret must make more faith than any pretended scroll, and cannot be taken away by his majesty's advocat's oath, to his majesty's prejudice: and for Mr. William Veitch, he stands expressly forfait in Anno 1667, and the doom of forfaiture is ratified in the parliament 1669.

Sir Patrick Hume opposes the reply, That as to the corresponding with Mr. Veitch, it does not appear that he is the person mentioned in the act of parliament; and albeit he were, as he is not, he having thereafter come home to Scotland, all the punishment inflicted upon him was banishment, not to return under

the pain of death, which did take off any former punishment; and it was no crime in any person to intercommune with him, especially in another kingdom; and by the late act of council in Anno 1683, even the conversing and intercommuning with declared traitors, is restricted to an arbitrary punishment.

His Majesty's Advocat opposes the standing doom of forfaiture against Veitch, and the proclamation, or act of council itself.

The lords, justice general, justice clerk, and commissioners of judiciary, having considered the libel pursued by his majesty's advocat, against Mr. Robert Baillie of Jerviswood, with my lord advocat's declaration, whereby he restricts the same to the crimes not insisted on in the decret of council formerly pronounced against the pannel: they find the same relevant as it is restricted, to infer the pain of treason, and remits the same to the knowledge of the assize, and repels the remnant defences proponed for the pannel, in respect of the decret of council produced, bearing no such thing as is alleadged, and of the answers made by his majesty's advocat thereto.

ASSISE.

The earl of Strathmore.

The earl of Belcarras.

Sir George Skene, provost of Aberdeen.

Sir James Fleming, late provost of Edinburgh.

Sir John Ramsay, of Whitehill.

Adam Hepburn, of Humby.

Andrew Bruce, of Earleshall.

John Stuart, tutor of Alpin.

Alexander Miln, of Carrin.

Mr. James Elies, of Stenhopsmilns.

Sir William Drummond, of Hathornden.

Major Andrew White, lieutenant of Edinburgh Castle.

Mr. David Graham, sheriff of Wigton.

Colin Mackenzie, collector of Ross.

David Burnet, merchant.

The assize lawfully sworn, no objection of the law in the contrary.

His Majesty's Advocat for probation adduced the witnesses and writs aforementioned; and first,

Walter earl of Tarras.

Sir Patrick Hume procurator for the pannel, objects against the earl of Tarras, that he cannot be a witness, because he is '*socius et participes criminis*'; and it is clear by the 34 chap. stat. 2, Rob. 1, concerning these that are excluded from bearing of testimony, that '*Socii et Participes ejusdem criminis, vel incarcerationi et vinculationi*,' cannot bear testimony: as also, the earl of Tarras being presently under an inditement of high treason, and under the impressions of fear, and death, no person in his circumstances can be admitted a witness, as is not only clear from the foresaid statute, but from the common law.

His Majesty's Advocate answers, That it is an exception from that rule, both by the common law, and ours, that in the crime of lese majestie, and especially that branch thereof which we call a conspiracy, 'socius criminis' may be a witness, and which is introduced very reasonably by lawyers to secure the common interest of mankind, which is the chief of all interests; and because conspiracies cannot be otherways proved, and not to allow this manner of probation, were to allow treason, since no man can prove a plot, but he that is upon it; and how can a man object against him as a witness, whom himself trusted with his life, his fortune, and their common plot? Nor is the intending of the libel any stronger qualification, since every man that is 'socius criminis,' is under the same impression, and it would rather seem the greater and nearer apprehensions a man has of death, he will be the more sincere and faithful; nor has the earl of Tarras, nor did he ever seek any security, in order to his deponing. And this has been constantly, and lastly, conform to the common law, as may be seen in the hundreds of citations set down by Mascard, de Probationibus, vol. 4, conclus. 1318. Num. 21, and the contrary citations prove only, that regularly 'socius criminis' cannot be a witness.

Sir Patrick Hume replies, That the statutes of Robert the first is opposed, and 'non est distinguendum, ubi lex non distinguit;' and not only was he 'socius criminis,' which is acknowledged, but he is 'in carceratus,' and lying under an inditement of high treason, and has thrown himself on the king's mercy; and it is not proper he should be a witness, seeing he is in the king's mercy, who may give him his life, or not; and there was never a person in these circumstances that ever was admitted a witness.

Mr. Walter Pringle adds, That the earl of Tarras is not only in the case of a person who stands indited for high treason; but must be looked upon as a person condemned for the said crime, seeing he fully and amply confess the crime; 'et confessus habetur pro convicto,' and never any lawyer asserted, That 'damnatu criminis lese Majestatis' could be admitted as a witness; and there is nothing more clear, than that by the common law, and the law of all nations, this objection ought to be sustained; for the civil law is clear, leg. 11, cod. de testibus, and Mathews in his title, de Probationibus, cap. de Testibus, doth assert positively, that the crime of lese majestie, heresie, and generally all these crimes, 'quæ sine sociis non possunt facile admitti,' are not excepted. And he asserts, that the lawyers, viz. Gornesius and Decianus, who are of another opinion, do acknowledge, 'nominatum à reo damnandum non esse,' and that they contravert only, 'An nominatu rei sit indicium sufficiens ad torquendum nominatum?'

Sir George Lockhart repeats, and opposes the answer, and the crime libelled, being a

conspiracy of treason, which of its own nature is managed and carried on by secrecie and contrivance; and which is only known to the complices of the treason, and which cannot be committed 'sine sociis.' The laws of this kingdom, and of all nations, do allow 'socius criminis' to be 'testes habiles;' and not only are they admitted in the case of such conjurations, but generally 'in omnibus criminibus exceptis,' amongst which the crime of Perduellion, and lese majestie in the chief; and it is absolutely impossible, that plots and conspirations of treason can be otherways proven, than 'per socios,' and such as are 'participes criminis,' and which is the common opinion of all lawyers, as may appear by Farin. Quest. 45, and the authorities cited by him, and which is the inviolable practise of this kingdom: and as to that pretence, that the earl of Tarras is under a process of treason, and has submitted to his majesty's mercy, and that 'confessus habetur pro convicto,' it imports nothing, and infers no more than that he is 'socius criminis,' and is still a habit witness: as to conjuration of treason, 'socius criminis hoc ipso,' that it is acknowledged, or proven, being still under the hazard of process, or condemnation; which law regards not in regard of the sciences involved in the nature of the crime, that either witnesses 'neque acta, neque habitu,' can be present; so that the objection amounts to no less than that conjurations of treason cannot at all be proven: and as to the law cited from the majestie, it imports no more than that the objection 'regulariter procedit,' in crimes, which of their own nature are not 'per difficulta probationis,' and are not 'inter crimina excepta,' such as the crime of conspiracy and treason is.

Mr. William Fletcher opposes the objection, and reply, and further adds, that albeit 'crimen lese Majestatis' be reckoned 'inter crimina excepta,' and so have some privilege, as to the qualification of witnesses; yet it cannot be denied, but there are some objections competent against witnesses adduced for proving conspiracies, and treason; 'verbi causa,' that a witness is a capital enemy, or that he is 'sub potestate accusatoris;' and the objection now pleaded, being taken complectis, viz. That the earl of Tarras is not only 'socius criminis,' but also, that he is 'publico judicio reus,' upon the same crime, and that as means to procure his majesty's favour, he has submitted himself, and come in his majesty's mercy, by an acknowledgment of the crime, before the diet of citation, he is obnoxious to a most just objection, viz. That he is 'sub potestate,' and by the submission and confession, his life and estate is now in his majesty's hand, so that he is not only in the case of a 'reus confessus,' but in the case of a witness, who does absolutely depend upon his majesty's advocate, the pursuer; and as a private accuser could not produce his own servants to be witnesses, because they are 'testes domestici,' and depend upon him; so

far less ought a witness to be adduced, who not only depends, as to his estate, but as to his life; and the law gives a very good reason, and which is mentioned by Paulus, lib. 1. receptarum sententiarum, cap. 12. parag. ult. in these words, 'De se confessus non est audendus ut testis, ne alienam salutem in dubium deducat, qui de sua desperavit.' And as to the pretence that a conjuration is a crime so occult, that it must either be proven by such witnesses, or otherways the guilty person will escape: It is answered, That in this case, his majesty's advocat had an easie remedy, for he might have pursued the pannel, before he pursued the witness; and the terror and apprehension of the event of a process for treason cannot be constructed otherways, than to have influence upon the deposition of the witness: and as to the citation out of Farinacius, it is only in the case of 'socius criminis;' but when he comes to treat de teste accusato vel carcerato, Quest. 56. articulo quarto, he says 'Regula sit in accusato, quod is pendente accusatione a testimonio repellitur.' And by the second rule of the same article, he says, it is a principle. 'quod carceratus testimonium ferre prohibetur;' and he gives this reason, 'quia presumitur, quod falsum testimonium diceret pro aliquo, qui ei promiserit se liberare a vinculo,' and limits this rule, that he must be 'carceratus propter crimen.'

Sir Patrick Hume adds, That it is a certain principle, that any person that is guilty 'infamia juris,' cannot be a witness, no more than a person that is convict and condemned of treason, and if he were convict, and condemned of treason, he could not be a witness, even in the case of treason: so neither can the earl of Tarras in this case be received a witness, for he being adduced a witness after he received his indictment, and confessed the crime, is equivalent, as if he had been actually convict; and whatever may be pretended, that 'testes infames' may be admitted; yet it was never asserted by any lawyer, that a person convict of treason can be admitted a witness.

Note, That the earl of Tarras deponed nothing against Jerviswood, but what the other two witnesses deponed against himself before the tryal, and upon which thereafter they being renewed, the earl was forefaulted, so that there could be no ground of suspicion from his circumstances.

The Lords repelled the objection against the earl of Tarras, and ordain him to be received a witness.

Walter Earl of Tarras, aged forty years, married, purged, and sworn; being interrogat, if about the time that sir John Cochran, and commissar Monro got their commission from the Carolina company for London, the pannel, Mr. Robert Baillie of Jerviswood, did not desire the deponent to speak to commissar Monro, to try if he could get him, the said pannel, added to that commission, depones affirmative.

Being interrogat, if the said Jerviswood, the pannel, did not tell the deponent that he was resolved to go to London however, upon his own expences, and that his and their going about the Carolina business was but a pretence, and a blind; but that the true design was to push forward the people of England, who could do nothing but talk, to go more effectually about their business, depones affirmative. Depones, That the pannel did settle a correspondence with the deponent, whereby he was to give an account to the deponent, of what should pass betwixt the country party in England, and the Scotsmen there: And on the other hand, the deponent was to write to him what occurred here. Depones, That the pannel did say to the deponent, if the king would suffer the parliament of England to sit, and pass the bill of seclusion, that that was the only way to secure the Protestant religion. Depones, That the pannel said to him, that the king might be induced to do so, if the parliament would take sharp or brisk measures with him, or the like. Depones, These words were spoke to him by the pannel since the holding of the last session of this current parliament; and before the pannel and commissar Monro went for London. Depones, That after the pannel went to London, he did give the deponent an account by letter, that things were in great disorder there, and that he hoped there would be effectual courses taken to remedy them. Depones, That Mr. Robert Martin did come to Mr. Pringle of Torwooddie's house in May 1683, or thereby, and brought a letter to the deponent's lady unsubscribed; but the deponent knows it was Jerviswood's handwriting, who was then at London, and that Mr. Martin told the deponent, that things in England were in great disorder, and like to come to an height, and that the country party were considering on methods for securing the Protestant religion. And that Archibald, sometime earl of Argyle, was to get 10,000*l.* sterling; whereas 30,000*l.* sterling was sought by the Scotsmen at London, which was to be sent over to Holland to provide arms; and that the late earl of Argyle was to land with these arms in the West-Highlands of Scotland, and that the deponent's friend, Jerviswood the pannel, was to be sent over with the money. Depones, That Philiphaugh and he went to Gallowshields' house, were they met with Potwart and Gallowshields, and that it was talked amongst them there, that in case those in England should rise in arms, that it was necessary in that case, that so many as could be got on the borders, should be in a readiness to deal with stragglers, and seize upon horses, and that thereafter they should join with those that were in arms on the borders of England. Depones, That in the case foresaid, it was said it was convenient the castle of Stirling, Berwick, and some other strengths should be seized upon; and it was likewise spoke amongst them, that some persons should be employed, to inquire what arms was in that country. Depones, That it was spoke then,

that the best time for Argyle was to land in the west, when there was a stir in England or Scotland, or words to that purpose. Depones, That every one desired another to speak to such particular persons as they could trust, by letting a word fall indirectly upon supposition, in case of the rising in England, concerning the affair for preparing of them: and that he was told by Philiphaugh thereafter, that there was a word and sign to be used amongst them, viz. the sign was by loosing a button on the breast, and that the word was, 'harmony.' Depones, The pannel spoke to the deponent, to advertise Torwoodlie, that he might acquaint Mr. William Veitch, a forfault traitor, who was in Northumberland, that he might keep himself close, and be on his guard, lest he should be catched; which was since the pannel was prisoner in the Tolbooth of Edinburgh. And this is the truth, as we shall answer to God.

Sic Subscritur, TARRAS.
LINLITHGOW, I. P. D.

Alexander Monro of Bear-crofts, aged forty-five years or thereby, *solutus*, solemnly sworn and purged. Depones, that the earl of Tarras proposed to the deponent, that Jerviswood might be made one of the commissioners for the affair of Carolina, for that he could not safely stay at home; and that the deponent's answer was, that he had no interest in the affair, and so could not be a commissioner. Depones, that the pannel did wait for the deponent at Wooller; and did go alongst with him to London, and that by the way he heard him regrave his own hazard and others, because of Blackwood's sentence; and that he heard him regrave the hazard our laws, and liberties, and the protestant religion were in. Depones, That the pannel spoke to the deponent and others, more than once at London, for getting of money from the English, to be sent to the late earl of Argyle, for bringing home arms for the said earl's use, as he understood, for carrying on an insurrection and rebellion in Scotland. Depones, That at the time libelled, in Jerviswood's chamber in London, Mr. William Veitch, a forfault traitor, was present; and that sir John Cockran did at that meeting expressly speak of money to be sent to Argyle, for bringing home arms for invading the kingdom of Scotland; and that at another occasion he heard some of them say, That there would be twenty thousand men in Scotland who would assist the rebellion, and that he heard sir John Cockran and Jerviswood speaking of it, but cannot be positive which of the two said it. Depones, That at the meeting he heard Jerviswood speak, but did not hear him oppose that treasonable proposal, or contradict the overture proposed by sir John Cockran. Depones, That Mr. Robert Martin was sent down from that meeting which was at Jerviswood's chamber, to Scotland, to try what the people of Scotland would do for their own safety: And that it was understood that the people of Scotland should not rise 'till there should be a rising in Eng-

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land; and that the commission was granted to Mr. Robert Martin, by all the persons present; whereof Jerviswood was one, and that there were present, the lord Melvil, sir John Cockran, Cessnocks elder and younger, Mr. William Carstares, Mr. William Veitch, Jerviswood, and the deponent; and depones, they did contribute money for Mr. Martin's journey. Depones, That at his return, he meeting with the deponent, told him, that matters were in that condition in Scotland, and that the country was in such a condition, as little would kindle the fire in order to the rebellion. And this is the truth as he shall answer to God.

Sic Subscritur, ALEXANDER MONRO,
LINLITHGOW, I. P. D.

James Murray of Philiphaugh, aged 30 years, married, purged, and sworn, produces four leaves of depositions, emitted by him before the lords of the Secret Committee, and all written and subscribed with his own hand, which being publicly read, in presence of the justices and assize, he adheres thereto, in all points, whereof the tenor follows. Upon the

day of May, 1683, upon a letter from Mr. Pringle of Torwoodlie, I came to his house in the morning, and he presently led me to a chamber, where I found Mr. Robert Martin, who was lately come from London, with whom we stayed a little, and discoursed of the news, and about the present condition and temper of England, and in particular of London, which Mr. Martin said, was much irritated through some attempts upon their privileges, either as to the concern of the sheriffs, or their charter, but that all honest men were of good heart and very brisk; and after some general discourses to this purpose, Torwoodlie and I left him and walked out a little, and he told me, he was expecting the earl of Tarras presently, for he had sent to him; and Mr. Martin had a letter to him from Jerviswood; then he told me that there were great matters in agitation at London, and that Mr. Martin had come down with a commission from our friends there (I do not remember he named any, but that I behoved not to expect he would impart his instructions to me, for he was to communicate them only to Polwart and himself, at least for these shires) and they were to pitch on such as they thought fit to intrust with the affair; whereupon he assured me, that he had great confidence in me, and his kindness to me obliged him to send for me, to acquaint me that matters were now come to a crisis, and that he had reason to think England would shortly draw to arms, and stand by them, 'till they were satisfied anent the bill of exclusion, and what other security they could propose for the protestant religion, and their liberties; and that it was no project of any inconsiderable party, but a design through the kingdom, and that many of the finest men, and of the greatest interest and credit there, had adjusted almost every thing necessary for the purpose, and had concerted matters with our friends there, in order to con-

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success from this, and had agreed to advance money for furnishing arms here (I do not remember he told me more particulars at this time); but said, Polwart would be at Gallowshields that night, and it would be necessary that the earl of Tarras and I should confer with him fully on the business. About this time the earl of Tarras lighted, and Torwoodlie having left us for a little time, being gone to bring Mr. Martin, the earl of Tarras asked me, what news? I told him of Mr. Martin's being there, but that he had given me no account of the design of his down-coming, which perhaps he would acquaint him with, but by what I had heard from Torwoodlie, I understood it to be, to engage us to rise in arms shortly; whereat the earl of Tarras hummed, and said he would look ere he leapt such a leap, or some such expressions. Presently Mr. Martin came and the earl of Tarras, and he retired a little after the reading a letter he gave him, the contents whereof was (as the earl of Tarras informed me) only an order from Jerviswood to deliver some money to the bearer, which he had left with him, and the earl of Tarras called for his servant, and had him bring up the money. In the mean time, Torwoodlie asked me, if I had acquainted the earl of Tarras with what he spoke to me, and I told him, I had let something of it fall to him, but it was not to be thought, that persons of sense and quality would engage in such designs at random; so Torwoodlie said, that (though Mr. Martin would not commune with us upon his commission directly) yet he thought it would be fit we conferred, and without taking notice of his commission, discoursed of things upon suppositions, and as our own private notions, abstract from any prospect of a present design. So after dinner we four went to a chamber, and after some general discourses of the discontents of both kingdoms, these suppositions following were discoursed (and as I remember Mr. Martin started them all, or the most part), viz. What if the country-party in England should have thoughts of going to arms (whereof he knew nothing, but only supposed such a thing, for discoursing a little freely, and to know our sentiments, what we thought could be expected here in such a case), would it not be expedient to have a settled correspondence betwixt that party there and here? and might not matters be so adjusted, that both kingdoms should draw out in one day? and might not as many be expected to undertake in these shires, and about Edinburgh, as would serve to surprise, and seize our rulers (I do not remember any named, but the then chancellor and treasurer), and some to join with these on the English borders, to assist them to surprise Berwick? and if for that effect, any horse or dragoons, that should be in the bounds might not be surprized, that their horse and arms might be gotten to furnish the country people, and Stirling Castle? And if Argyle should at the same time land in the West, and raise that country, would not these measures contribute

much to the advancement and security of the interest of that party, here since thereby the government would be disordered, and such steps would encourage all that had an inclination to the country-party, to draw to them frankly, and scar many of the other side to act against them, and so they might have leisure to join from all places? and might it not be expected, there would be as many in this kingdom, as would be able to deal with the forces here, at least divert them from troubling England? This is the sum, as I remember, of what was proposed and discoursed of, though I cannot distinctly say, it was in this method and expression, nor was all moved at once, but dropped now and then, as the discourse seemed to give rise to it; and though I cannot fully recount all that was spoke on these heads, and tell distinctly what this and that man said, yet I remember these following answers were given, and (as I judged) acquiesced to by the whole company; and they were certainly the earl of Tarras his sentiments and mine; and every one that spoke, used this or some such precaution, that if they were concerned, or to give counsel in any such cause (as they were not, &c.) 1. As to the settling a correspondence, it was confessed to be very convenient for those of a common interest, but the present circumstances of affairs were such (as we thought) that none could be found here, who was fit to manage it, and would undertake it. 2. As to the trusting, at the same time it could not be done without the divulging the design to all ranks of people, which none would undertake, except these already in desperate circumstances; and they could not have generally much influence. 3. The thing was not at all advisable for this kingdom, since if any of England's own measures miscarried they would not stir for any such trust; and the spring of their motions being always at London, there might happen an interruption near the appointment, whereof these here could have no timely notice, and so might keep trust, whereby they would be exposed a prey, and if they should subsist any time, or prevail (which was hardly possible) the multitude that must be employed, are tainted with such wild and unruly principles, that if once they got the sword in their hands, they would never be brought to order, without a greater force to over-awe them; neither would any expectation of Argyle's landing be a just ground for such a trust, considering the uncertainty of sea-voyages; and if Argyle were to be the head, undoubtedly many people would conclude that he were to be suspected of private designs, and that restoring him might lay him aside: so also, that despair might blind his usual prudence, and prompt him to unsolid and undigested methods, and so it was to be expected that few of the gentry (except such as he had special influence on, or such as were under hard circumstances) could embark with him. 4. As to the surprising rulers, &c. it was weighed against, as an action not to be thought of

amongst protestants (especially when the very design of it was pretended to secure that religion which taught its professors to abhor and detest such principles as popish, yea, unchristian); since it could not be effectual without bloodshed of people, secure in peace, which being by all approved divines and casuists condemned as unlawful, and meer assassination, it was not to be doubted, that as such a practice would cast a blot upon the whole affair, and quite take off any pretence of defensive arms, so it would scar many from joining. These things were reasoned again and again; but I do not remember there was any formal conclusion made, but the discourse was let fall; and Mr. Martin told us, if any of us had a mind for a suit of armour, he could provide as many as we pleased, from one who had made a great many lately to honest men at London, of a new fashion, very light, and at an easy rate, so Torwooddie and I gave him our measures; and the earl of Tarras told he had a suit already, then Torwooddie said to the earl of Tarras and me, we would meet Polwart at Gallowshells, and desired we might commun with him, anent what we had been discoursing; so we hastened away, that if possible we might both get home that night, it being Saturday, and we unfurnished for staying abroad, and Torwooddie whispered me just as I was mounting (as I think), that he was not clear we should convene before Gallowshells, for he was sometimes too much good-fellow, or the like; so the earl of Tarras and I rode away together, and upon the way we were both of opinion, that the suppositions we had discoursed of, were in effect propositions; and resolved, if they were insisted on by Polwart, as we suspected, we would adhere to the former answer, and would undertake nothing in these methods. When we came to Gallowshells, the laird was abroad, and Polwart was not come; so we had thoughts to go away, being both damped with what had passed, and inclining to be free of further meddling; but the lady would by no means hear of our going till her husband came, who, she assured us, was about the doors, and she having sent to call him, he would be in presently; yet it was so late ere he came, that the earl of Tarras could hardly have day enough to go home with; so Gallowshells would not let him go, and he would not stay unless I stayed, so we both stayed; and not being resolved to discourse with Gallowshells on what passed, we went to the tavern, on pretence I might call the bailie, and seek horses or lime, and stayed there till Polwart came, which seemed unknown to Gallowshells; then we returned to Gallowshells house, and after supper Polwart whispered the earl of Tarras and me, and enquired if we had seen Mr. Martin; and we having told him we had, he enquired if we were free to commun on the affair before Gallowshells; we told, as he thought fit, for we could trust him; then he whispered Gallowshells, and (as I understood afterwards) asked if he was free to commun on matters of great secrecy

and importante with that company, to which he assented; then we sat down close together, and, as I remember, Polwart began the discourse; but since I am not able to follow exactly the method of our conference, or keep the very expressions used, or repeat all that was spoke, or to tell distinctly what was every man's part of the discourse, I shall set down the heads, and most remarkable passages thereof, that I remember, in some articles following: 1. Polwart signified that he was credibly informed (but I do not remember he named his informer,) that the country party in England would draw to the fields shortly, as he heard before Lambass; wherewith Gallowshells seemed visibly surpris'd, and being asked, if his heart failed him already, he said he did love it better truly to be walking in his own park in peace and quiet, than to be meddling in such matters; however, he assured the company, that if there came any troublesome world, he would join with them firmly; and the earl of Tarras said, he wondered to hear of any such resolution in England; for he took it for a principle amongst that party there, that they should make no stir in the king's life (which the whole company owned to be their opinion and desire,) because that might strengthen the duke's interest, and he suspected it was the project of the commonwealth's men, with whom he believed few Scots gentlemen would join; and he was almost persuaded the duke of Monmouth would not concur in any rising during the king's life. To which it was answered by Polwart, that he had indeed heard that principle had been generally agreed to, but it seemed they found they behaved either to do their business now, or lay aside hopes of doing it hereafter, which might be: that if the charter of London were let fall, they would not only lose all safe opportunity of digesting matters, but a great part of their strength, and he heard all things were concerted mutually betwixt Monmouth's friends, and the heads of the commonwealth party; and though he heard Monmouth was shy on that account, yet it was hoped he would engage, for otherwise he would be deserted by that party. 2. Polwart told us the suppositions above-written as overtures concerted betwixt our friends at London, and the principal men of that party there; so the earl of Tarras and I renewed our former answers also above-written, and maintained them with all our vigour, wherein Gallowshells joined forwardly with us, and Polwart asserted, we went on very good grounds, and he was fully of our opinion, if things were entire; but referred it to be considered, whether it were better to comply with some of these methods, though not so proper and justifiable as were to be wished, than to disappoint the business totally, which might be of the best consequence to all the party; yet we did not condescend, as I remember, to undertake any of these methods. And there was a further argument adduced against the trusting above-written, viz. That it was talked there was a day appointed in

England, lately in Shafesbury's time, which did not hold, so they were not to be relied upon. 3. It was proposed to be considered, what methods were most proper in the Company's opinion for Scotland to follow in case of England's rising? Wherewith it was said, that all that all that could be expected or desired from Scotland, was, that upon the certain news of England's being in the fields, those in the Southern shyres, who would own that party, should presently rise, and (how soon they could get as many convened as would be able to deal with straggling parties, or any sudden rising in the countrey) march to join them, and that it would be fit these northern shyres of England waited near the borders for such; and that they had officers trysted there to command; and that then it would be seasonable for Argyle to land in the West, and these parties on the borders might divert the forces, till he had time to put himself in a posture. These things seemed to be the sentiments of the whole company, but were not finally determined till the opinion of others, who were to be communed with by Polwart, were known: and it was represented, there behoved not to be any wilful and obstinate adhering to our own thoughts of things, but an mutual condescendance to others concerned, otherwise it were not possible to bring a publick design to any good issue. 4. All the company seemed to agree, that they should undertake nothing, or move in that affair, till they had a full and certain account what England proposed, what methods they resolved to follow there, who were to be their heads; and that if they designed any attempt on the king's person, or overturning monarchy, they would not be forward or clear to joyn. And it being here insinuated, that the most they could do, at least for which there could be any plausible pretence to justify, was to draw together, and without any act of hostility, send addresses to his majesty for redress of the present abuses of the government, and for obtaining sufficient security against the hazard they apprehended to their religion and liberties. it was said by Polwart, that he was apt to think, that was their very design; for he had heard it was generally believed by that party in England, that if once they were in a body, the king would be prevailed with to quite the duke, to be tried for Popery, correspondence with France, and accession to the Popish plot; and then, if the king were once free from the influence of the duke's counsels, they were confident he might be moved to reform their abuses, and secure their religions and liberties for the future to their contentment. 5. It was resolved, that till we got the aforesaid account from England, and were satisfied thereabout, and knew others here, who were to be communed with, their sentiments of what methods were most proper for us, in case we should undertake, we should not meddle further; only it was left to the earl of Tarras and me, if we thought fit to acquaint sir Wm. Scot younger, with some of the matter of this conference

overly, without taking notice of our informers, or such an conference; and it was recommended to all to be enquiring at such as they had some trust in, indirectly about the affection of our neighbours, and what arms there was amongst them, that if we should get an satisfying account, and resolve to join, we might know where to seek men and arms suddenly. Here it was said by Polwart, as I think, that if the earl of Tarras, Torwoodlie, Gallowsheik, and I, once took horse, he thought the most part of the West end of Tiviotdale and Selkirkshyre would soon come to us, especially, when they heard England was risen; then we trysted to meet there against Midsommer fair, betwixt which the foresaid account was expected; but in case it came to any of our hands sooner, we promised to advertise the rest, that we might meet presently if the case required. This is the substance and sum of what passed at the foresaid conference, that I can now remember; but I remember, I was likewise told these following particulars in privat, by Polwart or Torwoodlie (which of them I cannot distinctly tell) the day of the aforesaid conference, or within a short time after. 1. That Polwart kept the correspondent with our friends at London; I remember not positively of any of them that was named to be on the intrigue there, except my lord Melvil, sir John Cochran, Jerviswood, and commissar Monro (for I hardly knew any of the rest) and, as I think, commissar Monro was called his correspondent there. 2. That the money to be advanced by the English party to Scotland was ready when Mr. Martin came from London; and it was expected, that within few days after it would be dispatched with some confident to Holland (whether by bills, or in cash, I cannot say); it was called ten thousand pounds sterling, and was to be employed (as I was told) by that confident, at Argyle's sight, for buying arms, providing ships to transport them with Argyle, to the West here, and such other charges. 3. That how soon our friends at London got notice of the safe arrival of the confident forsaid, and all other things were finally concluded there (which was expected would be about the middle of June, as I remember), they would come home, and, as they passed, would give them, or one of them, an particular account of all resolutions taken, to be communicat to the rest, that it was not to be expected by letters, that behoved to be under figures and dark expressions; and, as I remember they were written as it were about the Carolina business, or some household furniture, as I was told; for I never remember I saw any letter, either direct to London, or sent from it on that head. 4. I was told there was a sign and a word agreed on by that party, so that men might know with whom they might use freedom: the word, as I remember, was Harmony; and the sign, the opening two buttons in the breast coat, and shutting them presently; this I communicat to the earl of Tarras, but does not mind I ever saw it used, except when I

visited Park-bay here in town, about the end of June: we discoursing a little freely, he asked if I had the word and sign of the Carolina men; and I having given them, he said something to this purpose, that he was afraid that the Carolina business did not go well, for there had been some of the managers expected here (as I think he named Jarviswood or commissar Monro) these eight days past, but there was none come, nor could he learn that any of their friends had heard from them for several posts. Polwart, Torwoodlie, and I, met at Gallowsheils, on Midsummer fair; but I mind nothing passed but private whisperings. Dated September 15, 1684, and subscribed thus,

JAMES MURRAY.

EDINBURGH, December 23, 1684.

The Deposition above written being read to the said James Murray of Philiphaugh, in presence of the justices and assizers, he adheres thereto in all points upon oath.

Sic subscribitur, JAMES MURRAY.
LENLITHGOW, I. P. D.

The said James Murray further depons, That at their meeting at Gallowsheils, it was resolved, That they should keep up their cess unpaid till their next meeting at Midsummer, which was to be at Gallowsheils, and should deal with all these they had influence upon to do the like; and that upon the supposition mentioned in his oath given in, it was spoke amongst them, that the troopers horses should be seized upon when they were grazing. And this is the truth, as he shall answer to God.

Sic subscribitur, JAMES MURRAY.
LENLITHGOW, I. P. D.

Hugh Scot of Gallowsheils, aged 36 years, married, purged, &c. and sworn; depons, That the earl of Tarras, and Philiphaugh, did come to the deponent's house, in May, 1683, and Polwart came likewise there, where there were discourses and proposals, that if the English would rise in arms, their friends in the south shires should rise with them; and that they should seize the horses belonging to the king's troops, where they grazed; and the town of Berwick, and the castle of Stirling: and likewise it was there discoursed anent the late earl of Argyle's coming to invade Scotland; but because of the uncertainty of sea voyages, there was not much stress laid upon it. Depons, It was also proposed, that some of the south country, whom they trusted in, should be acquainted with it, and that endeavours should be used to learn what arms was in the country. Depons, There was some discourse there, as that the earl of Tarras, Philiphaugh, Torwoodlie, Polwart, and some others should draw to horse with the first, when the rising should be in readiness, that it might be expected that the south parts of Teviotdale and Selkirk shire would join with them. And this is the truth, as he shall answer to God.

Sic subscribitur, HUGH SCOT.
LENLITHGOW, I. P. D.

His Majesty's Advocat produced other Depositions, emitted by Gallowsheils before the lords of the Secret Committee, whereof the tenor follows.

Edinburgh, the 14th of September, 1684.

Gallowsheils Depons, That the earl of Tarras and Philiphaugh being in his house in May, 1683, discoursed of an intended rising in England, and of proposals made to Scotsmen to rise with them, and of London in particular, and that Polwart was present at that meeting; and told he was sure the Englishmen intended so, and that it was discoursed at that meeting amongst them, that it were fit to seize Berwick and Stirling; and that it was talked amongst them of bringing the duke of York to trial, and that the king would abandon him.

Sic subscribitur, HUGH SCOT.

Perth, Cancel.

Queensbury. Jo. Drummond.
George Mackenzie. George Mackenzie.

EDINBURGH, October 29, 1684.

Sederunt

Lord Chancellor, Lord President,
Lord Secretary, Lord Advocat.

The Laird of Gallowsheils, prisoner in the Tolbooth of Edinburgh, being called and examined upon oath, depons, that in the month of May, 1683, the earl of Tarras, Hume of Polwart elder, and laird of Philiphaugh, came to the deponent's house, himself being absent; at his coming home, they were speaking of the security of the Protestant religion; and of a party in England, who would secure or seize the king or duke; and that if any should rise in arms to defend them, or to rescue the king and duke, here was another party who would rise in arms against them; it was proposed, that some country-men should be spoken to to try their resolutions, and that the resolutions of England should be told them, to see if they would concur. But the deponent does not remember that this proposition was approved, or undertaken to be done by any present; nor does he remember who managed the discourse. It was likewise proposed to seize the officers of state, especially the chancellor and thesaurer; and the said sir John Cochran was to come to the West from England, for advancement of the design; and that the earl of Argyle was to land in the West-highlands, and to raise that country. Of these matters all these who were present, discoursed as of an affair that they were agitating, and wherein themselves were particularly concerned, though at that time they did not conclude what their carriage should be. The reason why the deponent cannot be more particular is, because he was sometimes going out, and sometimes walking up and down the room; and though the deponent cannot be positive of the very words, yet he is positive they were either these words, or words to that purpose.

Sic subscribitur, HUGH SCOT.
PERTH, CANCELLARIUS.

Edinburgh, December 23, 1684.

Hugh Scot of Gallowsbells, being solemnly sworn, in presence of the justices and assize, adheres to the depositions within and above written in all points.

Sic subscribitur, HUGH SCOT.
LEWISBOW, I. P. D.

His majesty's advocat, in fortification of the former probation, adduces the printed copy of *Mr. William Carstairs's* depositions, * emitted

* The following account of the Examination of *Carstairs* and of matters connected with it is extracted from *2 Wodrow, 387* :

"I come now forward to give some account of the sufferings and severe treatment of that truly great and good man, the reverend *Mr. William Carstairs*, this year. This extraordinary person is so well known through Britain, and, I may say, all the reformed churches, for his shining piety, his universal and polite learning, his candor and integrity, having the character of a truly honest man, from that great judge of men *king William*, and being in providence but lately removed to his master's joy, leaving behind him a most savoury remembrance of his constant and indefatigable services for Christ, souls, and the good of the church of Scotland, that it is needless for me to say any thing of him, to those who are now on the stage; but I wish some fit hand would be so kind to posterity, as to give us a just account of this excellent person. The hardships he met with will be a lasting blot upon this period.

"That I may give as large and yet succinct accounts of his sufferings this year as I can, I shall begin with a letter he was pleased to write to the author of this history, a very little before his death, which he allowed him to publish, and I promise myself it will be very acceptable to many readers; and then I shall give what I met with ancient him in the registers, and other certain documents. I begin with his Letter to me, which was among the last ever he wrote :

Dear Brother;

You put me upon a business, which, though it be of that nature that I ought to do something in it, yet it is uneasy to me to think upon it; but I shall give you a very brief account of some of the chief particulars of it, in so far as I remember.

I was taken at *Tenterden* in *Kent*, the Monday immediately after the execution of that great and honourable patriot of his country, *my lord Russel*.

The chief thing which exposed me to danger at that time, was the suspicion they had that I was *Mr. Ferguson*. I was admitted to bail for some days; but so soon as they had a return from court, I was committed prisoner to the common gaol of the place, no bail being allowed to me, though I was accused of nothing, but of refusing the oaths, one of which had

before the officers of state, and other lords of privy council, and leaves the same to the assize, and uses it as an admittance of probation; for though it was capitulated, that he should not be made use of as a witness; yet it was agreed, that the deposition should be published: and likewise produces the principal deposition signed by himself, and the said lords.

The lords justice-general, justice-clerk, and commissioners of judiciary, admit the paper produced as an admittance, and refers the in-

been then expired by law, viz. the Oxford oath.

I continued there for a fortnight, when I was sent for by an officer of the guards, to be brought up to London, which accordingly I was, and committed for two days to the hands of a messenger.

During which time, *sir Andrew Forrest* came to me, in the name of *King Charles*, offering me a pardon and all kindness, if I would tell what I know in that matter. He told me, that the king did not at all believe that I would be concerned in any such practice as the assassination of his person, but because I might hear of it upon occasions, he desired to know if I did; and I gave *sir Andrew* such answers as I thought were proper for me in the circumstances I was in. He very earnestly, yet very civilly, besought me to make a discovery of that plot, as to other things of it.

Which shows the falshood of what was positively asserted in an account given in the name of the king and duke of York, as to that matter; which is, that never any hopes of favour were offered to any to induce them to confess.

I was afterwards called before a committee of the lords of the council, and not giving them that satisfaction which they expected, I was sent close prisoner to the Gate-house: In which time, I was called twice out to be examined; at one of which, if not at both, was honest and worthy *Major Holens*, who was a prisoner in the Gate-house too, and had been a friend and correspondent of the earl of *Argyle*, to whom I was desired to give a cypher of names to correspond with, to which I added several with my own hand, which was well known to the earl of *Melford*, which afterward proved not a little prejudicial to me; for it was found among his papers when he was seized: He also told the lords of council, that I had told him, that there had been some consultations as to the lending money to *my lord Argyle*.

I continued in the Gate-house eleven weeks, close prisoner, looking upon myself as absolutely secure, under the protection of the plea law, of the act of *Habeas-corpus*, against being sent to Scotland: And therefore I did, in the first of *Michaelmas* term, petition the court of *King's-bench*, for being brought to my trial, or admitted to bail.

But the very day after, I was ordered to be ready for Scotland in twenty four hours, to be there tried for crimes committed in that kingdom, though I neither was, nor could possibly

post thereof to the inquest, and ordains the printed paper, as it is collationed, to be taken in and considered by the inquest.

Sir William Paterson, and Mr. Colin Mackenzie, clerks of his majesty's privy council, being interrogat, if they heard Mr. William Carstares own the Depositions read, depons, they saw and heard him swear, and own the same upon oath, and they collationed the printed copy with the original formerly, and now they heard it collationed.

Sic subscribitur. WILLIAM PATERSON.
COLIN MACKENZIE.

be guilty of any crimes there, not having been for several years there, but passingly.

Accordingly, I was sent to Scotland in his majesty's Kitchen Yaucht, with several other worthy gentlemen of my country, and was with them committed to the Tolbooth of Edinburgh, where I was close prisoner for several months.

During that time I was only once examined, as far as I remember; but some time after, we had the favour of open prison, till some of our great men, who were gone in that interval to court, returned to Scotland, and popish counsels then prevailing there, we were all of us shut up close prisoners again.

And Mr. William Spence, a faithful friend and servant of the earl of Argyle's, was pitched upon to be examined first; and upon refusal to give satisfaction to what was proposed to him, as to the decyphering of some letters of the earl of Argyle, he was put to severe tortures, one after another, in the thumbkins, kept waking for several nights and days, and the boots.

At last, finding, as he judged, no great matter if he should decypher the letters, and that no great poynctice would arise, as he imagined, to the earl of Argyle, or his friends, from his doing so, he was prevailed on to decypher them; but unhappily for me, there being several names of the cypher mentioned in that letter, some of which I was expressed by, which he did not know, but the earl of Melford, who was in the government, knew them, from the cypher above mentioned, wherein were several names writ by my own hand.

Upon this decyphering, I was ordered that very evening to be put into the irons, in which I continued for three weeks. In which time the earl of Melford came to me, and earnestly dealt with me to confess what I knew in that matter, and offered me conditions that many in my circumstances would have thought very great, particularly two, That I should not be obliged, after a month or five weeks time, to answer any questions that should be proposed about that affair, except what I should be myself pleased to say about it; and that nothing that I said should be brought directly or indirectly against any man in trial that I should mention.

I do acknowledge these conditions were staggering to me, considering that I could not well see how I should be able to go through a con-

The DEPOSITION of Mr. WILLIAM CARSTARES, when he was examined before the Lords of Secret Committee, given in by him, and renewed upon Oath, upon the 22d of December, 1684, in presence of the Lords of His Majesty's Privy Council.

EDINBURGH-CASTLE, September 8, 1684.

Mr. William Carstares being examined upon oath, conform to the condescension given in by him, and on the terras therein mentioned; depons, That about November, or December, 1682, James Stewart, brother to the laird of

stant torture during my life; however, I did resolve through divine assistance to adventure upon the torture, rejecting at that time the conditions which Melford had difficultly obtained for me from the privy council.

My reasons were, because I imagined, if I could once endure so severe torture, either the lords of the council would have some regard to my character, and not put me further to torture, or what I suffered might throw me into a fever, and so I might be carried off the world; for I can declare, that death, either by a sentence or any other violence, wherein my own hand was not concerned, would have been welcome to me.

I was brought before the privy council in England, and some depositions of major Holms and Mr. Shepherd were read against me; but neither of them was ever confronted with me, though one of them had been so with some of our countrymen upon that occasion. When I came to Scotland in company with several other worthy gentlemen of my country, and was committed, as I said above, prisoner to the Tolbooth of Edinburgh, I was at last brought out about noon to the council, about a fortnight or three weeks after Mr. Spence's decyphering the letters, and told by the lords of privy council, that I must either answer upon oath such questions as they gave me, or go to torture while I breathed.

And indeed chancellor Perth had told me a few days before, that I had refused so many singular favours that had been offered to me beyond any prisoner, that before God I should be tortured, and never a joint of me left whole.

When I was called in before the council, the declarations of major Holms and Mr. Shepherd were read against me. I told them, that I could say nothing to them, because I had never been confronted with them, which was a plain evidence that they had said things against me, which they would not have had the confidence to have asserted had I been present; but that was over-ruled.

Then I was urged to answer upon oath the questions that should be proposed to me. I told them, I would not do that in matters which were looked upon as criminal. They told me, that it should be presently enacted, that nothing that I said should ever militate against me, nor should they enquire whether what I answered were true or false. I said, it was a bad precedent, and I was not willing to begin it.

Culness, wrote a letter to him from Holland, importing, That if any considerable sum of money could be procured from England, that something of importance might be done in

Scotland: The which letter the deponent had an inclination to inform Shepherd in Abchurch-Lane, merchant in London, of; but before he could do it, he wrote to Mr. Stewart above-

Then I was asked, what reasons I had why I should not be tortured. I answered, I did humbly judge that I could not be any ways tried there, for the order, by which I was sent down to Scotland, was express, that I should be tried for 'crimes committed against the government in that kingdom;' and I desired to know if my lord advocate had any thing to charge me with of that nature. He declared, he had not; but that now I was in Scotland, and if I had been guilty of contriving against his majesty's government at Constantinople, I might be tried for it. I told them I thought it was true, but that the crimes I was accused of, were said to be committed in England, where his majesty's laws were equally in force for the security of his government, as they were in Scotland, which at Constantinople they were not.

But this was over-ruled, and yet this was a notorious and unjust breach of the law of the Habeas Corpus act, which was made expressly for the security of the liberty of Scots and Irish men.

Then they asked me, if I had any further to offer against being tortured. I told them, that I did not pretend to any skill in law, but that I was informed, that 'semiplena probatio' was necessary in order to torture, which was not in my case; for neither the depositions of these at London, nor what was said in my lord Argyle's letters, did amount to any such thing. They told me, presumptions were enough to warrant torture.

Then they asked me again, if I had any thing further to say why I should not be brought to torture. I told them, I had only an humble petition to them, that I might meet with no greater severity in my own country, than the laws of that in which the crimes I am accused of are said to be committed, do allow of.

After this commencing the king's smith was called in, to bring in a new instrument to torture by the thumbkins, that had never been used before. For whereas the former was only to screw on two pieces of iron above and below with finger and thumb, these were made to turn about the screw with the whole hand.

And under this torture I continued near an hour and an half. In the mean time the torturing by the boot was tried, but the hangman being newly come on, because the former was in prison for some crime, he had no skill, and therefore it was put off till the next day.

I do acknowledge I was much afraid I should not have been able to go through with that scene of torture; and if I had not, I was miserable, for I should have been brought to speak against every man they had mentioned, but God ordered it kindly otherwise, and the next day I had conditions offered to me afresh.

Now as to the whole of this unpleasant subject, I do declare, that this affair is, so far as I was concerned in it as to any consultations, no further than to discourse as to what might be proper to be done for securing our religion and liberty, from the dangers that they were then in, without any design against the royal persons of the king and his brother, or the government by monarchy; and that some thing was done among the Scots, as to the sending down a gentleman to discourse upon that head, with some others here.

I should be guilty of the most horrid injustice, if I should accuse any of the worthy gentlemen of my country that were my fellow-prisoners, or any of the English dissenting ministers, of having the least knowledge of, or concern in the abominable assassination of the king or his brother; for I did then, as I do now, abhor such practices, nor can I to this hour tell really what was in that matter that makes such a noise; for nothing in my maimed depositions that are printed, hath any regard to any thing of that nature, except as to what Mr. Fergusson and Mr. Shepherd did say, for which they alone are to be answerable; and I must also say, that Mr. Shepherd did own his abhorrence of such practices.

And now, brother, I shall conclude what I have to say upon this subject, with the great injustice I met with in being sent to Scotland, in open violation of the plain law of Habeas Corpus, which was only designed to make way for my torture; and the notorious breach of the public faith, as to the conditions that I had, by which no person was directly or indirectly to be mentioned in any trial as to that matter, nor any thing in my depositions was to be adduced against any person, which condition was openly violated, and this is acknowledged to have been so by the late earl of Cromarty under his hand, as is to be found among the Records of Parliament.

I was indeed earnestly urged to oblige the then king so far, as to appear and answer some questions before the judges when they were set, and that no person should be confronted with me. To which I replied, that the saying any thing before judges when sitting, might be of some consequence, and through God's strength I would rather undergo many deaths than accuse any of these worthy persons.

I cannot but also acquaint you, that I think it was a hardship put upon me, to print my depositions as they stood, because they were very lame, since simple answers to the questions are only set down, and neither the question that gave a rise to the answers, nor the just extenuations as to persons and things which I gave in my answers. Which had they been published, it would have been found from what I said, that there could be no reason

named, to know from him, if he might do it; and Mr. Steuart having consented, he communicated the said letter to Mr. Shepherd, who told the deponent that he would communicate

given why that affair should have been prosecuted with so much cruelty and violence.

And having had a liberty from the lords of council to go abroad, but was enjoined to wait upon the secretaries at London, upon which I told some of our lords, that I was afraid that might have very ill consequences, for if I should be brought before the king, I would say the same things to him in the extenuation of that affair, which I had said to them, which could not justify the methods that had been taken in prosecuting the nobility.

But when I came to London, and had waited upon my lord Melford and told him this, he told me, the less the king heard of me or saw me, it would be the better; and that therefore it was his advice to me to go abroad and live quietly, and offered me a pass, which I accepted, and I accordingly went abroad.

I am, &c. W. CARSTAIRS.

“ This Letter sets this excellent person's case and sufferings in a due light, and I am only sorry that he had not time and leisure to enlarge upon the base manking of his depositions, and to insert the just extenuating circumstances he was careful to give of every thing; and how these depositions were printed I cannot say, this reverend and candid person declares them miserably curtailed and maimed; and it seems the managers have been sensible of this, and therefore they have not insert them in the Registers, but there is a blank for them of two pages.

“ I come now to give what I meet with in the council records, with relation to this extraordinary person, and I shall likewise intermix some things from other authentic documents before me, which will in some measure help to make up what is wanting in his printed depositions.

“ Mr. Carstairs is not named in the Registers of Council, after his coming down, till September 5, and it seems, from August 19th, to this day he had lien in the irons; and now the council, according to the chancellor's threatening in private, come to pass an act in the forenoon Sederant, the tenor whereof follows:

Act anent Mr. WILLIAM CARSTAIRS'S Torture, Edinburgh, Sept. 5, 1684.

‘ It appearing that Mr. William Carstairs is concerned in the late conspiracy, and there being pregnant presumptions of his knowledge of this atrocious villany, to the effect that the whole plot may be known, and the truth expiscated; and having called the said Mr. William Carstairs, he would not answer and depone thereanent, albeit it was allowed by the advocate, that what he declared or deponed should not militate against him. The

contents of it to some persons in Edinburgh, but did at that time name no body, as the tenor thinks: sometime thereafter Mr. Sheppard told the deponent, that he had commu-

‘ lords of his majesty's privy council con- sidering, that thereby he renders himself suspect, do ordain that Mr. William Carstairs be questioned in torture this afternoon, and the questions agreed upon in the council, and appoint one of the bailies of Edinburgh to be present, and the executioner.’

Follow the INTERROGATORIES to be put said Mr. WILLIAM CARSTAIRS, which read in council, and approved of unanimous vote.

‘ 1. Who were the persons, whereupon what occasion, that did first acquaint with this conspiracy or association.

‘ 2. What persons in Scotland or England you know to have been concerned in this conspiracy.

‘ 3. Who were the great managers, authors of this intended insurrection.

‘ 4. Who was to contribute the money transmitted to Argyle, to buy arms.

‘ 5. Where were they to begin the insurrection, and whom did they look upon as friendly to their cause in the kingdom of Scotland.

‘ 6. How long have you been acquainted with Mr. Fergusson, and how oft have you been in company with him, sir John Monro, John Cochran, commissary Monro, B. Jerviswood, and the two lairds of Cessford together, and who other Scots or English to meet with you.

‘ 7. What was the carriage, or access to this conspiracy, or any part of it, of B. Jerviswood, the two Cessnocks, commissary Monro, or any other Scotsmen.

‘ 8. Was the ten thousand pounds, or part of it remitted to Argyle, or was the arms bought or bargained for.

‘ 9. What place in Scotland did Argyle go to land in, and make a descent.

‘ 10. What correspondence did Argyle have with any in Scotland.

‘ 11. What concern in this conspiracy had the earl of Lowdon, the lord Strathmore, the lord Melvil, and sir John Cochran.

‘ 12. At your last being in Holland did you see or understand, that Argyle corresponded with Lowdon, Strathmore, Melvil, as likewise with the English secretaries who had fled to Holland, particularly with the lord Gray, sir Thomas Armstrong, Mr. Fergusson, or Mr. Vane.

‘ 13. What letters were those which he depones he shewed you from Argyle, and what was the contents and design of them.

‘ 14. What was the contents of the letters you carried to Argyle from Holms, and direction of the duke of Monmouth, lord Russel, and what message was carried to Argyle from Monmouth and

the contents of the letter above-named to colonel Sidney, and that colonel Danvers was present; and told the deponent, that colonel Sidney was averse from employing the late

sel; of this letter you may particularly remember, it being about a month before major Holms was taken.

15. What persons of consideration were they, who, as you told major Holms, had proposed to raise at first thirty thousand pounds, and some other sum, and at last agreed to commit ten thousand pounds to Argyle, or some sum or other.

16. What messages were those you came so oft upon from Jerviswood to major Holms and Mr. Shepherd, anent that money to be remitted to Argyle.

17. Did you not see Mr. Spence, alias Butler, waiting on Argyle, at your last being in Holland with him.

18. Are you acquaint with Mr. Lenzienson Gore of Keuterden, where you was apprehended at Mr. Carsteise's house, under the name of Swan, and if he be concerned in this conspiracy.

19. What do you know of Aaron Smith's being sent down to Scotland, and to whom he was directed.

20. What do you know of any of your countrymen's transactions with the late Shaftsbury, colonel Sidney, or with the duke of Monmouth.

"In the afternoon of the same day, September 5, the council called and interrogated Mr. Carstairs, 'If he would now answer the queries upon oath ingenuously. He still shunned so to do, albeit the advocate declared what the said Mr. Carstairs deponed should not militate or operate against him in any manner of way, wherunto the council assented. The council called for one of the bailies of Edinburgh; and the executioner with the engines of torture being present, the lord chancellor commanded the bailie to cause the executioner to put him in the torture, by applying the thumb-screw to him, which being done, and he having for the space of an hour continued in the agony of torture, the screw being by space and space stretched until he appeared near to faint; and being still obstinate and refractory to depon, the lords thought fit to ease him of the torture for that time, but certified him that to morrow at nine of the clock, he would be tortured by the boots if he remained obstinate."

"September 6." "The lord treasurer-depute, appointed to confer with Mr. William Carstairs for bringing him to an ingenious confession, upon the interrogatories yesterday put to him in torture, reports, that he was content to depon thereupon, and be ingenious upon the terms mentioned in a paper exhibited by the lord treasurer-depute. Which paper being read and considered, was unanimously voted, and an act made thereupon, and the lord treasurer depute was authorized

earl of Argyle, or meddling with him, judging him a man too much affected to the royal family, and inclined to the present church government; yet Mr. Shepherd being put upon

'to give his word of honour to Mr. Carstairs, 'for performing of the council's part of these articles contained in the paper relating to them, he always performing his part; and 'he is ordered to the castle, and none are 'permitted to speak or converse with him, and 'particularly Mr. William Spence is not to be 'suffered to see him. And a chirurgurgeon is allowed him in order to his cure.'

"All I meet with in the council-books further upon the subject, is, Mrs. William Spence and Carstairs are, September 19, removed to Dunbarton castle, and allowed liberty within the walls. And September 30, Mr. Carstairs is ordered from Dunbarton to Stirling castle, and to be at large within the walls of it. And immediately after this, upon the foot of the page 517, of this volume, there is a paper pinned to the leaf, upon which is writ as follows." "The lord Lundin, secretary of state, 'as commissionate in the act above, did send 'in the underwritten certificate to the clerks of 'council, dated at Barntoun October 1, 1684, 'the tenor whereof follows. Whereas his majesty's honourable privy council authorized 'me, upon the terms mentioned in the foregoing 'act, to be fulfilled by Mr. Carstairs, to promise upon my word of honour, to procure him 'the conditions and indemnity therein mentioned; and these are therefore to testify to 'all concerned, that the said Mr. Carstairs 'hath fulfilled his part, by answering upon oath 'all questions proposed to him preceding this 'day. In witness thereof these presents are 'subscribed. DRUMMOND.

'In obedience to which act and certificate, 'the clerks of council delivered to the said Mr. 'Wm. Carstairs the act of council, of the date of 'the sixth of September.'

"And then in the register there follows a blank for two pages in folio. Whether this was left to be filled up with the deposition of the reverend Mr. Carstairs, and its being printed in so lame and maimed a manner prevented its being filled up, or, after it was printed in so unfair a manner, that they were ashamed to insert in the registers a just copy of his deposition, with the circumstances and extenuations he gave upon oath, or what the occasion was, I cannot determine; but thus it stands in the council-books, and I find no more with relation to him.

"That I may give the reader all I have further concerning with Mr. Carstairs, I shall add an account given by himself in a letter to his friends at the time of his depositions, for preventing, as he tells them, of lying aspersions upon himself, and satisfying them as to his conduct in this matter.

"The reader will observe, that the council, in their act of the sixth of September, deal not so fairly as to insert the paper of conditions

it by the deponent, still urged, that one might be sent to the earl of Argyle; but, as Mr. Shepherd told him, he was suspected upon the account of his urging so much; yet after-

agreed to by their delegate and Mr. Carstairs, which they ought in justice to have done, seeing these conditions were so unanimously approved: and, as I hinted before, they record nothing of what passed at his examination, September 8.

“It is the more necessary I insert the conditions Mr. Carstairs obtained before he would give his declaration upon oath, as to the interrogatories above named. In his present circumstances, and after he had gone through the torture, he essayed to get the best conditions possible, that any thing he should say should do no harm to others, and by his candor, precaution and prudence, he obtained from the secretary the following Conditions, which were signed by them both, and, upon the public faith of the kingdom pledged in them, he prevailed with himself to give his deposition.

CONDITIONS Mr. CARSTAIRS had, Edinburgh Castle, 1684, under the Secretary's hand.

‘That Mr. Carstairs answer all interrogatories that shall be put to him, betwixt and the first of October next, upon his great oath.

‘The which being done, he shall have his majesty's full pardon and remission, for his life, limb, fortune, estate, and fame.

‘That he shall never be brought as witness against any person or judicatory, directly or indirectly, for any thing contained in his answers.

‘And further, That the said Mr. William Carstairs shall never be interrogate in torture, or out of the same, concerning any thing preceding the date of this paper, after the day abovementioned, except he himself shall be delated as accessory, and that accésion to be after the date of this, or his remission.’

‘And whereas the council, upon the considerations abovenamed, hath, by their act September 6, authorized me to give my word of honour, and solemn promise, that so soon as the premises are fulfilled by Mr. Carstairs, I shall deliver him the council's act in those things, and in a convenient time thereafter, not exceeding a month, his majesty's pardon, in ample form, above exprest: therefore I, by my promise, give my faith to Mr. Carstairs, in manner above exprest, time and place above said.’

“His Depositions, without his knowledge, and to his grief, and scarce agreeable to these conditions, were, in a few hours after they were made, printed by the managers, and crying in the streets of Edinburgh. Mr. Carstairs's candor was singular, and such unfair dealing never entered in his mind, otherwise he would have taken care to prevent it, if conditions would have bound those people, as indeed they did not.

“These printed Depositions are lame,

wards he pressed, without the deponent's knowledge, that the deponent being to go to Holland, however might have some commission to the earl of Argyle; which he having

maintained, and unfair, as we have seen Mr. Carstairs declaring, and therefore I shall not reprint them again; they are in every body's hand, and have been too often printed already.

“It was yet a great deal worse in the advocate, to adduce the printed copy as an adminicle in Jerviswood's trial; and the reason he gives there for this, is but mere juggling, that though it was capitulate, he (Mr. Carstairs) should not be adduced as a witness, yet it was agreed, the depositions should be published. If the advocate mean any agreement among the council, it is perfect juggling; if he mean an agreement with Mr. Carstairs, that worthy person, while alive, still disclaimed this: and we see it is far from being in the conditions, but rather the plain contrary; for it was a poor matter to Mr. Carstairs, not personally to be adduced as witness. If his declarations emitted were to militate against others, he reckoned he was made a witness; and this was certainly an indirect making him a witness: and it appears most evidently from Mr. Carstairs's own letter, that one condition offered him was, ‘That nothing he said should be brought directly or indirectly against any man in trial.’ And when he was solicited to appear before the judges, his answer was, ‘He had rather undergo many deaths, than accuse any of those worthy persons.’ So that upon the whole, I cannot but suspect that article in Jerviswood's printed Trial, where Mr. Carstairs's depositions are said to be renewed upon oath, the 22d of December, in presence of his majesty's privy council, as being directly contrary to the second and third conditions granted him. I find nothing of it in the council-registers.”

“Many reports were spread, and lying stories told, as if Mr. Carstairs should have spoken many things to the disadvantage of the noblemen and gentlemen about whom he was interrogate; which, with what fell out in Jerviswood's trial, grieved him exceedingly, and he wrote a letter to his friends about this time, from which I shall give a few more hints, passing many things already noticed, and with them and my account of this worthy person.

‘He testifies his abhorrence of any design against the king or duke's life; that all his countrymen with whom he spake, were free of any design against the king or government, and that he frequently told the lords who came to him, this whole affair upon which he was questioned, amounted to no more than talk, without so much as any formed design, and even talking was much broke off, before the discovery of the plot. He shewed them how unwilling he was to bring any man to trouble, and that it could not but be very grievous to him, to be forced to speak of any who had trusted him as a friend, especially when the business never

informed the deponent of, the deponent told him, that he himself would not be concerned; but if they would send another, he would introduce him; but nothing of this was done: upon which the deponent went over, without any commission from any body, to Holland, never meeting with James Steuart above-named: he was introduced to the earl of Argyle, with whom he had never before conversed, and did there discourse what had past betwixt Mr. Shepherd and him; and particularly about remitting of money to the said earl from England; of which the said Mr. Steuart had written to the deponent, namely, of 30,000 pounds sterling; and of the raising of 1000 horse and dragons; and the securing the castle of Edin-

burgh, as a matter of the greatest importance. The method of doing this was proposed by the deponent, to be one hour, or thereby, after the relieving of the guards: but the earl did not relish this proposition, as dangerous: and that the castles would fall of consequence, after the work abroad was done. James Steuart was of the deponent's opinion for seizing the castle, because it would secure Edinburgh, the magazines and arms; as to the 1000 horse and dragons, my lord Argyle was of opinion, that without them nothing was to be done; and if that number were raised in England to the said earl, he would come into Scotland with them; and that there being so few horse and dragons to meet them, he judged he might get the

came to any bearing, or to that height as to be any way prejudicial to the government.

As to the objection made against him, That he had been so particular in his confessions, he says, that could not be escaped, his interrogatories were so particular, and he upon oath. We have before noticed, how his extenuations were omitted; he adds, That he had declared as to my lord Melvil, his great aversion to be any way concerned in that affair; and so fair was he, that he acknowledged he himself was the person, who, with difficulty, prevailed with my lord, to come to the meeting. As to old Cesnock, he said, he was a man so cautious, and of so few words, they knew not what to make of him; that his son was much upon the reserve; that he had nothing to say of the lord Stair, and did not think he had any knowledge of their meetings, and that he had never spoke with him upon that head: he commended Mr. Stuart much for his peaceable temper, and acknowledged his correspondence with him.

That he had never conversed with the duke of Monmouth, and what was in Holms's declaration was a mistake; and, for any thing he knew, the duke rather discouraged as encouraged the affair; that Mr. Carstairs was much a stranger to the methods in Scotland, as to this business, and could give no account of any ministers engaged in it. He commended Langshaw as a person very much for moderate measures, and addressing the king's ancient grievances. All this and much more, he says, he signified to the lords of the committee present.

In the same letter he regrets, that his depositions were read in the criminal court, and says, That he was so far from knowing of it, that upon hearing of it he went and waited upon some of the lords of council, and represented his deep concern on that account, and complained of it as a breach of their conditions with him; and that the chancellor (upon reading the conditions) owned before the treasurer and others of the counsellors, that what was done, was indeed a breach with him, an inadvertency, though without any design, in the advocate; that the advocate

himself, when Mr. Carstairs waited on him, declared he was indisposed when the council transacted that affair, and did not fully know them. Whereupon Mr. Carstairs gave him a copy of them, signifying to his lordship, that he expected the faith given him should have been kept, and he hoped any thing he had confessed should never be heard of any more in public, against any man: and the rather,

That when he was called from Stirling castle before the lords, they used many arguments with him, to give a general account before the justice-court of the substance of his confessions to them; yet he signified his utter aversion to it, as what would be a witnessing against all whom he mentioned. And the lords were pleased to tell him, they would rather die than break conditions with him; which he depended upon.

Those things Mr. Carstairs desires in his letter, may be used for the greatest advantage of all concerned; and says, it was declared by the lords, and believed by him, that what he discovered was for their private satisfaction, and not at all to militate against any; and adds, the nature of the thing declares so much, since the interrogatories propounded to him were such as could not well be proposed in a criminal court, and answered by him in a way he could not well have answered them as a witness, and in a way of proof, and that the lords still assured him they would keep their promise to an ace.

Thus much I thought necessary for the just vindication of the memory of one to whom the Church of Scotland are under obligations, whose character is so universally known, and savoury for every good thing, that I say no more of him. The people of this time knew his character, and therefore they were so hard upon him when in their clutches; and, by breach of condition, adduce what he had said in Jerviswood's process, as what they imagined would be of great weight, coming from Mr. Carstairs. This is all the reason I have for insisting so long in setting this great man's sufferings in their due light, and come now forward to those of his dear friend and fellow-sufferer."

country without trouble, having such a standing body for their friends to rendezvous to; and the said earl said he could shew the deponent the convenient places for landing, if he understood, and, as the deponent remembers, where the ships could attend. The deponent remembers not the names of the places. The deponent spoke to the lord Stairs, but cannot be positive that he named the affair to him, but found him shy: but the earl of Argyle told him, he thought Stairs might be gained to them; and that the earl of Lowdown being a man of good reason and disobliged, would have great influence upon the country, and recommended the deponent to major Holms, with whom the deponent had some acquaintance before, and had brought over a letter from him to the earl of Argyle; but the deponent had not then communicated any thing to the said Holms. James Steuart laid down a way of correspondence by cyphers and false names, and sent them over to Holms and the deponent, for their use (which cyphers and names are now in the hands of his majesty's officers, as the deponent supposes), and did desire the deponent earnestly to propose the 30,000*l.* sterling above-named to the party in England, and did not propose any less; for as the earl told the deponent, he had particularly calculated the expence for arms, ammunition, &c. But James Steuart said, that if some less could be had, the earl would content himself, if better might not be; but the earl always said, that there was nothing to be done without the body of horse and dragoons above-mentioned. During the time of the deponent his abode in Holland, though he had several letters from Shephard, yet there was no satisfactory account, till some time after the deponent parted from the earl of Argyle, and was making for a ship at Rotterdam, to transport himself to England, James Steuart wrote to him that there was hopes of the money. The next day after the deponent came to England, he met with sir John Cochran, who, with commissar Monro, and Jerviswood, was at London before he came over; and deposes, that he knows not the account of their coming, more than for the perfecting the transaction about Carolina: and having acquainted sir John Cochran with the earl's demands of the 30,000 pounds sterling, and the 1000 horse and dragoons, sir John carried him to the lord Russel, to whom the deponent proposed the affair; but being an absolute stranger to the deponent, had no return from him at that time; but afterwards having met him accidentally at Mr. Shephard's house, where the lord Russel had come to speak to Shephard about the money above-named, as Mr. Shephard told the deponent: The deponent (when they were done speaking) desired to speak to the lord Russel, which the lord Russel did, and having reiterate the former proposition for 30,000*l.* sterling, and the 1000 horse and dragoons, he the lord Russel told the deponent, they could not get so much raised at the time; but if they had 10,000 pounds to begin, that would draw people in; and when they were

once in, they would soon be brought to more; but as for the 1000 horse and dragoons he could say nothing at the present: for that hehoved to be concerted upon the borders. The deponent made the same proposal to Mr. Ferguson, who was much concerned in the affair, and zealous for the promoting of it. This Mr. Ferguson had in October, or November before, as the deponent remembers, in a conversation with the deponent in Cheapside, or the street somewhere thereabout, said, That for the saving of innocent blood, it would be necessary to cut off a few, insinuating the king and the duke: but cannot be positive whether he named them or not. To which the deponent said, That's work for our wild people in Scotland, my conscience does not serve me for such things; after which the deponent had never any particular discourse with Ferguson as to that matter; but as to the other affair, Ferguson told the deponent that he was doing what he could to get it effectuate, as particularly that he spoke to one major Wildman, who is not of the deponent his acquaintance. Ferguson blamed always Sidney as driving designs of his own. The deponent met twice or thrice with the lord Melvil, sir John Cochran, Jerviswood, commissar Monro, the two Cessnocks, Montgomery of Landshaw, and one Mr. Veitch, where they discoursed of money to be sent to Argyle, in order to the carrying on the affair; and though he cannot be positive the affair was named, yet it was understood by himself, and, as he conceives, by all present, to be for rising in arms for rectifying the government. Commissar Monro, lord Melvil, and the two Cessnocks, were against meddling with the English, because they judged them men that would talk, and would not do, but were more inclined to do something by themselves, if it could be done. The lord Melvil thought every thing hazardous, and therefore the deponent cannot say he was positive in any thing; but was most inclined to have the duke of Monmouth to head them in Scotland, of which no particular method was laid down. Jerviswood, the deponent, and Mr. Veitch, were for taking money at one of these meetings. It was resolved, that Mr. Martin, late clerk to the justice-court, should be sent to Scotland, to desire their friends to hinder the country from rising or taking rash resolutions upon the account of the council, till they should see how matters went in England. The said Martin did go at the charges of the gentlemen of the meeting, and was directed to the laird of Polwart and Torwoodlie, who sent back word that it would not be found so easy a matter to get the gentry of Scotland to concur. But afterwards in a letter to commissar Monro, Polwart wrote that the country was readier to concur than they had imagined, or something to that purpose. The deponent, as above-said, having brought over a key from Holland, to serve himself and major Holms: He remembers not that ever he had an exact copy of it, but that sometimes the one, sometimes the

other kepted it, and so it chanced to be in his custody when a letter from the earl of Argyle came to major Holms, intimating, that he would join with the duke of Monmouth, and follow his measures, or obey his directions. This Mr. Veitch thought fit to communicate to the duke of Monmouth, and for the understanding of it was brought to the deponent, and he gave the key to Mr. Veitch, who, as the deponent was informed, was to give it and the letter to Mr. Ferguson, and he to shew it to the duke of Monmouth; but what was done in it the deponent knows not. The deponent heard the design of killing the king and duke, from Mr. Shepherd, who told the deponent some were full upon it. The deponent heard that Aaron Smith was sent by those in England, to call sir John Cochran, on the account of Carolina; but that he does not know Aaron Smith, nor any more of that matter, not being concerned in it. Shepherd named young Hamden frequently as concerned in these matters.

Signed at Edinburgh-castle, Sept. 8, 1684, and renewed the 18th of the same month.

WILLIAM CARSTARES,
PERTH, Cancell. I. P. D.

EDINBURGH CASTLE, Sept. 18, 1684.

Mr. *William Carstares* being again examined adheres to his former deposition, in all the parts of it, and depones he knows of no correspondence between Scotland and England, except by Martin before named; for those gentlemen, to whom he was sent, were left to follow their own methods. Veitch sometimes, as the deponent remembers, stayed sometimes at Nicolson, Stabler's house at London-Wall; sometimes with one widow Hardcastle in Moorfields. The deponent did communicate the design on foot to doctor Owen, Mr. Griffil, and Mr. Mede, at Stepney, who all concurred in the promoting of it, and were desirous it should take effect; and to one Mr. Freth in the Temple, counsellor at law, who said that he would see what he could do in reference to the money; but there having gone a report, that there was no money to be raised, he did nothing in it; nor does the deponent think him any more concerned in the affair. Nelthorp frequently spoke to the deponent of the money to be sent to Argyle, whether it was got or not; but the deponent used no freedom with him in the affair. Goodenough did insinuate once, that the lords were not inclined to the thing, and that before, they would see what they could do in the city. The deponent saw Mr. Ferguson and Mr. Rumsey lurking, after the plot broke out, before the proclamation, having gone to Ferguson, in the back of Bishopsgate-street, at some new building, whither he was directed by Jerviswood, who was desirous to know how things went. Rumsey was not of the deponent his acquaintance before, but they knew as little of the matter as the deponent. This is what the deponent remembers; and if any thing

come to his memory, he is to deliver it in betwixt the first of October. And this is the truth, as he shall answer to God. WILLIAM CARSTARES.

PERTH, Cancell. I. P. D.

At EDINBURGH, Dec. 22, 1684.

These foregoing Depositions, subscribed by Mr. William Carstares, deponent, and by the lord chancellor, were acknowledged on oath by the said Mr. William Carstares, to be his true depositions; and that the subscriptions were his, in presence of us undersubscribers,

WILLIAM CASTARES,
PERTH, Cancell.
DAVID FALCONER,
GEORGE MACKENZIE. QUEENSBERRY.
ATHOL.

His majesty's Advocat for farther probation adduces the Examinations of Mr. Shephard, taken before sir Leolin Jenkins, secretary of state for England, with the Information or Deposition of Mr. Zachary Bourn, relating to the Plot, signed by him and secretary Jenkins of which Depositions the tenors follow:

The EXAMINATION of THOMAS SHEPHARD of London, Merchant, taken upon oath before the Right Honourable sir Leolin Jenkins knight, his majesty's principal secretary of state, the 23d day of December, 1683.

The deponent saith, That Ferguson told him, on or about the month of April last, that an insurrection was intended both in England and in Scotland; and that for the settling that affair betwixt the two nations, Mr. Baillie, Mr. Monro, sir John Cochran, sir Hugh and sir George Campbells, with some others (whose names this deponent heard not) were come to London.

That the deponent had some acquaintance with Mr. Baillie, Mr. Monro, and sir John Cochran, and none at all with sir Hugh and sir George Campbells; that Mr. Baillie, told the deponent, that the earl of Argyle demanded 30,000*l.* of the English to capacitate him to begin the business effectually in Scotland, and that he the said Baillie likewise told the deponent, that having concerted things with the lord Russel, and others, he the said Baillie found an impossibility of raising that sum; after which the said Baillie had acquainted the deponent, that they were certainly promised 10,000*l.*, which sum was agreed to be paid into the deponent's hands, in order to be remitted into Holland, for the providing of arms; and that the said Baillie told the deponent at divers times, that the said sum, or at least one half of it, would be paid such a day, and such a day; and sometimes asked the deponent, if he had received any part of the said money; to which the deponent replied, that he had not, and that he the deponent scarce thought any would be paid.

And the deponent also saith, that having had some little conversation with sir John Cochran, he remembers well, that both of them did sometimes lament the delays in not

paying in the money; and said that although the said 10,000*l.* were payed in, they, the said sir John Cochran and Mr. Monro, feared it would be too little: and this deponent further saith not as to any new matter. But the deponent being asked, to explain what he thought was meant by the words above written, viz. *capacitat* him, the earl of Argyll, to begin the business, he this deponent sayeth, that he did understand by the word *business*, an insurrection in Scotland.

Sic Subscritur, THOMAS SHEPARD.
Jurat coram L. JENKINS.

The INFORMATION of ZACH. BOURN, of London, Brewer, taken upon oath, the 10th day of December, 1685, before the right honourable Mr. Secretary Jenkins.

The Informant deposeth, and sayeth, That Mr. Baillie sat up one night, if not two, with Mr. Ferguson, and went several times in the evening with him to the duke of Monmouth, and the chief managers of the conspiracy; that Ferguson told the deponent, that he the said Baillie was the chief man for the Scots, next to the lord Argyll; that he the said Baillie did sit up the greatest part of one night with the said Ferguson, at which time this deponent believeth they were busy in preparing the intended declaration, which the deponent has the more reason to believe, in as much as the said Ferguson did go about to shew him the deponent such a paper, wherein the said Ferguson was hindered by the coming up stairs of some person, to speak with the said Ferguson; that the said Ferguson told the deponent, that the main business of the said Baillie in meeting the said conspirators, was in order to get from them the 10,000*l.* promised for the buying of arms, for the insurrection intended in Scotland.

That the deponent saw Mr. William Carstares come often to the lodgings of the said Ferguson; but that the said Ferguson never told the deponent of any discourse held by him with the said Carstares; and further this deponent saith not.

Sic Subscritur, ZAC. BOURN.
Jurat, coram L. JENKINS.

His majesty's Advocat likewise produced several warrants and papers, to move that those depositions are signed by sir Leolin Jenkins.

His majesty's advocat also produced the books of adjournal, bearing Mr. William Veitch to be a forfaiter traitor, and the act of Parliament whereby the forfaiture is ratified.

HIS MAJESTY'S ADVOCAT'S SPEECH TO THE INQUEST.

My Lords and Gentlemen;

You have now a conspiracy against his majesty's sacred person and royal government, so fully discovered, that they must want reason as well as loyalty, who do not believe the dis-

covery; and they must be enemies to sincerity, as well as to the king, who do not acknowledge it. Beside that the councils of all the three nations thought the proof sufficient for indicting a general thanksgiving through all these nations, and that the judges of England thought the same strong enough to infer forfeiture of life and estate against some of all ranks there; you have a discovery made here from the late earl of Argyll's own letters, and the confession of his own emissaries, the two surest proofs that law ever invented, or the nature of human affairs can allow; and I am this day to add to all this, a new set of proofs in the process that I now lead against this pannel, from the confessions of noblemen and gentlemen, who have been engaged in this wicked conspiracy: and who, from a sense of their guilt, are content freely to depose against their nearest relation and their most intimate friend; in which having thus cleared to you, that there was really such a conspiracy, I shall, in the next place, proceed to prove this pannel's accession to it.

It cannot be imagined, that we would willingly involve our countrymen in it, without a conviction stronger than our kindness to Scotland, nor did his majesty's servants accuse this pannel, without the opinion of the ablest lawyers of the kingdom, who did with them concur to think, that there was not the least occasion of doubting left to the most indifferent inquest of his guilt, after they had seriously and with reflection read over and pondered the probation now laid before you.

The person accused of accession to this crime, is the ringleader of all those who in this kingdom concurred with the English conspirators, as you may see by the testimonies of all who have deposed; and it was indeed fit and just to begin with the most guilty; so that if he be not convicted, there should no man be punished for this conspiracy; all the noise we have heard of it, is but a cheat, the king's judges have been murderers, all the witnesses have been knaves, and such as died for it, have been martyrs.

The accession charged on the pannel is not an accidental escape, nor is it proved by witnesses, who can be suspected of unkindness to his person, or his cause; for it is a long tract of a continued design, gone about with the greatest deliberation and concern imaginable, and proved by his nearest relations, and persons so deeply engaged in that cause, for which he suffers, that they were content with him to venture their lives and fortunes in that quarrel. He is not accused of a crime that can amount only to a single murder, though that be a dreadful crime, but a rebellion, which was to draw upon us a civil war, that murder of murderers, in which hundreds of thousands were to fall; and to crown all, he was to begin, and to be the chief promoter of a rebellion, in which one of the first steps was to kill his sacred majesty, and his royal brother: and one of the chief witnesses, which I have led against him,

is Bourn, which Bourn confessed that he was to kill the king, and who confesses the pannel sat up several nights with Ferguson, the other contriver of the king's murder: and so familiar was he with him, that Bourn depones, that the said pannel had been with Ferguson at the drawing of the manifesto; whereby he was not only to be an actor, but to be the justifier of that horrid villainy; and therefore Bourn depones, that Ferguson (the best judge in that case) looked upon him as the chief man, next to Argyle. But because no man is presumed to go to such a height, without previous inclination and motives, I shall, to convince you that this gentleman was very capable of all that was libelled against him, remember you, that he is nephew and son-in-law to the late Waristoup, bred up in his family, and under his tutory. About the time of his plot it was undeniably known, and is now sufficiently proved by two present witnesses, the earl of Tarras and commissar Monro, that he thought himself desperate, knowing himself to be guilty of treason by Blackwood's case; and as it is presumable, that a man that is guilty of one point of treason, will commit another, so when a man is desperate as to his life and fortune, he is capable of any thing. He was likewise animated to commit this crime by the intelligence he had that there was a plot in England, carried on by men of so great parts, fortune, and influence, and by the too probable hopes, that they would get all the western shires to join with them here, because of the common guilt in which they had engaged themselves, by their late extravagancies, they made an account of an assistance of twenty thousand men; and by Philiphaugh's deposition, that these gentlemen expected the concurrence of the Southern shires; and thus I am to prove to you a crime, which is in itself so probable and likley, that it should need little probation, though I have adduced for your conviction sufficient evidences, albeit the crime were in itself very unlikley.

The crimes, which I hope I have proved, are, 1. That Jerviswood the pannel transacted for money to the late earl of Argyle, a declared traitor. 2. That he designed to raise a rebellion. 3. That he intercommuned with the earl of Argyle and Mr. Veitch, declared traitors. 4. That he was present where it was treated, either that Argyle should have money from the English, and assistance from Scotland, or that a rebellion should be raised, and that he did not reveal the same; and all these being found relevant *separatim*, it is sufficient for me to have proved any one of them. And if a gentleman was lately found guilty of high-treason, by the opinion of all the lords of session, for not revealing, that sir John Cochran sought fifty pounds sterling from him,* though he refused the same, and though he believed it was sought for a charitable subsistence to preserve him from starving, what deserves this

* This was the Case of Peterfield of Donchal, A. D. 1684, in this Volume.

pannal, who sought thirty thousand pounds sterling, to buy him arms, to invade his native country?

That Jerviswood was designing to carry on a rebellion, or at least was accessory, or (as our law terms it) was art and part thereof, is clearly proved; but that in this occult and hidden crime, which uses not to be proved by clear witnesses, I may lead you throw all the steps of the probation, which, like the links of a chain, hang upon one another: You will be pleased to consider, that, 1. It is proved that he desired a blind commission to go to England, not to manage the affairs of the Carolina company, as he confessed, but to push the people of England to do something for themselves, because they did only talk, and not do. And what he would have them to do, appears too clearly; because he tells the earl of Tarras, it was probable, that if the king were briskly put to it by the parliament of England, he would consent to exclude the duke from the succession: here is not only a reasonable design (though a design be sufficient in treason) but here are express acts of treason proved, viz. The treating with the earl of Tarras upon this design, the settling a correspondence with him for the prosecution of it, and the writing letters from London to him concerning it, and the sending down Mr. Martin to complete it by a general rising. As he designed to push on the English, so he prosecutes closely this design upon all occasions. On the road he complains cunningly and bitterly, that our lives, laws, and liberties, and the Protestant religion, were in danger, the style and method of all such as design to rebel; after he arrives at London, he engages the conspirators there to assist the late earl of Argyle, a declared traitor, with money to buy arms; this was indeed to push the English to do the most dangerous things by the most dangerous man, and in the most dangerous methods. He enters also in a strict correspondence with Ferguson the contriver, with Shephard the thesaurer, and Carstairs the chaplain of the conspiracy.

Alexander Monro, another present witness, proves that he argued with him that it was necessary to give Argyle money expressly for carrying on the rebellion; and that they did meet at Jerviswood's chamber where this was spoke of, and from which Mr. Robert Martin was sent to their friends in Scotland, to know what they would do; and though the silly caution was, that they sent him to prevent their rising, yet a man must renounce common sense, not to see that the design was to incite them to rebellion, and to prevent only their doing any thing in this rebellious design, by which they might lose themselves in a too early and abortive insurrection here, till things were ready in England. For 1. This commission was given him in a place, and by a company who had been themselves treating immediately before of sending money to the earl of Argyle to buy arms, and certainly those arms were to be bought for men, and not for a magazine.

2. They were treating how many men could be raised in Scotland. 3. Carstares' Deposition bears, that Martin was sent to hinder rash resolutions, till they saw how matters went in England; and the return to their embassy bore, that it would not be an easy matter to get the gentry of Scotland to concur, but afterwards better hopes of their rising was given, which could not have been, if the true commission had not been, to raise Scotland. 4. That sir John Cockran made a speech to that purpose, is expressly proved, and that Jerviswood spoke to the same purpose, is proved by a necessary consequence; for since it is proved, that he spoke, and that he did not speak against it, it must necessarily follow that he spoke for it, though the witness is so cautious, that he cannot condescend upon the words after so long a time, and it is against sense to think, that Jerviswood, who in private pressed the same so much upon commissar Monro, and who was the Deacon-Conveener here, and who as Mr. Martin their envoy declared, was the person who was to be sent for the arms, should not himself have been the most forward man in that design. But above all 'exitus acta probat,' this commissioner (who being a mere servant, durst not have proposed any thing from himself, being a mean person, and being one, who, as the earl of Tarras deposes, would say nothing but what was in his paper) does expressly declare, that he came from Jerviswood and others; and in the meeting with him, a rebellion is actually formed, and it is resolved, they should seize the king's officers of state, garrisons, and forces, and that they should join with the late earl of Argyll, and put their own forces in a condition to join with these forces, that were to come from England, and they gave a sign, and a word, which uses only to be done in actual war; so here is treason clearly proved, by two present witnesses, from the first design to its last perfection.

Nor can it be objected, that they are not concurring witnesses, but *testes singulares* upon separate acts; for in reiterable crimes, witnesses deposing upon different acts, do prove, if the deeds tend to the same end; as for instance, if one witness should depose, that they saw a traitor sit in a council of war in one place, and in another place they saw him in arms; or that one saw him assist at a proclamation in one place, and saw him in arms in another; or that one saw him write a treasonable paper, and another saw him use it: These witnesses are still considered as *contestates*, or concurring witnesses; and ten or twelve inquests have so found, and upon their verdict, rebels have been lately hanged. The learned judges of England being all met together did expressly find, that one witness proving, that A. B. said, that he was going to buy a knife to kill the king, and another deposing, that he saw him buy a knife without telling for what, that these two witnesses were *contestates*, and proved sufficiently the crime of treason; yet there the one witness proved only a remote design, and the

other an act which was indifferent of its own nature, and became only treasonable by the connection; but no witnesses ever deposed upon things so coherent, and so connected together, as these do; for they depose still upon the same person carrying on the same design of a rebellion, as to which, in one place, he is exciting his own nephew, and telling him his resolutions, and settling a correspondence with him; at another time he presses commissar Monro to the same rebellion, at a third, he holds a meeting at his own chamber, and speaks concerning it, and from that meeting he sends a trusty, who forms the rebellion. Besides all this, though two witnesses be sufficient, I have adduced Mr. William Carstares chief conspirator, and who choosed rather to suffer violent torture, than to disclose it; he likewise deposes upon all these steps, and connects them together, and thus his Deposition is twice reiterated, upon oath, after much premeditation. And I likewise adduce two depositions taken upon oath, by sir Loolim Jenkins, who was impowered by the law of England, and at the command of the King, and the council of England, upon a letter from his Majesty's officers of state here, in which deposition, Shephard, one of the witnesses, deposes, that Baillie came frequently to him, and desired him to advance the money, and lamented the delays; and that there was so little to be advanced; and who should be better believed than one who was his own trusty, and a person who was able to advance so great a sum? Bourn, another of the witnesses, deposes, that Ferguson told him, that the pannel spoke frequently to him concerning the same money, and that he sat up several nights with Ferguson upon the said conspiracy; and who should be better believed than Ferguson's confident, and one who was so far trusted in the whole affair, that he was to take away that sacred life, which heaven has preserved by so many miracles?

Against these three depositions you have heard it objected, that 'non testimonia, sed *testes probant*,' especially by our law; in which by an express act of parliament, no probation is to be led, but in presence of the assise and pannel. To which it is answered, That these depositions are not meer testimonies; for I call a testimony a voluntary declaration, emitted without an oath, and a judge; but these depositions are taken under the awe of an oath, and by the direction of a judge. 2. Shephard was confronted with the pannel himself, and he had nothing to say against him; whereas the great thing that can be objected against testimonies (and by our statute especially) is, that if the party who emits the testimony had been confronted with the pannel, the impression of seeing a person that was to die by his deposition, would have made him afraid to depose laxly: and the pannel likewise might by proposing interrogators and questions, have cleared himself, and satisfied the judges in many things deposed against him: But so it is that Mr. Shephard having been confronted

with the pannel, before the king himself, who is as far above other judges, in his reason and justice, as he is in his power and authority: he deposes that the pannel was the chief manager of this conspiracy, next to Argyll, and that he was so passionate to have this money to buy arms, that he lamented the delays. And can it be imagined that Mr. Shephard, whom he trusted with his life, and his fortune, and whom all their party trusted with their cash, would have deposed any thing against him that was not true, especially when he knew that what he was to depose, was to take away his life and his fortune? or that if the pannel had been innocent, he would not, when he was confronted with Mr. Shephard before the king himself, have reared against Mr. Shephard, if he had not been conscious to his own guilt? There is a surprize in innocence, which makes the innocent, exclaim; and it inspires men with a courage which enables them to confound those who depose falsely against them. And in what occasion could either of these have appeared, more than in this, wherein this gentleman was charged to have conspired with the greatest of rascals, against the best of princes; and that too in presence of the prince himself, against whom he had conspired? But guilt stupifies indeed, and it did never more than in this gentleman's case, whose silence was a more convincing witness than Mr. Shephard could be. Mr. Carstares likewise knew when he was to depose, that his deposition was to be used against Jerviswood: and he stood more in awe of his love to his friend, than of the fear of the torture; and hazarded rather to die for Jerviswood, than that Jerviswood should die by him: How can it be then imagined, that if this man had seen Jerviswood in his trial, it would have altered his deposition; or that this kindness, which we all admired in him, would have suffered him to forget any thing in his deposition, which might have been advantageous in the least to his friend! and they understand ill this height of friendship, who think that it would not have been more nice and careful, than any advocate could have been. And if Carstares had forgot at one time, would he not have supplied it another; but especially at this last time, when he knew his friend was already brought upon his trial, and that this renewed testimony was yet a further confirmation of what was said against him? And albeit the king's servants were forced to engage, that Carstares himself should not be made use of as a witness against Jerviswood; yet I think this kind scrupulosity in Carstares for Jerviswood should convince you more than twenty suspect, nay than even in different witnesses; nor can it be imagined, that the one of these witnesses would not have been as much afraid of God, and his oath at London, as at Edinburgh; and the other in the council-chamber in the forenoon, as in the justice-court in the afternoon.

3. The statute founded on does not discharge the producing of testimonies, otherways than

after the jury is inclosed: for then indeed they might be dangerous, because the party could not object against them: but since the statute only discharges to produce writ or witnesses, after the jury is inclosed, it seems clearly to insinuate, that they ought to prove, when they are produced in presence of the party himself, as now they are. And though the civil law did not allow their judges to believe testimonies, because they were confined to observe strict law, yet it does not from that follow, that our juries, whom the law allows to be a law to themselves, and to be confined by no rule, but their conscience, may not trust intirely to the deposition of witnesses, though not taken before themselves, when they know that the witnesses by whom, and the judges before whom these depositions were emitted, are persons beyond all suspicion, as in our case. But yet for all this, I produce these testimonies, as admiocies here, only to connect the depositions of the present witnesses, and not to be equivalent to witnesses in this legal process; albeit as to the conviction of mankind, they are stronger than any ordinary witnesses.

When you, my lords, and gentlemen, remember that it is not the revenge of a private party, that accuses in this case; and that even in private crimes, such as forgery, or the murder of children, &c. many juries here have proceeded upon mere presumptions, and that even Solomon himself found his illustrious decisions approved by God Almighty, upon the presumed assertion of a mother; I hope ye will think two friends deposing, as present witnesses, admioculated and connected by the depositions of others, though absent, should heget in you an intire belief; especially against a pannel, who has been always known to incline this way, and who, though he was desired in the Tolbooth to vindicate himself from those crimes, would not say any thing in his own defence: and though he offers to clear himself of his accession to the king's murder, yet says nothing to clear himself from the conspiracy entered into with the late earl of Argyll, for invading his native country; which is all that I here charge upon him, and which he inclines to justify as a necessary mean for redressing grievances. I must therefore remember you, that an inquest of very worthy gentlemen did find Rathillet guilty, though there was but one witness led against him; because when he was put to it, he did not deny his accession: and two rogues were found guilty in the late circuit at Glasow, for having murdered a gentleman of the guard, though no man saw them kill him; but the murderers having been pursued, they run to the place, out of which the pannals then accused were taken, none having seen the face of the runaways; and the pannals being accused, and pressed to deny the accession, shunned to disown the guilt, but desired it might be proved against them. This may convince you that there are proofs which are stronger than witnesses; and I am sure that

there were never more proving witnesses than in this case; nor were the depositions of witnesses ever more strongly administered. Remember the danger likewise of emboldening conspiracies against the king's sacred life, and of encouraging a civil war, wherein yourselves and your posterity may bleed, by making the least difficulty to find a man guilty, by the strongest proofs that ever were adduced in so latent a crime as a conspiracy is. And I do justly conclude, that whoever denies that a conspiracy can be thus proved, does let all the world see, that he inclines that conspiracies should be encouraged and allowed. Our age is so far from needing such encouragements, that on the other hand in this, as in all other crimes, because the guilt grows frequent and dangerous, the probation should therefore be made the more easy, though in this case, the king needs as little desire your favour, as fear your justice. And I have insisted so much upon this probation, rather to convince the world of the conspiracy, than you that this conspirator is guilty.

Thereafter the Lords ordained the assize to increase, and return their verdict to-morrow, by nine a'clock in the morning.

EDINBURGH, December 24, 1684.

The said day the persons, who past upon the assize of Mr. Robert Baillie of Jarviswood, returned their verdict in presence of the said lords; whereof the tenor follows: The assize, all in one voice, finds the crimes of art and part in the conspiracy, and plot libelled, and of concealing, and not revealing the same, clearly proven against Mr. Robert Baillie the pannel, in respect of the depositions of witnesses and admissions adduced. *Sic subscribitur*, STRATHMORE, Chancellor.

After opening and reading of the which verdict of assize, the lords, justice general, justice clerk, and commissioners of judiciary, therefore by the mouth of James Johnston demostator of court, decreed and adjudged the said Mr. Robert Baillie of Jarviswood to be taken to the mercat-cross of Edinburgh, * this twenty-

* "This great expedition was occasioned by the prisoner's bad state of health, who they feared might avoid his execution by a natural death." Former Edition.

"Baillie of Jarviswood was offered his life," says Dalrymple, *Memoirs*, Part 1, Book 1, p. 291, 4to ed. of 1771, "if he would consent to turn evidence. He smiled and said They who can make such a proposal to me, know neither me nor my country." He refers not indeed to any authority: it is probable therefore that till sir John wrote his book, this interested and seductive offer on the one hand, and contemptuous indignant refusal on the other, never existed:—unless perhaps in the thoughts of the parties. Of sir John's system of history-writing upon such occasions I will transcribe his own strange account in his own strange lan-

guage; "In order to give variety to the narration, and to avoid making reflections on myself, I have often thrown what people thoughts into what they said. This, though warranted by the example of almost all the ancient historians and the greatest of the moderns, may in this age give an appearance of infidelity to the narrative. But I flatter myself a reader of taste will easily perceive a distinction. When the words are contained in a sentence or two, they are those which were actually spoken. When they run into length the writer is in part answerable for them." (Preface to vol. 1 of *Memoirs*, 4to ed. 1771) The distinction taken in the last clause of this paragraph is most undoubtedly not true in the case of sir John Dalrymple.

Sic subscribitur, LINLITHGOW.
JAMES FOULIS. ROGER HOG.
J. LOCKART. A. SETON.
DAVID BALFOUR. P. LYON.

Extracted forth of the books of adjournal, by me Mr. Thomas Gordon, clerk to the justice court.

Sic subscribitur, THOMAS GORDON.

He was executed accordingly the same day, and at the place of execution persisted in denying his knowledge of any design against the king's life, or the duke's, or of any plot against the government: he owned, he thought it lawful for subjects, being under such pressures, to try how they might be relieved from them,

guage; "In order to give variety to the narration, and to avoid making reflections on myself, I have often thrown what people thoughts into what they said. This, though warranted by the example of almost all the ancient historians and the greatest of the moderns, may in this age give an appearance of infidelity to the narrative. But I flatter myself a reader of taste will easily perceive a distinction. When the words are contained in a sentence or two, they are those which were actually spoken. When they run into length the writer is in part answerable for them." (Preface to vol. 1 of *Memoirs*, 4to ed. 1771) The distinction taken in the last clause of this paragraph is most undoubtedly not true in the case of sir John Dalrymple.

Sir John (at the end of part 3, book 10) informs us, that to him "it appears that to write history without drawing moral or political rules of conduct from it, is little better than writing a romance." The student of sir John's work, may experimentally ascertain the melancholy truth; that the absence of moral and political deductions is not the only quality by which history can be degraded to the rank of a romance.

and his design went no farther; but he refused to enter into particulars.

Afterwards, in pursuance of the sentence, his majesty's heralds, and pursuivants, with their coats displayed (after sound of trumpets) did publicly, in face of the court, conform to the custom in the sentences of treason, in his majesty's name and authority, cancel, tear and destroy the said Mr. Robert Baillie his arms, threw them in his face, trampled them under foot; and ordained his arms to be expunged out of the books of heraldry, his posterity to be ignoble, and never to enjoy honour and dignity in time coming: and thereafter went to the Mercat cross of Edinburgh, and solemnly tore and cancelled the said Mr. Robert Baillie his arms, and affixed the samine on the said Mercat-cross reversed, with this inscription; The arms of Mr. Robert Baillie, late of Jerviswood, Traytor.

Wodrow, in his History of the Sufferings of the Church of Scotland, gives the following particulars respecting this Trial:

"Mr. Robert Baillie of Jerviswood, with whose sufferings I shall end this section, was a gentleman who had the testimony of some of the greatest men of this age, whom I could name for one of the best of men, and greatest of statesmen, and so was a very proper object of the fury of this period, and could scarce escape the rage and malice of the duke of York, and such as were with him carrying on the plot against our religion, reformation and liberty.

"Indeed he fell a sacrifice for our holy reformation, and received the crown of martyrdom, upon the account of his zealous appearances against popery and arbitrary power. I can never consider this great man, and several others, in this and succeeding years, of the most judicious and notable of our martyrs, neglected of design by the collectors of the cloud of witnesses, but I must blame their private and party temper.

"Jerviswood's trial was published by the managers, and I may perhaps make some remarks afterwards upon it. I shall here give some few hints I meet with in the records, with relation to him, when before the council, of which there is nothing in his printed trial.

"Through his long confinement, and harsh treatment when in prison, this good man turned very sickly and tender; and it was reckoned almost certain by all, that had the managers spared this gentleman a few weeks longer, they would have been rid of him by a natural death, and escaped the indelible blot of inhumanity and barbarity to so excellent a person. He was evidently a dying man when tried before the judiciary, and was obliged to appear in his night gown before them, and scarce able to stand when he spake; and yet he was kept in the pannel for ten hours, and behaved to take cordials several times; and next day

he was carried in a chair, in his night gown, to the scaffold.

"By the council-books, I find, August 18, the lady Jerviswood is, upon her petition, allowed to see her dying husband, with the physicians, but to speak nothing to him but what they hear and are witnesses to. I am of opinion this low state of his health put the managers at first off the design of processing him criminally; and to secure his estate, while he is dying a natural death, brought on by their maleatment, they raise a process in order to fine him to the value of 6000*l.* ster.

"Thus, August 30, the council order the advocate to pursue Jerviswood, for resetting, entertaining, and corresponding with rebels; and as far as I can find he was not able to appear before the council when they passed a decree against him, only he ordered his advocate to appear for him.

"Accordingly, September 4, the council pass their decret, fining him in six thousand pounds sterling. The decret is very long, and would take up too much room here. In short, it narrates the libel given in against Jerviswood, which consists mostly of the articles of his printed indictment, upon which afterwards he suffered, and a charge of his converse and intercommuning with the persons who will just now come in; and then the libel is referred to his oath, which he refusing, they pass sentence. The sum of all is this:

'The lords of his majesty's privy council, having heard and considered the foresaid libel, and the interrogatories given in by his majesty's advocate, in order only to an arbitrary punishment, to which his majesty's advocate restricted the libel 'pro loco et tempore,' and reserved the other articles of the libel to be pursued as law accords; and the council having appointed a committee to examine Mr. Robert Baillie of Jerviswood, upon the said interrogatories, the tenor whereof follows:

'1mo. Did you harbour or intercommune with Mr. Samuel Arnot, Mr. Gabriel Semple, Mr. David Hume, Mr. George Barclay, Mr. William Gilchrist, Mr. Alexander Pedin, Mr. John Hepburn, Mr. John Rae, Mr. James Kirkcoun, Mr. Alexander Lennox, Mr. David Jamison, Mr. Thomas Douglas, Mr. Alexander Mowcrief, Mr. John Welsh, Mr. Richard Cameron, Mr. Donald Cargil, ——— Denholm of Westshields, ——— Stuart of Cultneas, James Stuart his brother, Mr. Thomas Pellings, John Wilson in Lanerk, Mr. John Menzies of Hangingshaw, Michael Lamb in Lanerk, David Barclay surgeon in Edinburgh.

'2do. Did you reset Alexander Tweedy your gardiner, after Bothwel-bridge.

'And the said committee having gone to the Tolbooth, and desired the the said Jerviswood to answer upon oath to the said interrogatories, and he having refused to depone, the said lords do hold him as confest, and guilty in regard of his refusing to depose, referring to his majesty's advocate to pursue the

other crimes libelled, and whereof the said Jerviswood is now holden as confest, as law accords, and have fined, and fine the said laird of Jerviswood in the sum of six thousand pounds, sterling money, for the crimes whereupon he is holden as confest, to be paid to his majesty's cash-keeper for his majesty's use. Which sentence was intimated to Mr. Walter Pringle his procurator.

“ We shall hear more just now of such unaccountable fines imposed upon gentlemen, to the real value of their estates, but in a little time the managers go on to hunt for his precious life. September 10, the council give orders to remove the lady Graden his sister, and the lady Jerviswood from his room in prison, they being informed he is recovered of his indisposition. We shall find this was but a very slender recovery, and that afterwards he grew worse, in part, no doubt, from his being deprived of the care of these excellent ladies; and November 6, the lady Graden is allowed to be close prisoner with Jerviswood, because of his valetudinary condition.

“ He continued in prison still weaker and weaker, till December 18, when I find the king's advocate is ordered to pursue a process of treason and forfeiture, against Mr. Robert Bailly of Jerviswood, to morrow at two of the clock, and sir George Lockhart of Carnwath, and sir John Lawder advocates, are appointed to concur with the king's advocate in the process. I need not again remark, that this was to prevent Jerviswood's employing them in defence of his just rights. However, the time was exceeding short, and therefore, though it seems to be yet the more straitening to him, the libel and indictment were not put in his hands till the 22nd: upon the 23rd of December Jerviswood gives in a petition to the council, shewing,

“ That only yesterday he received an indictment of treason at eleven of the clock, to appear before the justiciary this day at two of the clock in the afternoon, which is so short a time, that the petitioner has got no lawyers consulted, nor time to raise his letters of exculpation for proving his defences and objections against the witnesses, as is allowed by the act of regulation, and the ordinary time in such cases is fifteen days; and the petitioner at present being so sick and weak, as he is not able to come over his bed without being lifted, as appears by the testimony of physicians; wherefore he humbly supplicates, that the council may prorogate the diet to some competent time, and allow him lawyers, viz. Sir Patrick Hume, Mr. Walter Pringle, Mr. James Graham, Mr. William Fletcher, Mr. James Falconar, and Mr. William Bailly. The council refuse to prorogate the diet, but grant him the advocates he seeks, and allow them to plead without hazard, they containing themselves in their pleadings in the terms of law and loyalty, as they will answer at their peril.

“ This is all I meet with in the council-

books concerning Jerviswood. I shall now give the reader an abstract of this excellent person's trial, from the justiciary records; the principal papers being already printed, I shall only give the substance of them. Upon September 23, when, as I have already remarked, this worthy gentleman was in a dying condition, and could not have lived many days, he was carried in before the justiciary, where his indictment is read, bearing,

“ That notwithstanding conspiring to overturn the government, or concealing and not revealing any treasonable design, project, or discourse tending thereto, or assisting, aiding, or abetting such as have any such designs, infer the pains of treason by act 3 Parl. 1, Jam. 1. Act 37, Parl. 2, Jam. 1, and 144 act, parl. 12, Jam. 6, and act 1, sess. 1, parl. 1, Char. 2, and act 2, sess. 2, parl. 1, Char. 2, and act 2, parl. 3, Char. 2. Nevertheless the pannel traiterously designed to debar his royal highness, his majesty's only brother, from his right of succession; in order to which he endeavoured to get himself elected one of the commissioners for settling a colony in Carolina, that he might thereby have better access to treat with the earls of Shaftsbury, lord Russell and others, who had entered into a conspiracy in England against his majesty's person and government, and with colonel Rumsey, Walcot and others, who had conspired the murder of the king and his brother, and went to England himself to push forward the people of England, who, he said, did nothing but talk; and after he had settled a correspondence here, did transact with the said conspirators to get a sum of money to the late earl of Argyle a declared traitor, for raising a rebellion, and did chide the English conspirators for not sending it seasonably. And among many other meetings at London, January, February, March, April, or May 1683, for carrying on the said traiterous design, had one in his own chamber, where were the lord Melvil, sir John Cochran, Cessnock elder and younger, with Mr. William Veitch a declared traitor, and did treat of sending the foresaid money, and the Scots upon their attempting any thing for their own relief, their getting horse from England, and sent down Mr. Robert Martin from that meeting to prevent any rising in Scotland, till it should be seasonable. Which Robert did treat with Polwart and others, about securing the officers of state, castles and forces in Scotland, and putting their associates in readiness to assist the earl of Argyle. That he did correspond with Ferguson, Armstrong, Rumsey, and Walcot, who were privy to the horrid part of the conspiracy: at least he corresponded with the late earl of Argyle, and Mr. William Veitch, declared traitors, where-through he has committed, and is guilty of the crimes of high treason and rebellion.

“ Jerviswood's advocates pled, that he ought not to pass to the knowledge of an assize, because he had not gotten a citation of fifteen

days, and was precluded his exculpation; and by act of parliament, all pannels before the criminal court are allowed to raise precepts of exculpation, which suppose a competent time, not here allowed. This the king's advocate, in his Criminals, title of libels, allows, and the lords decided it in the case of Robertson 1673, who albeit he got his libel in prison, by an interlocutor behaved to have fifteen days. The advocate opposes the constant tract of decisions, and says, that act of parliament is only in cases where a summons or libel is to be raised; but here there is only an indictment, nor was exculpation sought before the trial, which is the case in the act. However it is plain, decisions can never prove any thing against law. And Jerviswood, as we heard, petitioned for exculpation: yet the lords repel the defence for the reasons given by the advocate.

"It was further alledged for Jerviswood, that the harbouring, entertaining and intercommuning with the persons named, is 'res hactenus judicata,' and the pannel already fined by the council in a vast sum upon that account. The advocate restricts his libel to the pannel's entering into a conspiracy for raising rebellion, and for procuring money to be sent to the earl of Argyle, and concealing, and not revealing this. It is replied, that Jerviswood's corresponding with Argyle at any time since his forfeiture, was expressly propounded as an interrogatory before the council, and that not only by himself but likewise by major Holms, Mr. Carstairs, West, Shepherd, Rumbold and Ruinsey, and refers it to a double of the act of council writ by the clerk's servant, and to my lord advocate's oath; and as to Mr. Veitch, he was not declared rebel.

"Sir John Lawder for the king, opposes the council decree, where no such interrogatory was put to the pannel, which must bear more faith than any scrol, and cannot be taken away by his majesty's advocate's oath, to the king's prejudice; and adds, Mr. Veitch was forfeited 1667, and 1669, the forfeiture was ratified in parliament. To this it is replied, that he does not appear to be the person named in the act of parliament, and though he were, he came home since, and all the punishment inflicted on him, was banishment, not to return under pain of death, which took off any former punishment, and it was no crime to intercommune with him, especially in another kingdom; and by the act of council 1683, the conversing with declared traitors is restricted to arbitrary punishment. The advocate opposes the doom of forfeiture, and the proclamation of council.

"The lords sustain the libel, as restricted, relevant, and repel the defences, and the assize are sworn; and for probation the earl of Tarras is first adduced, against whom Jerviswood's advocates object, that he is 'socius criminis,' and by 34 cap. stat. 2, Rob. 1, and likewise under an indictment of high treason, and being under the impressions of fear and death, ought

not to be admitted. The advocate answers, that in conspiracies 'socii criminis' have still been admitted, because no other witnesses can be had, and the earl hath not, and never sought any security for his deposing. The lawyers for the pannel reply, the statute of king Robert stands in full force, and 'ubi lex non distinguit, non est distinguendum;' besides, the earl is incarcerated for the same crime, and under an indictment of high treason hath thrown himself upon the king's mercy, and cannot be witness, seeing the king may give him his life or not, and in such circumstances a witness was never admitted. Yes, the earl of Tarras is to be considered as condemned for the crime of treason, seeing he full and amply confessed the crime, and never any body allowed, that 'damnatus criminis esse non-jestatis,' could be admitted as a witness, for which he adduceth many lawyers. Sir George Lockhart for the king opposes, that 'socii criminis' are admitted witnesses in 'omnibus criminibus exceptis,' which is agreed to by all lawyers; and that the earl of Tarras hath submitted to the king's mercy, is no more but 'socius criminis;' and if this objection stood, conjurations of treason could never be proved. Another of Jerviswood's lawyers replies, that there are some objections competent against witnesses, even in 'criminibus exceptis,' for example, that he is a capital enemy, and 'sub potestate accusatoris,' and so the earl of Tarras is by his submission and confession; and he having submitted his life and fortune to the king, is in the case of a witness, who absolutely depends upon his majesty's advocate the pursuer, and in a private process 'testes domesticis,' and such as intirely depend on a person, will not be admitted; and as to the argument, that at this rate the guilty person must escape, the answer is plain, his majesty's advocate might have pursued the pannel before he had pursued the witness; but now the terror of a process of treason cannot but have influence on him as a witness. In short, they urged that none under 'infamia juris' can be admitted, no more than a person convict and condemned, even in the case of treason; but the earl is materially convict, when after an indictment he confesseth; and never a lawyer asserted, that a person convict of treason could be admitted a witness.

"These reasonings were so strong, that the publisher of Jerviswood's process takes notice on the margin, as if he had been conscious the earl ought not to have been admitted, that he depones nothing different from the other two witnesses, who deposed the same things against the earl, for which he was forfeited, so that there could be no ground of suspicion from his circumstances, which might be easily answered. This might be a laid and concerted thing, and I doubt not but it was; and since the earl was convict by confession, there was no need of witnesses, but *ex abundanti* to colour the design the better.

"However, the lords repel all objections,

and call the earl as a witness. His deposition, and that of commissary Menro, Philiphaugh, and Gallowshiels, have been more than once printed, not only in *Jerviswood's* process, but in *Sprat's* History of the Rye-house Plot, and I shall not here enter on the detail of them. They prove that *Jerviswood* being in hazard, as all the nation were, of oppression, after the unaccountable decision in *Blackwood's* case, went up to London, and did speak and talk ancient methods to bring in the king to exclude a popish successor; and that they discoursed likewise upon money to be sent to the earl of Argyll, and Mr. Martin in May 1683, came down to Scotland with some proposals to the earl of Tarras, Philiphaugh, Gallowshiels, and some others, to engage them to a rising, when England rose for the security of the protestant religion; but as to a design against the king's life, nothing of that was known to any of them. Most part of them relate to the plot, as it was called, and design then in hand, and very little militates against *Jerviswood* in particular. They all adhere judicially to their Depositions made before the lords of the Secret Committee.

“As an admicicle of probation, the advocate produces the printed copy of Mr. Carstairs's deposition, and the clerks depone they collationed the printed copy with the original, and the lords ordain it to be taken in as an admicicle; and they give it a title very injurious to Mr. Carstairs, and contrary to their own conditions granted him. ‘The deposition of Mr. William Carstairs, when he was examined before the lords of the secret committee, given in by him, and renewed upon oath, upon the 22 of December 1684, in the presence of his majesty's privy council.’ This looks as if Mr. Carstairs had voluntarily renewed his deposition, December 22, with an eye to his dear friend, *Jerviswood's* trial now coming on, than which nothing is more injurious to this worthy person. The matter was this, as appears by what is above inserted, and the account that reverend and singularly candid person gave me more than once in conversation. Mr. Carstairs was their prisoner, and he is brought into town a few days before *Jerviswood's* trial, and dealt with most earnestly to be a witness against *Jerviswood*, which he rejected with abhorrence, and put them in mind of the conditions granted him, and the breach of faith in this proposal. He was again urged but to appear before the lords of justiciary and own judicially that he had emitted the depositions signed by his own hand, at a time when *Jerviswood* was not present; he told them he would suffer any thing before he would do so mean a thing. Mr. Carstairs was positive, that as far as he could mind, he was never before the council; but when dealt with by the chancellor, *Queensberry* and some others, and had flatly refused the two former proposals, the original papers signed by him in the castle being produced, he did own what he could not get by, that those were his subscriptions, and put them in mind of the conditions upon which he had made those decla-

rations, and expected they should not be brought against any person, as they had promised, and so left them. And this is all that was attested by the chancellor, *Queensberry*, and the rest; yet they were sustained as an admicicle. *Shepherd's* and *Burn's* declarations were produced, and this was all the proof.

“Before the assize inclosed, the advocat had a most bloody and severe speech to them, wherein every thing is stretched to the uttermost against the pannel. I shall not insert it here, since 'tis already published. In short, he urges the appointment of a thanksgiving, for the discovery of the conspiracy, through the nations, the practice of the judges in England, who found proof enough to forfeit some of all ranks, and insists upon the witnesses being *Jerviswood's* relations; and if he be not punished, no man can; the conspiracy is a cheat, the king's judges murderers, and the witnesses knaves, and such as have died, martyrs.

“He goes on to aggravate the designed invasion and civil war which would ensue, and most calumniously insinuates, that the pannel was privy to *Bourn's* design to kill the king: Whereas the reader will observe in *Bourn's* deposition, that *Jerviswood* was with them merely about the money to be transmitted to Holland. He reproaches him with being nephew and son-in-law to the lord *Waristoun*, which, I believe, *Jerviswood* reckoned a great honour and happiness, and alleges he was ringleader in Scotland, and guilty of treason as much as *Blackwood*, whom he might have been ashamed to mention.

“Then the probation is summed up with much cunning, and many stretches. Among other things he alleges Mr. Carstairs's friendship for Mr. Baily, as an argument of the truth of his deposition, which was emitted when he knew it was to be used against *Jerviswood*. After what hath been narrated, the reader will very much question the truth of this, Mr. Carstairs provided expressly against it, and unless he knew the people about him to be faithless and villanous, he could not know this.

“He insists again upon the clearness of the probation, that *Jerviswood* was accessory to Argyll's design of invading his country, and adduces *Rathillet's* case, wherein he says, there was but one witness, and that of two men before the circuit at Glasgow, against whom there were no witnesses of their killing two of the guard, but only their not disclaiming the guilt, and putting the court on proof; and urges *Douchal's* case, and says, if a gentleman was lately found guilty of high treason, by the opinion of all the lords of the session, for not revealing that sir John Cochran sought fifty pounds sterling from him, though he refused the same, and though he believed it was sought for a charitable subsistence, what deserves this pannel who sought thirty thousand pounds sterling? Thus we see precedents made of their own iniquous and unprecedented practices. The advocat closes all by shewing, he insisted not so much upon this probation to convince

the assize, as the world, that there was a conspiracy; and indeed this speech seems contrived on purpose to stretch every thing against Jerviswood.

“ I wish I could give as good an account of the moving speech Mr. Baily had to the inquest, and the home thrusts he gave the advocate; but I can only say he appealed to the advocate’s conscience, whether he was not satisfied as to his innocence, and had not owned so much to himself; which the other acknowledged, but added, he acted now by order from the government; and to the advocate and judges, he, like a dying man, most pathetically disclaimed any access to, or knowledge of any design against the king or his brother’s life; but added, if his life must go for his essays to prevent a popish succession, he owned them, and heartily parted with his life as a testimony against a papist’s mounting the throne.

“ When all this is over, the assize are ordered to inclose, and bring in their verdict to-morrow by nine of the clock; which was done, and is as follows. ‘ The assize in one voice finds the crimes of art and part in the conspiracy and plot libelled, and of concealing and not revealing the same, clearly proven against Mr. Robert Baily the pannel, in respect of depositions of witnesses and admicules aduced.’

STRATHMORE, Chancel.

“ Upon the opening of the verdict, The lords decerned and adjudged the said Mr. Robert Baily of Jerviswood, to be taken to the market-cross of Edinburgh, this 24th day of December, ‘twixt two and four in the afternoon, and there to be hanged on a gibbet till he be dead, and his head to be cut off, and his body to be quartered in four, and his head to be affixed upon the Nether-bow port of Edinburgh, one of his quarters on the Tolbooth of Jedburgh, another on the Tolbooth of Lanerk, a third on the Tolbooth of Air, and a fourth on the Tolbooth of Glasgow, and ordain his name, fame, memory, and honours, to be extinct, his blood to be tainted, &c. as in common form; which was pronounced for doom.’

“ Thus this saint of God is hasted away to his father’s house. In two days time they begin and end his process, and executed him as if they had been in fears of being prevented by a natural death. His carriage was most sedate, courageous, and christian, after his sentence, and during the few hours he had to live. And at his execution he was in the greatest serenity of soul possible almost for a person on this side of heaven, though extremely low in his body. He prepared a speech to have delivered on the scaffold, but was hindered. Under the prospect of this he left copies with his friends, and it deserves a room here, as containing a short and distinct view of his case.

THE LAST SPEECH OF Mr. Robert Baily of Jerviswood, who died at the Cross of Edinburgh, December 24, 1684.

‘ Having received such usage as I have done,

and having got so short time, it cannot be expected from me in reason that I should say much.

‘ Only for my own vindication, and the vindication of my religion, I do testify and declare in the sight of the omniscient God, and as I hope for mercy on the day of Christ’s appearance, that I was never conscious to any conspiracy against the life of his sacred majesty, or the life of his royal highness the duke of Albany and York, or the life of any other person whatsoever.

‘ That I was never conscious to any plot in any of the nations, for the overthrow and subversion of the government; and that I designed nothing in all my public appearances, which have been few, but the preservation of the protestant religion, the safety of his majesty’s person, the continuation of our ancient government upon the foundations of justice and righteousness, the redressing of our just grievances by king and parliament, the relieving of the oppressed, and putting a stop to the shedding of blood.

‘ As for my principles with relation to government, they are such, as I ought not to be ashamed of, being consonant to the word of God, the confessions of faith of the reformed churches, the rules of policy, reason, and humanity.

‘ I die a member of the church of Scotland, as it was constitute in its best and purest time under presbytery, judging that form of government most conducing to piety and godliness, and most suitable for this nation.

‘ I die a hater of popish idolatry and superstition. The faint zeal I have had against popery, and for the preservation of the protestant religion in this nation, hath brought me to this condition. I am very apprehensive popish idolatry will be the plague of Scotland.

‘ God open the eyes of his people, to consider the hazard they are in of popery. It seems the generation is fitted for it, and all the engines of hell have been made use of to debauch the consciences of people, that they may be fitted for idolatry and superstition. Men are compelled to take contradictory oaths, that they may believe things that have a contradiction in them.

‘ I know I will not be allowed to speak what I would, and therefore I will say little. I bless God this day, that I know whom I have believed, and to whom I have committed my soul as unto a faithful keeper. I know I am going to my God and chief joy. My soul blesseth God and rejoiceth in him, that death cannot separate betwixt me and my God.

‘ I leave my wife and children upon the compassionate and merciful heart of my God, having many reiterated assurances that God will be my God, and the portion of mine.

‘ I bless and adore my God, that death for a long time hath been no terror to me, but ra-

ther much desired; and that my blessed Jesus hath taken the sting out of it, and made it a bed of roses to all that have laid hold on him by faith, which worketh by love.

My soul bleeds for the deplorable condition of the church of Scotland; we are losing the gospel, having fallen from our first love and zeal, therefore God is threatening to spue us out of his mouth. Oh that my blood might contribute in the least to awaken the remnant to do their first works, and might contribute to establish any of his in the ways of holiness and righteousness.

I have had sharp sufferings for a considerable time, and yet I must say, to the commendation of the grace of God, my suffering time hath been my best time; and when my sufferings have been sharpest, my spiritual joys and consolations have been greatest. Let none be afraid of the cross of Christ, his cross is our greatest glory. Let all who love God in sincerity, prepare for the hardest of suffering, for fire and gibbets; the aversation that is in all to the cross of Christ, is the bane of our professors.

I am much afraid, that Christ will be put to open shame in Scotland, and will be crucified afresh, and his precious blood accounted unholy and polluted, and that Christ, in his members, may be buried for a while in the nation; yet I have good ground of hope to believe, that the sun of righteousness will yet shine again, with healing under his wings.

Oh that God would awaken his remnant while it is to day, that they may consider what belongs to their peace. Wo will be to them that are instrumental to banish Christ out of the land, and blessed are they who are instrumental, by a gospel conversation, and continual wrestling with God, to keep Christ in the nation. He is the glory of a land, and if we could but love him, he could not part with us. Wo be to them that would rather banish Christ out of the land than love him. God pour, out his spirit plenteously on his poor remnant, that they may give God no rest till he make his Jerusalem the joy and praise of the whole earth.

I have no more time, but they who love God I hope have minded me in my affliction, and do mind me now, and will mind my wife and children. I go with joy to him who is the joy and bridegroom of my soul, to him who is the Saviour and Redeemer of my soul. I go with rejoicing to the God of my life, to my portion and inheritance, to the husband of my soul. Come, Lord.

"I have several circumstances of this excellent person's carriage, during the trial and execution, too large to be insert here. When his sentence was intimated, he said, My lords, the time is short, the sentence is sharp, but I thank my God who hath made me as fit to die, as ye are to live. When sent back to his room in the prison, after sentence, he leaped

over on the bed, and fell into a wonderful rapture of joy, from the assurance he had, that in a few hours he would be inconceivably happy. Being, after a little silence, asked how he was, he answered, Never better, and in a few hours I'll be well beyond all conception; they are going to send me in pieces and quarters through the country, they may lag and hew my body as they please, but I know assuredly nothing shall be lost, but all these my members shall be wonderfully gathered, and made like Christ's glorious body. When at the scaffold, he was not able to go up the ladder without support. When on it, he said, My faint zeal for the protestant religion has brought me to this end; and the drums interrupted him. Their spite against his body was very great, and I am told the quarters of it lay in the thieves-hole for three weeks, before they were placed as in the sentence.

"There are some other noblemen and gentlemen, I meet with this year in the council-registers, attacked for the plot, as the earl of Tarras, who, as we have heard, was indicted before he was made use of as a witness against Jerviswood, and the laird of Polwart, since the revolution chancellor of Scotland, and king's commissioner, and Pringle of Torwoodlie, and some others; but their processes not being brought to an issue till next year, I reserve them till then, that we may have the full view of all which concerns them."

And in the Additions and Amendments prefixed to his second volume, Woodrow says,

"After the case of that singular person Mr. Baily of Jerviswood was printed off, I received a narrative of some further circumstances of his Trial from a worthy friend of mine who was present, and a mournful spectator. What passed made so deep impression upon him, that he is distinct as to the very words and phrases that were used, and I thought they deserved a room here.

"Jerviswood being much indisposed, came to the bar of the Judiciary in his night-gown, attended by his sister, who several times gave him cordials, he being so ill as he was obliged to sit down on a stool. He heard all very patiently; only when ——— was reading his long narrative, Jerviswood would now and then look upwards, and hold up his hands. When the declarations and affidavits that came from England were read, he appeared to be in some concern, and said, Oh, oh! staring upon the king's advocate.

"But when the advocate, in his discourse to the assize, insisted on those declarations and affidavits, and enlarged more fully upon them than in the speech he caused print in Jerviswood's trial, then Jerviswood stared him very broad, and appeared to be very much troubled.

"After the advocate had ended his discourse, Jerviswood desired liberty of the earl of Linlithgow, to speak a few words, not being able to say much because of his great weakness. Which being granted he spake to this purpose.

‘ That the sickness now upon him in all human appearance would soon prove mortal, and he could not live many days ; but he found he was intended for a public sacrifice in his life and estate ; that he would say nothing as to the justice of their lordships’ interlocutor, and was sorry his Trial had given them so much and long trouble, by staying so long in the court, it being then past midnight. And then addressed himself to the assize, telling them, he doubted not, but they would act as men of honour ; that there were hard things in the depositions of the witnesses against him, which was to be their rule, and that nothing he could say was to prevail with them ; yet for the exoneration of his own conscience, and that his poor memory and family might not suffer unjustly, he behoved to say, that the most material witnesses were correspondents, and life might be precious to some ; that one of them was very happy in a memory, yet he was sure there were some things said to be spoken in a meeting where he was which, he was positive, were not at least while he was there ; withal he most heartily forgave them. But there is one thing, says he, which vexes me extremely, and wherein I am injured to the utmost degree, and that is for a plot to cut off the king and his royal highness, and that I set up nights to form a declaration to palliate or justify such a villainy. I am in probability to appear, in some hours, before the tribunal of the Great Judge, and, in pre-

‘ sence of your lordships and all here, I solemnly declare, that never was I prompted, or privy to any such thing, and that I abhor and detest all thoughts or principles for touching the life and blood of his sacred majesty, or his royal brother. I was ever for monarchical government.

“ And then looking directly upon the king’s advocate, he said, ‘ My lord, I think it very strange you charge me with such abominable things ; you may remember, that when you came to me in prison, you told me such things were laid to my charge, but that you did not believe them. How then, my lord, come you to lay such a stain upon me, with so much violence ? are you now convinced in your conscience, that I am more guilty than before ? You may remember what passed betwixt us in the prison.’

“ The whole audience fixed their eyes upon the advocate, who appeared in no small confusion, and said, ‘ Jerviswood, I own what you say, my thoughts there were as a private man ; but what I say here is by special direction of the privy council ;’ and, pointing to sir William Paterson, clerk, added, ‘ he knows my orders.’ ‘ Well,’ says Jerviswood, ‘ if your lordship have one conscience for yourself, and another for the council, I pray God forgive you, I do.’ And turning to the justice-general, he said, ‘ My lord, I trouble your lordships no further.’ ”

315. Proceedings against JOHN SPREULL and ROBERT FERGUSON, in the Court of Justiciary at Edinburgh, for Treason and Rebellion : 33 CHARLES II. A. D. 1681. [Now first printed from the Records of Justiciary at Edinburgh.*]

CURIA JUSTICIARIE S. D. N. Regis tenta in Prætorio Burgi de Edinburgh, secundo die Mensis Martii 1681, per Honorabiles viros Richardum Maitland de Duddop Justiciarie, Clericum, Robertum, Dominum de Nairn, Dominos Jacobum Foulis de Colintoun, Davidem Balfour de Forret, et Davidem Falconer de Newtoun, Commisionarios Justiciarie dicti S. D. N. Regis: Curia legitime affirmata.

Intran

JOHN SPREULL, Apothecary, prisoner:

INDYTED and accused for the crymes of treason and rebellion committed be him in manner mentioned in his Dittay.

Persewers—Our sovereign lord's Advocate.

Procurators in Defence.—Mr. David Thoirs, Mr. James Daes.

The lords continue the dyet against the said John Spreull till the first Monday of June next, and ordaines the hail witnesses for the persewer and pannall to attend the said dyet, as also the hail assyers, ilk person under the paine of 300 merks.

* The MS. of this case, and some other Scots cases, was not obtained in time for insertion in exact chronological order. This case formed part of that persecution of the Presbyterians which is related in the 4th vol. of Mr. Laing's history of Scotland, and very circumstantially detailed in Wodrow's History of the Sufferings of the Church of Scotland.

The following passages in Fountainhall relate to Spreull:

"May 14, 1679. Mr. John Spreull in Glasgow upon suspicion was brought before them, and because he shifted to call it the murder of the bishop, and to tell who lodged with him the night after the murder happened; he was threatened with the boots, but at length he satisfied them.

"June 10, 1681. *Criminal Court*. John Spreull being pannelled for treason, and that diet being deserted against him, and a new summons of treason given him in the very court, at the bar, by a herald in his coat, with sound of trumpet, for being with the rebels at Bothwell bridge, (though he produced testificates that he was in Ireland all that time,) and for being present at Cargill's excommunicating of the king, (but naked presence here was not treasonable, without some farther concourse and accession,) and it being alledged for him, that being put to the torture, and having per-

CURIA JUSTICIARIE, S. D. N. Regis tenta in prætorio Burgi de Edinburgh sexto die mensis Junii 1681, per honorabiles viros, Richardum Maitland de Duddop, Justiciarie, Clericum, Robertum Dominum de Nairn, Dominos Jacobum Foulis de Colintoun, Davidem Balfour de Forret, et Davidem Falconer de Newtoun, Commisionarios Justiciarie dicti S. D. N. Regis. Curia legitime affirmata.

Intran

John Spreull, apothecary in Glasgowe, prisoner.

Indyted and accused for rysing and joining in armes with the rebels at Bothwellbrige ia June 1679, in manner mentioned in his Dittay.

Persewer.—Sir George M'Kenzie of Rosehaugh, our sovereigne lord's Advocate.

Procurators in Defence.—Mr. Walter Pringle.

The lords for several causes moveing them deserted and be thir presents deserts the dyet *simpliciter*:

The lords continue the dyet against Robert Ferguson of Letterpin till Fryday nixt.

severed therein without confession of the crimes laid to his charge, the same purged all the preceding *indicia et presumptiones* that urged him, so that he can never be questioned on these again, except new presumptions should emerge against him; as was found in 1632, in the case of Toshack of Mopivaird, accused for burning the tower of Frenndraught. It was answered by the advocate, that there were farther presumptions *qua cum gravabant*, which are 'noviter venientes ad notitiam.' 2do, His denial in the torture could never purge, because these who examined him in the torture had no power nor commission from the privy council to ask these questions at him, and he was not bound to have answered beyond their warrant; (and yet it would have been thought presumption enough in him to have sought to limit them to their commission.) The criminal lords repelled the defence, and found the torture purged not the preceding *indicia*.

"On the 13th June, the said John Spreull was tried at the criminal court, and probation led against him, who deponed they saw one called John Spreull at Bothwell bridge, but they knew not if the pannel was he, and there being another of that same name present in the court, (who confessed his being at Bothwell bridge, and had taken the benefit of the indemnity,) to whom all the tokens and descriptions they gave agreed more than to the pannel, as the colour of

CURIA JUSTICIARIE S. D. N. Regis tenta in præsoria Burgi de Edinburgh, decimo die Mensis Junii, 1681, per honorabiles viros Gulielmum, Comitem de Queensberrie Justiciarii, generalem Richardum Maitland de Duddop Justiciariæ, Clericum, Roberti, Dominum de Nairn, Dominus, Jacobum Foulis de Colintoun, Davidem Balfour de Forrett, et Davidem Falconer de Newtoun, Commissionarios Justiciariæ dieti S. D. N. Regis. Curia legitime affirmata.

Intran

John Spreull, apothecary in Glasgowe.

Robert Ferguson of Letterpin, prisoners in the Tolbuith of Edinburgh.

his horse, his having a cap and not a hat, a black peruke, &c. The assize, upon this, cleansed and assozied him; notwithstanding whereof the king's advocate procured an order, from the privy council, to detain him still in prison, till he got a new indictment, which was the 3d, to wit, for treasonable expressions uttered by him before the council, such as refusing to call Bothwell bridge a rebellion, or the assassinating and killing the archbishop a murder: which last is no treason, though it be a very perverse opinion.

"On the 14th June, the king's advocate having complained to the king's council that the witnesses led against Spreul had prevaricated and deposed falsely, at least did conceal their knowledge: it was moved by my lord Haddo and approved by the king's advocate, that witnesses in such a case might be tortured when they vary, as well as parties. This is indeed agreeable to the R. law, but does not suit the genius of our nation, which looks upon the torture of the boots as a barbarous remedy; and yet of late it hath been frequently used among us. I think, however, these witnesses deserve to be punished, yet the assize should not look upon the testimonies of such witnesses as a full probation, not being spontaneous and voluntary, where they either are threatened with the boots, or tortured.

"After all this, on the 14th July 1681, Spreul is brought before the privy council, and fined in 9,000 merks, for refusing to depone anent his presence at conventicles, the same being referred to his oath conform to the 2nd act of Parl. 1670; and he was ordained to be sent to the Bass till he paid it."

Wodrow says:

"I shall end this section with an account of the process against John Spreul, apothecary in Glasgow, who was before the Justiciary June this year, and give it at some length, both because it was after torture, and made no little noise; and I have distinct and attested accounts of it, and he continued more than six years a close prisoner after torture. This gentleman is yet alive after all his sore sufferings, and I know his modesty will not allow me to

Indyted and accused that where notwithstanding be the common lawe, lawe of nations, lawes and acts of parliament, and constant practise of this kingdom, the ryseing of his majesties subjects, or any number of them, the joyning and assembling together in armes, without and contrarie to his majesties command, warrant and authority, and the abating, assisting, recepting, intercommuning, or keeping company, or correspondenc with such rebels, either with or without armes, and supplying of them with levies of men, horse, money, armes, and furnishing them with meat, drink, powder, ball, or other munition bellicall, most detastable, horrid, hynous and abominable crymes of rebellion, treason and lese majestie, and are punishable with forfaiture and eschat

give that character of him which he deserves, and therefore I shall only relate his sufferings as they stand in the public records, intermixing some other hints which I have well vouched.

"Mr. Spreul's troubles began very soon after Pentland. His father, Johu Spreul, merchant in Paisly, was fined by Middleton, although he had suffered for his refusing the tender; he paid the one half of his fine, and being prosecuted for the other, or rather his refusing the declaration, he was forced, with many other worthy persons, to abscond. When general Dalziel came, as we have heard, to Kilmarnock 1667, a party of soldiers were sent to Paisly, and took Mr. Spreul, whose sufferings I am now relating, prisoner, merely because he would not discover where his father was. At that time, after many terrible threatenings of being shot to death, roasted at a fire, and the like, and some short confinement, he was dismissed.

"In the year 1677, he was, with Aikenhead and many other gentlemen, cited before a court in Glasgow, of which some account has been already given. Finding that severity was designed against all that compared, Mr. Spreul absented, and was with several other worthy persons denounced and intercommuned, though nothing was laid to their charge but mere non-conformity.

"This obliged him to quit his house and shop, and go abroad, sometimes to Holland, France, and Ireland, and merchandize. He was in Ireland with his uncle Mr. James Alexander in May 1679, and came over to Scotland after the scuffle at Drunhlog in Jude, and went to his house at Crawford's-dyke, where understanding the conduct of the west country army, he had no freedom to join them, though his own brother James Spreul, and two cousins, John Spreul writer, and John Spreul merchant in Glasgow, were with them in arms. His-business obliged him to be with some in that army, but he never joined them.

"After the defeat at Bothwell he absconded again, however his wife and family was turned out of his house and shop, and all the moveables secured. Within a little he retired to

of liff, land and goods; and be the third act of the first parliament of king James the first and threttie and seventh act of his second parlia-

Holland, and stayed there some time, where hearing of the continued persecution in Scotland, and growing divisions among the sufferers, he came home 1680, with a design to bring his wife and family to Rotterdam.

“When lurking at Edinburgh, November 12, a severe search was made for Mr. Cargil and his followers, and Mr. Spreul was apprehended by major Johnston when in his bed, and his goods he had brought from Holland seized by the party, though none of them were prohibited. He was carried first to the general, and then to the guard at the Abbay, where Mr. Skene and Archibald Stuart were prisoners; with whom he was carried up to the Tolbooth next day about time of the clock when the council was convened.

“By the council registers we have seen he was examined, November 13, but his answers are not insert, and therefore I shall give the substance of what passed as far as Mr. Spreul could remember. He was interrogate, Were you at the killing of the archbishop? Ans. I was in Ireland at that time.—Quest. Was it a murder? Ans. I know not, but by hearsay, that he is dead, and cannot judge other men's actions upon hearsay. I am no judge, but in my discretive judgment I would not have done it, and cannot approve it.—He was again urged; but do you not think it was murder? Ans. Excuse me from going any further, I scruple to condemn what I cannot approve, seeing there may be a righteous judgment of God, where there is a sinful hand of man, and I may admire and adore the one when I tremble at the other.—Quest. Were you at Drumclog? Ans. I was at Dublin then.—Quest. Did you know nothing of the rebels rising in arms when in design? Ans. No; the first time I heard of it was in coming from Dublin to Belfast in my way home, where I heard that Claverhouse was resisted by the country people at Drumclog.—Quest. Was not that rebellion? Ans. I think not; for I own the freedom of preaching the gospel, and I hear, what they did was only in self-defence.—Quest. Were you at Bothwel with the rebels? Ans. After my return from Ireland I was at Hamilton seeking in money, and clearing counts with my customers, so I went through part of the west country army, and spoke with some there, since the king's high-way was as free to me as to other men; but I neither joined them as commander, trooper, nor soldier.—Quest. Was that rising rebellion? Ans. I will not call it rebellion, I think it was a providential necessity put on them for their own safety, after Drumclog.—This confession of his he was urged to subscribe, but absolutely refused it. By the Registers, I find, ‘Mr. Spreul before the council, November 15, confessed he was in company with Mr. Cargil in Edinburgh, but will not discover in what

ment and 14 act, 6 par. k. Ja. 2d, and 25 act 1st par. k. Ja. and hundreth furtie and fourth act of the 12 par. k. Ja. 6. It is statute that

‘house,’ and adds, ‘That there was nothing ‘twixt them but salutations.’

“Mr. Spreul having come from Ireland in the time of Bothwel, and being just now come from Holland, and owning he had been in company with Mr. Cargil, the managers were of opinion, that he could give them more information; and now being got into the inhumane way of putting people to the torture, and A. Stuart being examined this way, November 15, that same day the council pass the following Act: ‘The lords of his majesty's privy council having good reason to believe, that there is a principle of murdering his majesty, and those under him, for doing his majesty service, and a design of subverting the government of church and state, entertained and carried on by the fanatics, and particularly by Mr. Donald Cargil, Mr. Robert Macward, and others their complices, and that John Spreul and Robert Hamilton have been in accession thereunto, ordain them to be subjected to the torture, upon such interrogatories as relate to these three points: 1. By what reason and means that murdering principle is taught and carried on; who were accessory to the contrivance of murdering; who were to be murdered; and also as to the archbishop of St. Andrews's murder. 2. If there was any new rebellion intended; by what means it was to be carried on; who were to bring home the arms; if any be brought or bought, and by whom; who were the contrivers and promoters of the late rebellion at Bothwel bridge. 3. Who were their correspondents abroad and at home, particularly at London, or elsewhere; what they know of bringing home or dispersing seditious pamphlets, and such other particulars as relate to those generals: and give full power and commission to the earls of Argyle, Linlithgow, Perth, and Queensberry, treasurer-depute, register, advocate, justice-clerk, general Dalziel, lord Collingtoun, and Haddo, to call and examine the said persons in torture, upon the said interrogatories, and such other as they shall find pertinent upon the said heads, and report.’

“I find no report in the council-books, because nothing was expiscate by torture, which was not before acknowledged. Indeed there was nothing in this plot and murdering design, but imaginary fears, and therefore I shall, from other papers, give some account of this torture, the questions proposed, and answers given by Mr. Spreul, as far as his memory could serve him afterwards to write down.

“The lord Haltoun was preses of this committee, and the duke of York and many others were present. The preses told Mr. Spreul, That if he would not make a more ample confession than he had done, and sign it, he behoved to underly the torture. Mr. Spreul said,

non rebell against the king's person, or authority, or make war against the king's lieges, or

wilfullie receipt, maintaine, or supplie rebels, with help, redd, or councill, or doe favour, or

He had been very ingenious before the council, and would go no further; that they could not subject him to torture according to law; but if they would go on, he protested that his torture was without, yea, against all law; that what was extorted from him under the torture, against himself or any others, he would refile from it, and it ought not to militate against him or any others; and yet he declared his hopes, God would not leave him so far, as to accuse himself or others under the extremity of pain. Then the hangman put his foot in the instrument called the Boot, and, at every query put to him, gave five strokes or thereby upon the wedges. The queries were, Whether he knew any thing of a plot to blow up the Abbey and duke of York? who was in the plot, and where Mr. Cargil was, and if he would subscribe his confession before the council? To these he declared his absolute and utter ignorance, and adhered to his refusing to subscribe. When nothing could be expiscate by this, they ordered the old boot to be brought, alleging this new one used by the hangman was not so good as the old, and accordingly it was brought, and he underwent the torture a second time, and adhered to what he had before said. General Dalziel complained at the second torture, that the hangman did not strike strongly enough upon the wedges: he said, he struck with all his strength, and offered the general the mall to do it himself. Mr. Spreul was very firm, and wonderfully supported, to his own feeling in body and spirit, during the torture. When it was over, he was carried to prison on a soldier's back, where he was refused the benefit of a surgeon; but the Lord blessed so the means he himself used, that in a little time he recovered pretty well. That same day his wife came to Edinburgh, but by no means could she be allowed access to him, to help him after his torture.

"When he was recovered the Advocate sent him an indictment, and, in March this year he was before the Justiciary; but the advocate's witnesses were not ready, so the process was delayed. Under this dilature, new witnesses were got in from the west country; and Mr. Spreul was brought before some counsellors, and the witnesses confronted with him. Mr. Spreul protested against examining witnesses extrajudicially, and not before his judges and the assize, and took instruments in the clerk's hand. Meanwhile he was informed by one present, that some of the witnesses were threatened, and others of them had large promises given them to bear testimony against him. Yet, after all, the lords themselves began to think the probation would not reach his life; but the duke of York very much pressed their going on, alledging they were at much pains about poor country people, but Mr. Spreul was more dangerous than five hundred of them.

"In March, an incident fell in, which brought Mr. Spreul to some more trouble before his trial, and it deserves a room here. John Murray, a sailor, was sentenced to die for his being at a conventicle in arms, as we shall hear. A good many had been already executed chiefly at the duke of York's instigation, and some of the managers were willing to shew this man some favour. Accordingly, several draughts of a petition were proposed to him, which if he should sign, the council would procure him a reprieve: he refused them all, as what he thought imported a receding from his principles. At length, sir William Paterson calling Mr. Spreul, who was in the same room of the prison with John Murray, to another, told him, the council inclined to spare Murray, and intreated him to deal with him to sign any petition, and he would present it. Mr. Spreul was not willing to engage much in this matter, lest he should be mistaken, and misrepresented; and John Murray would not direct any petition to the duke of York: 'however, at length he drew a declaration with a petitory clause added to it, which satisfied John, and he signed it. It was directed to the council, and ran, 'Whereas I am sadly misrepresented to your lordships, as if I were a man of king-killing principles, I declare I would kill no man whatsoever but upon self-defence, which the law of God and nature allows; I own the free preaching of the gospel, whether in the fields or houses, seeing it is written, 'Without faith it is impossible to please God, and faith cometh by hearing. I also own Jesus Christ as the only head of his own church, and king of saints, and disown all others pretending thereunto. May it therefore please your lordships, to recal the sentence against me, as if I were of dangerous and king-killing principles, lest you bring innocent blood upon your own heads, this city, and inhabitants thereof; for I declare I am no Papist, and hate and abhor all those jesuitical, bloody, and murdering principles.'

"When this petition was read in council, John Murray was asked, who drew it: With much difficulty he was brought to tell; and straightway Mr. Spreul was called before them, and interrogate, if he knew any thing about a petition presented by John Murray. He asked a sight of it, and owned it his writ, desired it might be read before him, and that he might know what was objected against it; and acknowledged he had drawn it at the clerk's earnest desire, and again intreated it might be read, that he might know what they quarrelled in it. This was not done, but the duke of York rose up, and said with a frown, Sir, would you kill the king? After a pause, Mr. Spreul directing himself to the chancellor, said, My lord, I bless God I am no papist, I lothe and abhor all those jesuitical, bloody and murdering principles; neither my parents, nor

give any relief, or comfort, to oppin and manifest rebels against the king's majestie or the

the ministers I heard ever taught me such principles. A great silence followed, and many expected that Mr. Spreul should have been sent to the irons immediately. In a little, the chancellor asked Mr. Spreul, if he had been at Bothwel, and some other questions relative thereto; which the pannel declined giving answers to, since he was before the justiciary. There was not one word more of the petition; but it is probable what he spoke at this time made his prosecution the more violent before the justiciary." 2 Wodrow 163.

He then gives an abstract of the proceedings before the Justiciary as they are here printed, and proceeds thus:

"And so Mr. Spreul was sent back again to prison. I have given the fuller account of this process and as distinct a detail of the reasonings as I could form, because I was of opinion, the debates which fell in this case, are in many branches of them, upon heads common to several other sufferers in this period; and the pleading of such noted lawyers on both hands, will afford no small light to the cases of torture, of extrajudicial confession, the refusal to sign confessions, and other points not uncommon in this period. Besides the weight of the case of torture itself, which deserves a room here, the method of treating pannels, and the pains used to make every thing turn to their disadvantage, with the vigour now used in prosecutions will appear. And if such efforts were made in this process, when so many able lawyers were procurators for the pannel, we may easily guess what sad work was in the more ordinary processes, with poor ignorant country people.

"Upon the 14th of July, I find Mr. Spreul and Wm. Lin writer in Edinburgh, brought before the privy council, for being present at field conventicles; and they are found guilty of hearing Presbyterian ministers preach, when some of the hearers were without doors, as likewise of reset and converse with intercommunicated persons. The matter was referred to their oaths, which they refusing are found guilty. Mr. Spreul was out of the kingdom at the times libelled as to conventicles; and each of them is fined in five hundred pounds sterling, and sent to the Bass. Mr. Spreul lay six years in the Bass, and, from his long continuance in that place, he has yet the compellation of Bass John Spreul, whereof he needs not be ashamed.

"I find joined with Mr. Spreul in the same process, upon the 10th of June, Robert Ferguson of Letter-pin; he is indicted as guilty of treason and rebellion, by his being at Bothwell-bridge. His own signed confession is adduced as probation, and the lords delay passing sentence against him till November. I find no more about him in the Registers, and by some composition or other I suppose the matter was dropped."

"In May 1687 an order is granted to liberate

common lawe, under the paine of forfaiting lyff, land, and goods; and be the fyft act of the

Mr. Spreul. Favours were now shown to the prisoners, and after near seven years imprisonment, Mr. Spreul sent a Petition to the Council: which follows from the original.

'Whereas it is not unknown to your lordships, how that your lordships' petitioner, after his first imprisonment was put to the extremity of the torture two several times, the which having sustained, was thereby assolated by the laws of this and all other nations. Thereafter when he was indicted, he was also cleared by the verdict of the whole assize, and thereupon assalized by the lords of the justiciary; and at last being libelled before your lordships by his majesty's advocate who could prove nothing against him, yet your lordships being pleased to fine him, and continue his imprisonment so long, because he had not freedom to depone upon the libel, the reasons whereof he could not, being not only from grounds in law, but especially from conscience, and his obligation and respect to the Gospel of Jesus Christ, which are at more length expressed in his information, together with a touch at a few of the great losses he hath sustained, both before and since his imprisonment (what by sea, the great fire at Glasgow, house and shop taken from his wife in his absence, also by bad debtors, and through his imprisonment all is prescribed by law (that is due to him) after three years past, the goods taken from him by major Johnston and the death of his wife, and other great expences since his imprisonment, being these six years and five months) all which he humbly offereth to your lordships' consideration and pity.

'May it therefore please your lordships to grant your lordships' petitioner liberty to follow his lawful calling in his native country, at least in any other nation where he may with best conveniency, not that he petitioneth for his own banishment (and so to be sold as a slave, the which he would not be ashamed of, for the Gospel's sake, if he be called of the Lord to it) but the liberty of a free born subject is that he humbly begs, at least liberty a competent time to see if by law he can obtain any thing of his debtors to maintain himself in prison, seeing nothing hath been hitherto allowed him out of the goods taken from him by major Johnston, neither out of the Treasury."

"May 13. The council grant the following act of liberation:

'The lords of his majesty's privy council having considered an address made in behalf of John Spreul apothecary in Glasgow now prisoner in the Isle of the Bass, supplicating for liberty, in regard of his majesty's late gracious proclamation, do hereby give order and warrant to Charles Maitland Lieutenant Governor of the Isle of the Bass, to set the said John Spreul at liberty, he having found

first session of his majesties first parliament, it is declared, that it shall be hie treason to

'caution acted in the books of Council to appear before the council once in June next, under the penalty of 1000*l.* Scots money, in case of failie.'

"When this Order comes to the Bass, Mr. Spreul was unwilling to take his liberty upon any terms that to him appeared inconsistent with the truths he was suffering for; and he apprehended this order involved him in an approbation of the proclamation specified, which he was far from approving. So much he signified to the governor of the Bass, and continuing sometime in prison, till a letter came over requiring the governor to set open doors to him, and tell him he was at liberty to go or stay as he pleased. Whereupon after so long imprisonment, he chose to come out under a protestation against what he took to be wrong in the orders and proclamation, and went over to Edinburgh, and waited on the counsellors, thanked them for allowing him liberty, and verbally renewed his protest against the proclamation and orders. Thus ended the long tract of sufferings this good man was under."

The king's Proclamation was dated Feb. 12, 1687, and it was sent to the council inclosed in a Letter of the same date. They were as follows:

KING'S LETTER TO THE COUNCIL, Feb. 12, 1687.

'James R.

'Right trusty and right well-beloved cousin and counsellor, right trusty and right well-beloved counsellor, right trusty and entirely beloved cousins and counsellors, right trusty and right well-beloved cousins and counsellors, right trusty and well-beloved cousins and counsellors, right trusty and well-beloved counsellors, and trusty and well-beloved counsellors, we greet you well. Whereas, by our letter of the 21st day of August last past, we were graciously pleased to inform you of our designs, in order to the ease of our Roman Catholic subjects, unto which we had your dutiful answer in some days thereafter; we have now thought fit to publish these our royal intentions, and to give an additional ease to those of tender consciences, so to convince the world of our inclinations to moderation, and to evidence that those of the clergy, who have been regular, are our most particular care, though we have given some ease to those whose principles we can with any safety trust: we have at the same time expressed our highest indignation against those enemies of Christianity, as well as government and human society, the field-conventiclers, whom we recommend to you to root out with all the severities of our laws, and with the most vigorous prosecution of our forces, it being equally our, and our people's concern, to be rid of them. As for the other particulars of our royal proclamation here inclosed,

the subjects of this kingdom, or any number of them, more or lesse, upon any ground, or

'we doubt not but they will appear to you most just and reasonable, as they do to us, and that you will, in your respective capacities, assert and defend our royal rights and prerogatives, which we are resolved to maintain in that splendor and greatness, which can only make them safe for us, supports for our friends, and terrors to our enemies. It is evident, we do not mean to encroach on the consciences of any, and what we will not do, we are resolved not to suffer in others: and therefore it is our will and pleasure, that these our commands be forthwith obeyed, and that in order thereunto, this our proclamation be forthwith printed and published, in the usual manner in such cases accustomed: and if any shall be so bold as to shew any dislike of this our procedure, we desire to be informed thereof by you, to the end we may convince the world that we are in earnest, assuring all, that as we expect obedience therein, and a readiness from you and all our judicatures, to assert our rights, so it shall be our care on all occasions, to shew our royal favours to all of you in general, and to every one in particular. For doing all these things as well contained in this our letter as in our proclamation aforesaid, these presents shall be to you, and all others respectively who may be therein any way concerned, a sufficient warrant; and so we bid you heartily farewell.

'Given at our court at Whitehall the 12th day of February 1686-7, and of our reign the third year.

'By his Majesty's Command.'

PROCLAMATION, Feb. 12, 1687, or First Indulgence.

'James R.

'James 7, by the grace of God, king of Scotland, England, France and Ireland, defender of the faith, &c. To all and sundry our good subjects, whom these presents, do or may concern, greeting. We having taken into our royal consideration the many and great inconveniencies which have happened to that our ancient kingdom of Scotland of late years, through the different persuasions in the Christian religion, and the great heats and animosities amongst the several professors thereof, to the ruin and decay of trade, wasting of lands, extinguishing of charity, contempt of the royal power, and converting of true religion, and the fear of God, into animosities, name, factions, and sometimes into sacrilege and treason; and being resolved, as much as in us lies, to unite the hearts and affections of our subjects, to God in religion, to us in loyalty, and to their neighbours in Christian love and charity, have therefore thought fit to grant, and by our sovereign authority, prerogative royal, and absolute power, which all our subjects are to obey without reserve, do hereby give and

pretext whatsoever, to ryse, or continue in armes, to make, peace, or warr, or to make any

grant our royal toleration, to the several professors of the Christian Religion afternamed, with, and under the several conditions, restrictions and limitations aftermentioned. In the first place, we allow and tolerate the moderate presbyterians, to meet in their private houses, and there to hear all such ministers as either have, or are willing to accept of our indulgence allenarly, and none other, and that there be not any thing said or done contrary to the well and peace of our reign, seditious or treasonable, under the highest pains these crimes will import; nor are they to presume to build meeting-houses, or to use out-houses or barns, but only to exercise in their private houses, as said is. In the mean time, it is our royal will and pleasure, that field-conventicles, and such as preach or exercise at them, or who shall any wise assist or connive at them, shall be prosecuted according to the utmost severity of our laws made against them, seeing from these rendezvous of rebellion, so much disorder hath proceeded, and so much disturbance to the government, and for which, after this our royal indulgence for tender consciences, there is no excuse left. In like manner, we do hereby tolerate Quakers, to meet and exercise in their form, in any place or places appointed for their worship. And considering the severe and cruel laws made against Roman Catholics (therein called Papists) in the minority of our royal grandfather of glorious memory, without his consent, and contrary to the duty of good subjects, by his regents, and other enemies, to their lawful sovereign, our royal great grandmother queen Mary of blessed and pious memory, wherein, under the pretence of religion, they clothed the worst of treasons, factions and usurpations, and made these laws, not as against the enemies of God, but their own; which laws have still been continued of course, without design of executing them, or any of them, 'ad terrorem' only, on supposition, that the papists, relying on an external power, were incapable of duty, and true allegiance to their natural sovereigns, and rightful monarchy. We, of our certain knowledge, and long experience, knowing that the Catholics, as it is their principle to be good Christians, so it is to be dutiful subjects, and that they have likewise on all occasions, shewn themselves good and faithful subjects to us, and our royal predecessors, by hazarding, and many of them, actually losing their lives and fortunes, in their defence, (though of another religion) and the maintenance of their authority, against the violences and treasons of the most violent abettors of these laws, do therefore, with advice and consent of our privy council, by our sovereign authority, prerogative royal, and absolute power aforesaid, suspend, stop and disable all laws or

treaties, or leagues with forraigne princes, or estates, or amongst themselves without his ma-

acts of parliament, customs or constitutions, made or executed against any of our Roman Catholic subjects, in any time past, to all intents and purposes, making void all prohibitions therein mentioned, pains or penalties therein ordained to be inflicted, so that they shall, in all things, be as free, in all respects, as any of our Protestant subjects whatsoever, not only to exercise their religion, but to enjoy all offices, benefices and others, which we shall think fit to bestow upon them in all time coming: nevertheless it is our will and pleasure, and we do hereby command all Catholics, at their highest pains, only to exercise their religious worship in houses or chapels, and that they presume not to preach in the open fields, or to invade the Protestant churches by force, under the pains foresaid, to be inflicted upon the offenders respectively, nor shall they presume to make public processions in the high-streets of any of our royal burghs, under the pains abovementioned. And whereas the obedience and service of our good subjects is due to us by their allegiance, and our sovereignty, and that no law, custom or constitution, difference in religion, or other impediment whatsoever, can exempt or discharge the subjects from their native obligations and duty to the crown, or hinder us from protecting and employing them, according to their several capacities, and our royal pleasure, nor restrain us from conferring heritable rights and privileges upon them, or vacuate or annul these rights heritable, when they are made or conferred: and likewise considering, that some oaths are capable of being wrested by men of sinister intentions, a practice, in that kingdom, fatal to religion, as it was to loyalty, do therefore, with advice and consent aforesaid, cass, annul and discharge all oaths whatsoever, by which any of our subjects are incapacitated, or disabled from holding places or offices in our said kingdom, or enjoying their hereditary rights and privileges, discharging the same to be taken or given in any time coming, without our special warrant and consent, under the pains due to the contempt of our royal commands and authority; and, to this effect, we do, by our royal authority aforesaid, stop, disable and dispense with all laws enjoying the said oaths, tests, or any of them, particularly the first act of the first session of the first parliament of king Charles 2, the eleventh act of the foresaid session of the foresaid parliament, the sixth act of the third parliament of the said king Charles, the twenty first and twenty fifth acts of that parliament, and the thirteenth act of the first session of our late parliament, in so far allenarly as concerns the taking the oaths or tests therein prescribed, and all others, as well not mentioned as mentioned, and that, in place of them, all our good subjects, or

justies speciall authoritie and approbation first interponed thereto, and all his majesty's subjects are discharged upon any ground, or pretext whatsoever, to attempt any of these

' such of them as we, or our privy council shall require so to do, shall take and swear the following oath allenary.

' I A. B. do acknowledge, testify and declare, that James 7, by the grace of God, king of Scotland, England, France and Ireland, defender of the faith, &c. is rightful king, and supreme governor of these realms, and over all persons therein, and that it is unlawful for subjects, on any pretence, or for any cause whatsoever, to rise in arms against him, or any commissioned by him, and that I shall never so rise in arms, nor assist any who shall so do, and that I shall never resist his power or authority, nor ever oppose his authority to his person, as I shall answer to God, but shall, to the utmost of my power, assist, defend and maintain him, his heirs and lawful successors, in the exercise of their absolute power and authority, against all deadly. So help me God.

' And seeing many of our good subjects have, before our pleasure, in these matters, was made public, incurred the guilt appointed by the acts of parliament above mentioned, or others, we, by our authority, and absolute power, and prerogative royal abovementioned, of our certain knowledge, and innate mercy, give our ample and full indemnity to all those of the Roman Catholic or popish religion, for all things by them done contrary to our laws or acts of parliament, made in any time past, relating to their religion, the worship and exercise thereof, or for being Papists, Jesuits, or traffickers, for hearing or saying of mass, concealing of priests, or Jesuits, breeding their children catholics, at home or abroad, or any other thing, rite or doctrine, said, performed or maintained by them, or any of them, and likewise for holding or taking of places, employments, or offices, contrary to any law or constitution, advices given to us, or our council, actions done, or generally any thing performed or said against the known laws of that our ancient kingdom; excepting always from this our royal indemnity, all murders, assassinations, thefts, and such like other crimes which never used to be comprehended in our general acts of indemnity. And we command and require all our judges or others concerned to explain this in the most ample sense and meaning acts of indemnity at any time have contained; declaring this shall be as good to every one concerned, as if they had our royal pardon and remission under our great seal of that kingdom. And likewise indemnifying our protestant subjects, from all pains and penalties due for hearing or preaching in houses, providing there be no treasonable speeches uttered, in the said conventicles, by them, in which case the law is only to take place against the guilty, and none other

things under the paine of treason. Nevertheless it is of vertie that the saids John Spruell and Robert Ferguson, having shaken off all fear of God, respect and regard to his majestie

' present, providing also that they reveal to any of our council the guilt so committed; as also excepting all fines, or effects of sentences already given. And likewise indemnifying fully and freely all quakers, for their meetings and worships, in all time past, preceeding the date of these presents, and we doubt not but our protestant subjects will give their assistance and concourse hereunto, on all occasions, in their respective capacities: in consideration whereof, and the ease those of our religion, and others, may have hereby, and for the encouragement of our protestant bishops, and the regular clergy, and such as have hitherto lived orderly, we think fit to declare, that it never was our principle, nor will we ever suffer violence to be offered to any man's conscience, nor will we use force, or invincible necessity against any man on the account of his persuasion, nor the protestant religion, but will protect our bishops and other ministers in their functions, rights and properties, and all our protestant subjects in the free exercise of their protestant religion in the churches; and that we will, and hereby promise, on our royal word, to maintain the possessors of church-lands formerly belonging to abbeys, or other churches of the Catholic religion, in their full and free possession and right, according to our laws and acts of parliament, in that behalf, in all time coming; and we will employ indifferently all our subjects, of all persuasions, so as none shall meet with any discouragement on the account of his religion, but be advanced and esteemed by us, according to their several capacities and qualifications, so long as we find charity and unity maintained; and if any animosities shall arise, as we hope in God there will not, we will shew the severest effects of our royal displeasure against the beginners or fomenters thereof, seeing thereby our subjects may be deprived of this general ease and satisfaction we intend to all of them, whose prosperity, wealth and safety is so much our royal care, that we will leave nothing undone which may procure these blessings for them. And lastly, to the end all our good subjects may have notice of this our royal will and pleasure, we do hereby command our Lyon king at arms, and his brethren heralds, macers, pursevaers, and messengers at arms, to make timeous proclamation thereof at the market-cross of Edinburgh; and besides the printing and publishing of this our royal proclamation, it is our express will and pleasure, that the same be past under the great seal of that our kingdom *per saltum*, without passing any other seal or register: In order whereunto, this shall be to the directors of our chancellery, and their deputies for writing the same, and to our chanceller

authoritie and lawes, hes presumed to committ and is guilty of the said crymes in suae fare as John Balfour of Kinloch, David Hackstoun of Rathlet and others, having most cruellie killed

for causing our great seal aforesaid to be appended thereunto, a sufficient warrant.

Given at our court at Whitehall, the twelfth day of February, 1686-7, and of our reigns the third year.

By his Majesty's command,

MaLFOED.

God save the King.

COTWEN'S ANSWER to the KING, Feb. 24, 1687.

May it please your most sacred Majesty, Your Majesty's commands are exactly obeyed, your royal proclamation is printed and published, by which your majesty hath given a further evidence of your favour and goodness to all your subjects. And we are hopeful, that by your majesty's extraordinary acts of mercy to some, who have been too ready on many occasions to abuse the clemency of your royal predecessors, they will be at last convinced what they owe to so gracious a king; and if any shall be still so obstinate as to make any wrong use of your majesty's goodness, we do unanimously assure your majesty, that we will maintain and assert your royal prerogatives and authority, with the hazard of our lives and fortunes; and all of us shall in our several capacities do our utmost, that your government may be easy to all whom your majesty thinks worthy of your protection.

We are very willing that your majesty's subjects who are peaceable and loyal, may be at ease and security, notwithstanding of their profession and private worship, and do conceive, that such of them as are, or shall be employed by your majesty in offices of trust, civil or military, are sufficiently secured by your majesty's authority and commission for their exercising the same.

We return your majesty our most humble thanks, for giving us your royal word for maintaining the church and our religion, as it is now established by law, and rest satisfied, believing your majesty's promise to be the best and greatest security we can have. We are, may it please your majesty, your majesty's most humble, most faithful, and most obedient subjects and servants. Signed by the earl of Perth lord high chancellor, the lord archbishop of St. Andrews, the lord archbishop of Glasgow elect, the lord marquis of Athole lord keeper of the privy seal, the duke of Gordon, the lord marquis of Douglas, the earl of Linlithgow, the earl of Dumfermling, the earl of Strathmore, the earl of Lawderdale, the earl of Southesk, the earl of Traquair, the earl of Airlie, the earl of Balcarras, the lord viscount of Tarbat, the lord viscount of Strathallan, the lord Livingstone, the lord Kinnaird, sir George Lockhart of Carnwath

and murdered his grace the late archbishop of St. Andrews, they to escape justice and involve others in their guilt, fled into the western shires and there joyned in armes with the

lord president of the session, sir John Dalrymple younger of Stair lord advocate, sir James Fowlis of Colintoun lord justice clerk, sir John Lockhart of Castlehill one of the senators of the college of justice, lieutenant general James Douglas, sir Andrew Ramsay of Abbotshall, major general John Graham of Claverhouse, and Andrew Wauchop of Nid-dry.

And his majesty's said privy council having ordered, that the said letter should afterwards be signed by such of the counsellors as were not then present; it was accordingly signed at Westminster by the earl of Murray, and the earl of Melford, principal secretaries of state for the said kingdom, the earl of Arran, the earl of Drumlanrig, the earl of Wintoun, the earl of Seafort, the earl of Ancram, and the earl of Dumbarton.

In the following month the King again wrote to the Council on the same subject:

KING'S LETTER to the COUNCIL, March 31, 1687, or the Second Toleration.

JAMES R.

Right trusty and right well-beloved cousin and counsellor, right trusty and right well-beloved counsellors, right trusty and entirely beloved cousins and counsellors, right trusty and right well-beloved cousins and counsellors, right trusty and well-beloved cousins and counsellors, right trusty and well-beloved cousins and counsellors, right trusty and well-beloved counsellors, We greet you well. Whereas by our letter of the first day of this instant, amongst other things, we did recommend unto you to take care, that any of the Presbyterians should not be allowed to preach, but such only as should have your allowance for the same; and that they, at receiving the indulgence therein mentioned, should take the oath contained in our proclamation, bearing date the twelfth day of February last past: these are therefore to let you know, that thereby we meant such of them as did not formerly take the test, or any other oath; but if nevertheless, the Presbyterian preachers do scruple to take the said oath, or any other oath whatsoever, and that you shall find it reasonable or fit to grant them our indulgence, so as they desire it upon these terms: it is now our will and pleasure, and we do hereby authorize and require you to grant them, or any of them, our said indulgence, without being obliged to take or swear the oath in our said proclamation mentioned, or any other oath whatsoever, with power unto them, or any of them respectively, to enjoy the benefit of the said indulgence, (during our pleasure only) or so long as you shall find that they behave

said John Spreull, and Robert Ferguson and others ther accomplices, under the command of Robert Hamitoun, brother to the laird of Prestoun; who to the number of three-score and upwards, went to the burgh of Rutherglen* and ther upon the twentie-nynth day

‘ themselves regularly and peaceably, without giving any cause of offence to us, or any in authority and trust under us in our government. For doing whereof these presents shall be to you and them, and all others respectively, who may be therein respectively any way concerned, a sufficient warrant. And so we bid you heartily farewell.

‘ Given at our Court at Whitehall, the thirty first day of March 1687 and of our reign the third year.

‘ By his Majesty’s Command.

‘ MELFORD.’

Concerning John Spreull, the father of this John Spreull, I find in Wodrow the following passages:

“ September 14th 1660. By order of the Committee of estates, John Graham provost of Glasgow and John Spreul town clerk, these were imprisoned in Edinburgh Tolbooth: both of them had been reckoned favourers of the Remonstrance, and yet they were pious and excellent persons.

“ 1664, December 18. The Council pass an act about Mr. Spreul.

“ The lords of council considering, That Mr. John Spreul, late town clerk in Glasgow, having been cited before the commission for church affairs to answer for his disobedience to the laws and disaffection to the government thereby established, he for eviting the sentence of the said judicatory, did for sometime withdraw himself forth out of the country, and having privately returned, did carry himself most suspiciously, by travelling secretly from place to place, in the night time; for which being apprehended and brought before the council, and the oath of allegiance being tendered to him, he refused the same, alledging he had not freedom to sign the same by reason of the tie that lay upon him by the oath of the covenant, therefore the said lords judging it unjust that any person should have the benefit of the protection of his majesty, and enjoy the liberties of a free subject, who refuse to give their oath of allegiance, ordain the said Mr. John Spreul to enact himself under the pain of death, to remove out of the kingdom against the first of February next, and not to return without licence, and find caution to behave peaceably till then, under the pain of two thousand pounds, and not to go within six miles of Glasgow.’

* “ This rising in the west of Scotland,” says Wodrow, “ like many other considerable turns, had but very small beginnings: and it is scarce to be thought that the persons concerned in them had any prospect that what they did, and particularly their attempt at

of May 1679, after reading acts of their own coying, most treasopable and wickedie burnt severall acts of parliament, asserting his majesties prerogatives and establishing the government of the church, drowned out bon-fyres sett on in commemoration of that day,

Rutherglen, May 29, would have been followed with what succeeded.

“ Hitherto the persons concerned in that united and contracted meeting before spoken of, had contented themselves with coming to sermons preached in the fields by the ministers and preachers who went their lengths, and defending themselves when attacked: but their numbers increasing as well as their warmth against such as differed from them, Mr. Hamilton, and some others in the company, moved, That somewhat further should be done by them as a testimony against the iniquity of the times. The reader will have the best view of what they came to, from one of their own Papers just now before me, as follows:

“ After serious consideration and prayer, they” (speaking of these concerned in the above-mentioned meeting) ‘ resolved to continue in hearing the gospel, and reckoned they would plainly quit their duty, if upon the account of danger they gave up this privilege; and considering the smallness of their number, the strength of their persecuting adversaries, together with their own manifold infirmities and failings, they feared, that, if the Lord in his providence should permit them to be dispersed, or to fall before their enemies, their cause would likewise fall; therefore they judged it their duty to publish to the world their testimony to the truth and cause which they owned, and against the sins and defections of the times.’

“ These who were violently against the indulgence, entered into this resolution towards the end of May, and Mr. Hamilton was very active in pressing it, and pushing forward a public appearance, as the way to form and strengthen their party, and prevail with others to come and join them when they set up openly against the evils of the time.

“ In prosecution of this resolution, some were pitched upon, the said Robert Hamilton, brother to the laird of Prestoun, Mr. Thomas Douglas, one of the ministers who preached to them, with about eighty armed men, to go to some public place, and burn the acts and papers which shall just now be named, and publish their declaration.

“ It needs scarce be again here noticed, That neither this Resolution, nor the under-written Declaration were formed in any concert with the ministers or people who kept field-meetings in other places, far less with any concurrence of the body of Presbyterians through the nation; and consequently the good or evil in the matter or manner of these is chargeable only upon the few who were engaged.

“ The 29th of May was by them found to

and thereafter they and their accomplices, did most treasonable waylay a small partie of his majesties forces under the command of the hard of Claverhouse at Loudonhill, and did

be the most convenient day for making this appearance, being the anniversary day so much abused, and against which, among other things, they were to testify. I am informed the city of Glasgow was the place where at first they resolved to have published their paper; but hearing the king's forces were many of them come down from Lanerk, and lying there, they altered their resolution, and went to Rutherglen a small royal burgh two miles from Glasgow.

"Accordingly they came there in the afternoon, and extinguished the bonfires with which the day was solemnized, and at the market-cross, burnt the papers just now to be mentioned in their testimony, and read publicly, and then affixed upon the cross a copy of the following Declaration:

The DECLARATION and TESTIMONY of some of the true Presbyterian Party in Scotland, published at Rutherglen, May 29, 1679.

"As the Lord hath been pleased to keep and preserve his interest in this land, by the testimony of faithful witnesses from the beginning, so some in our days have not been wanting, who, upon the greatest of hazards, have added their testimony to the testimony of those who have gone before them, and who have suffered imprisonments, finings, forfeitures, banishment, torture and death from an evil and perfidious adversary to the church and kingdom of our Lord Jesus Christ in the land.

"Now we being pursued by the same adversary for our lives, while owning the interest of Christ according to his word, and the national and solemn league and covenants, judge it our duty (though unworthy, yet hoping we are true members of the church of Scotland) to add our testimony to those of the worthies who have gone before us, in witnessing against all things that have been done publicly in prejudice of his interest from the beginning of the work of reformation, especially from the year 1648, downward to the year 1660. But more particularly those since, as

"1. Against the act recisory, for overturning the whole covenanted reformation.

"2. Against the acts for erecting and establishing of abjured prelacy.

"3. Against that declaration imposed upon, and subscribed by all persons in public trust, where the covenants are renounced and condemned.

"4. Against the act and declaration published at Glasgow, for outing of the faithful ministers who could not comply with prelacy, whereby 300 and upwards of them were illegally ejected.

"5. Against that presumptuous act for im-

posing an holy anniversary day, as they call it, to be kept yearly upon the 29th of May, as a day of rejoicing and thanksgiving for the king's birth and restoration; whereby the appointers have intruded upon the Lord's prerogative, and the observers have given the glory to the creature that is due to our Lord Redeemer, and rejoiced over the setting up an usurping power to the destroying the interest of Christ in the land.

"6. Against the expiatory act 1669, and the sacrilegious supremacy enacted and established thereby.

"Lastly. Against the acts of council, their warrants and instructions for indulgence, and all other their sinful and unlawful acts, made and executed by them, for promoting their usurped supremacy.

"And for confirmation of this our testimony, we do this day, being the 29th of May 1679, publicly at the cross of Rutherglen, most justly burn the abovementioned acts, to evidence our dislike and testimony against the same, as they have unjustly, perfidiously, and presumptuously burned our sacred covenants.

"And we hope, none will take exception against our not subscribing this our testimony, being so solemnly published; since we are always ready to do in this as shall be judged necessary, by consent of the rest of our suffering brethren in Scotland." 2 Wodrow 43.

Mr. Laing, after relating the assassination of Sharp, proceeds:

"The assassination of a prelate and privy counsellor, might be expected to excite a severe inquisition; but the government was inspired with the most frantic revenge. The people were prohibited the use or possession of arms; and in the proclamation to discover the assassins, the whole body of fanatics was implicated in the crime. Field and armed conventicles were declared to be treason. The people who attended were indirectly ordered to be put to the sword; and when the military were employed to execute this sanguinary proclamation, it was not difficult to predict the insurrection that ensued. The conventicles which persecution alone had created, united into larger masses, and from the very means employed to suppress them, acquired the formidable appearance of a regular army, and of a camp, to which none, except from the near vicinity, repaired unarmed. Parties continued, during the week, in arms, agitated by the murderers of Sharp, who had secretly joined them, and impelled by their preachers to something more than defence. A party of fourscore appeared at Rutherglen, on the anniversary of the restoration; they burnt the statutes and acts of council restoring episcopacy, and proclaimed

said John Spreull, Robert Ferguson, and their accomplices did most treasonable attack a small partie of his majesties forces, within the town Glasgowe, by whom they and ther accomplices were defate and repulsed; and still continuing in ther rebellious arms they did swell and growe to the number of ten or twelve thousand, did robb, pliage and search for horse, armes, powder, ball, and other instruments of warr, throwout the shyres of Lanerk, Aire, Renfrewie, and other shyres of this kingdome, and having marched to Hamiltoun they did take the boldnes upon them to issue proclamations and print declarations bearing the treasonable grounds of their rebellion, did modell, and forme themselves in troupes, companys, and regiments, nameing colonells of regiments, captaines of companies, commanders of troupes, and other officers under the command of Robert Hamiltoun, and the bloodie and sacrilegious murderers of the late archbishop of St. Andrews* did treasonably beat parties be drumes and take the boldnes and presumption upon them to send in ther commissioners to the royall camp, treasonable requyering the subversion and overturning of the government of the church, prouddie and insolently boasting of ther treasonable armes, in which they and ther accomplices did most treasonable continue, until the twentie second day of the said month of

an unsubscribed declaration as their solemn testimony against the defection of the times. A prudent government might have dissembled the insult, or deferred the punishment for a few days till their zeal had subsided, and their conventicle was dispersed. A violent government is incapable either of reflection or delay. Graham of Claverhouse, afterwards the celebrated viscount Dundee, was instructed to seize, or, on their resistance, to extirpate the rebels by the sword. Next Sunday he discovered and attacked their conventicle on Loudoun hill. His dragoons were defeated with loss by a detachment of undisciplined peasants, and he was almost intercepted himself by the gallant Cleland who was killed at the revolution in the defence of Dunkeld. Elated perhaps with success, and afraid to disperse or to return to their homes, they advanced to Glasgow, where they were repulsed at first; but while their numbers were still inconsiderable and easily dissipated, the town was evacuated, and the whole country was abandoned, as if to permit the insurrection to increase. The privy council, so vigilant and prompt to strike while the people were tranquil, recalled its forces to the capital when the people were unwarily betrayed into an insurrection; and amidst the most vigorous preparations throughout the rest of Scotland, a severe administration appeared solicitous only to justify and to enrich itself by the growing magnitude of the revolt."

* As to this, see in this Collection the case of James Mitchell, vol. 6, p. 1907.

June 1679, that his majesties forces did at-taque and assault them at Bothwel-bridge, wher by God's blessing on his majesties armes, ther numerous and rebellious army was dissipat, routed and vanquished. Lykeas the saids John Spreull and Robert Ferguson, in the said month of June, and oft' and diverse tymes sensyn did receipt, supplie, and inter-comon with, and defend Mr. Samuel Arnot, Mr. John Welsh, the bloodie murderers of the late archbishop of St. Andrews, Mr. Donald Cargill, the deocast Mr. Ritchard Cameron, and sundrie other notorious traitors and rebels, and in token of the said John Spreull's guilt, he hes confessed the samen before the lords of his majesties privie council *. Throwe deicig

* I have not met with any full account of the extent of the powers exercised or claimed by the Scotch Privy Council, and of the foundations of those powers respectively, whether prescription, act of parliament or usurpation. Sir George Mackenzie writes thus of the council:

"The affairs of this, as of all other nations, are either such as concern the policy of the kingdom in general, or such as respect the distributing of justice betwixt private parties. The policy of government of the kingdom is regulated by his majesty's privy council, in which the chancellor is president, if he be present, but in his absence the president of the council presides. This office of president in the council is a distinct employment, and it gives him the precedency from all the nobility. The number of this judicature is not definite, depending upon his majesty's commission; but all the officers of state are members of it, *rations officii*. It has its own signet, and its letters pass by a bill subscribed by any one of the council: upon which warrant the letters are, in their several forms, extended and subscribed by the clerk of the council, and they bear also to be '*ex deliberatione dominorum secreti assensu*.' They must be executed at least upon six free days, and a full copy must be given, because all diets here are peremptory and not with continuation of days; the reason whereof is, '*ut reus veniat instructus ad defendendum*.' Whereas before the session, a short copy is sufficient, because the summons is given out at sea, and a time allowed to answer. The diets are here so peremptory, that if the defender be cited to a day whereupon the council sits not, if he appear at the day to which he is cited, and take instruments at the council chamber, he will not be thereafter obliged to attend, nor can he be denounced fugitive for being absent: for seeing it is peremptory against him, it is reasonable that it should be peremptory for him.

"Where many parties are cited as defenders upon a bill to the council, any one or two will be allowed to answer for the rest, they finding caution, and enacting themselves to be liable for whatever shall be decreed against those for whom they undertake: which privilege is granted if no personal punishment be concluded

whereof or one or other of the deeds above mentioned, the saids John Sprull and Robert Ferguson have committed and are guilty of

against the defenders; but if either the complaint conclude, or that the crime will in law infer a corporal punishment, then the offering to find caution to answer, will not be allowed, 'nam noxa caput sequi debet,' and no man can bind his body for another, 'nara nemo est dominus suorum membrorum.' The pursuer may appear by his procurator, but the defender must either be present, or send a testificate of his sickness upon soul and conscience: and yet it is the privilege of any counsellor, that he may undertake to answer for any defender that is cited, *quo casu* the defender will not be unlawful, or denounced fugitive upon his absence, but his defences will be received as if he were present, nor can any bill for receiving a complaint, pass against a counsellor, but in *prentie*.

"The council, by the first constitution, were only to take cognizance of what concerned the public peace, and were neither judges in civil cases, nor crimes, but in so far as these infringed upon, or were violations thereof: but now that judicature doth, under the notion of riots, and breaches of the public peace, hear too many causes civil and criminal."

After the union of the two crowns of England and Scotland, the government of the latter country was, in the absence of its king, and the intervals of its parliament, administered merely by the privy council, of which Mr. Laing (*Hist. vol. 4, p. 19*) observes, that being "at once a court of justice, and a council of state, it necessarily became tyrannical: the judicial functions were united with the executive powers of the state, and a legislative authority was not unfrequently assumed." He is of opinion too, that the expectation of obtaining, by means of this instrument, unrestrained by the control of parliament, permanent possession of the government of Scotland, was the secret motive which induced Argyll and Queensberry to support the projected incorporating union of the two monarchs of Great Britain. Such a hope, however, they were not suffered to realize. The separate privy council of Scotland was abolished by stat. 4 Ann. ch. 6. Of this event, Mr. Laing's account is as follows:

"The union was not yet complete, unless the same government were established in the united kingdoms, with the same laws against state crimes. The motives of the Scottish statesmen in acceding to an union, to govern by means of the privy-council, exempt from the opposition of the country party, or the control of parliament, have been sufficiently explained. A new commission was issued for the privy-council, excluding such as opposed the union. A subordinate, yet distinct administration, was delegated by Godolphin, and entrusted by Queensberry, Seafeld, Mar, and others; through whom alone access was ob-

tained to the queen. Twenty-five members, chiefly their own creatures, were appointed commissioners to distribute the equivalent according to their instructions; and as the writs were directed, and the returns made to the privy council, the management of elections, and the nomination of the representatives to both houses, were placed in their hands. They promised Godolphin the most unreserved support; but the Squadroné party applied to the whigs, to dissolve the administration of the privy-council from which they were excluded themselves. [Cunningham, *ii. 71. 79.*] The situation of Scotland would have been infinitely worse than before the union, if an institution were preserved which was at once a court of justice, and a council of state, wherein policy must ever predominate over the laws. While the legislature remained entire, its oppression was restrained, but if a distinct administration were permitted to subsist, there was no power in the nation to procure the redress of grievances from the British parliament: the complaints and the applications of the people would have been intercepted; and to suppress their murmurs, the privy-council must have soon degenerated into the tyranny practised in former reigns. [Hardwick's State Papers, *ii. 473. Burnet, v. 300—78.*] From the same disinterested and enlightened views which produced the union, the abrogation of the privy-council was concerted by lord Somers, with the principal whigs. A bill was introduced to render the union more entire and complete. The same privy-council was proposed for the whole island; the returns of elections were to be transferred to the sheriffs; and the jurisdiction of the Scottish council was to be supplied by justices of peace, an institution often attempted but never accomplished, and by regular circuits of the judiciary court, twice a year. The administration opposed the bill, against which the Scottish statesmen endeavoured to excite a clamour at home; but there, the public discontent at the union was gratified by every disappointment which they sustained. [Letters from the earl of Mar to his brother, MS. in the Archives of the Family.] At that distance from the seat of government, they maintained that the disaffection of the Highlanders and principal families, incensed at an union, required the vigilant inspection of the privy-council; but their real design was to retain the nation in a miserable dependence on themselves and on the crown. The antipathy to the union was expected to subside the sooner, if every national distinction were once obliterated. An amendment, to prolong the duration of the privy-council till October, was rejected, as a device to secure the approaching elections for a new parliament; and the first of May was prefixed for its dissolution, that the anniversary of the union might introduce the

they ought to be punished with forfeiture of liff, land, and goods, to the terror of others to commit the like hereafter.

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

Procurators in Defence for Spreull.—Sir George Lockhart, Mr. Walter Pringle, Mr. James Daes, Mr. Alexander Swinton, Mr. David Thoris.

His Majesties *Advocat* produced a warrand for perseweing John Spreull and Robert Ferguson, whereof the tenor follows :

EDINBURGH, 9 June 1681.

'The lords of his Majesty's privie council doe ordaine his majesties advocat to persewe a proces of forfeiture against John Spreull merchant in Glasgowe, and Robert Ferguson of Letterpine, before the lords of his majesties justiciarie, for which this shall be his warrand. Extract by me.—*Sic subscribitur*

'W. PATERSON.'

His Majesties *Advocat* for obviating debat, declares that he makes use of John Spreull's confession, lybelled only as a mean of probation to adimiculate, the other probation to be led, but does not insist upon that confession at this tyme, either as a cryme *per se*, nor as a sufficient mean of probation, without being adimiculate as said is.

Mr. *Walter Pringle* for the pannel, alledges, denying always the lybell and the pretendit confession, that the pannall cannot passe to the knowledge of ane inequist, because it is offered to be proven, that he being examined before the lords of his majesties privit council upon the same cryme, and having denyed the same, and all accession thereto, and thereafter the tortor^e being adhibit to him, and having

same government through the whole island. So variously are our feelings modified and affected by our personal interest, that the loss of a venerable institution was deplored by those who had sacrificed the constitution and the independence of their country without a pang of regret. [Letters from the earl of Mar to his brother, MS.] The concluding labours of the privy-council were usefully employed in recalling the coin, and in altering its denomination."

"Torture," says Mackenzie, "is seldom used with us, because some obstinate persons do oft times deny truth, whilst others who are frail and timorous, confess for fear what is not true. And it is competent to none, but to the council, or justices, to use torture in any case; and therefore they found, that sir William Balledeu, as a captain, could not torture, though it was alledged, that this was necessary sometimes for knowing the motions of the enemy, and might be necessary and allowed in some cases to soldiers, for the good of the commonwealth. And the council are so tender in torture; that though many presumptions were adduced against Giles Thyre, Englishman, sus-

endured the same two severall tymes, he constantlie denyed the cryme, and consequentie, by the laws of this, and all other nations he

pected of murder and adultery, they refused to torture him, albeit it was pressed zealously by his majesty's advocate,

"It is a brocard amongst the doctors, that he who offers to abide the torture, purges all other presumptions which can be adduced against him; and yet Alexander Kennedy being pursued for forging some bonds, and nothing being adduced for proving the crimes, save presumptions, offered to abide the torture, but this was refused.

"Torture likewise being adduced, purges all former presumptions which preceded the torture, if the person tortured deny what was objected against him; but yet he may be put to the knowledge of an inequist, upon new presumptions, as was found after a learned debate in the case of Tochoch, [See 2 Hume's Commentaries, 117 and 118] who was tortured for the alledged burning the House of Fren-draught, August 1632, for it was alledged, that torture is intended for bringing the verity to light, and as he had been condemned, if he had confest, so he should be assolied when he denies, else no man would endure the torture, if they were not persuaded, that upon denial they should be cleared, but would confess, and not endure so much torment unnecessarily; so that the inquisition would be the occasion of much sin, and make men die with a lie in their mouth: and therefore torture is called 'probatio ultima,' vid. Clar. quest. 64. Yet Spot, Maxwell of Garrery, and others, were condemned after torture, upon other probation than was deduced before the torture.

"I remember it was debated in council, anno 1666, if the West-country men who were condemned for treason might after sentence be tortured, for clearing who were their accomplices; and it was found that they could not, 'nam post condemnationem judices functi sunt officia;' yet all lawyers are of opinion, that even after sentence, criminals may be tortured for knowing who were the complices.

"One of the privileges of minors is, that they cannot be subjected to torture, lest the tenderness both of their age and judgment, make them fall *intra vim discretionis* *hinc de ipso re iudicatos* *Legum. Eolog. de quest. cap. 9. ad.* Yet L. 5, ff. de quest. Judges are discharged only to torture such as are under fourteen. Persons very old were not to be tortured, for the same reason, L. 3. ff. ad S. C. Sillan. Which was by some extended to women, sick persons, and such as had been eminent in any nation for learning or other arts; but all this is arbitrary with us.

"Those who torture, if the person tortured die, are punishable as murderers, but though they die not, yet by the civil law they were punished 'deportatione in insulam,' or by banishment; and with us they are punished according to the quality of the crime."

cannot be impeached nor condemned, for the same crimes upon any new probation. And whereas his majesties advocat declares that he

makes only use of the present confession, ty-balled upon as an admittance of any other probation, which is to be adduced, the p^{er}sonall

Upon the subject of Torture, see in this Collection, Emlyn's Preface, p. xiv. Vol. 1. p. 506, 1336, Vol. 2. pp. 773, 774, Vol. 3, p. 371. Vol. 6. p. 1217 et seq. See, too, Hume's Commentaries on the Criminal Law of Scotland, Vol. 2. chap. 12, s. 1. Mr. Rose, in his "Observations on Mr. Fox's Historical Work" sect. 5. p. 179, mentions that two cases of Torture occurred so lately as in the reign of William the third. Of the Proceedings in one of these cases he has given the following History from the Records of the Scotch Privy Council:

PROCEEDINGS RESPECTING THE APPLICATION OF TORTURE IN SCOTLAND. AUGUST 4, 1690.

Sederunt,

- | | |
|----------------------------|----------------------|
| His Majesty's High
Com. | L. Raith |
| E. Drumlanrig | L. Cardross |
| E. Argyle | L. Ruthven |
| E. Crawford P. | M. of Burligh |
| E. Sutherland | Ld. Justice Clerk |
| E. Eglington | L. Abercrombly |
| E. Mortone | Laird of Grant |
| E. Cassils | Laird of Blackbarony |
| E. Lothian | Laird of Leyes |
| E. Forfar | Sir George Monro |
| E. Leven | Laird of Brodie |
| E. Kinross | Major Gen. M'Kay |

Forasmuch as ther has been a treasonable and hellish plot contrived and carried on against ther majties persons their government and their good subjects within this and the neighbouring nations; and that ther is evident presumptions and documents that Henry Navill Pain prisoner within their castle of Edinburgh Kendall alias Morgan, Colin, John and Patrick Bells have been accessory to and in the knowledge of such an unnatural and damnable conspiracy: Therefore, and for detecting and discovering thereof, ther majties high commissioner and the lords of privy council do ordaine the Tortur to be put to the saids Henry Navill Pain Kendall alias Morgan, Colin, John, and Patrick Bells, in their own presence, or a Committee to be appointed for that effect (Sic. Sub.) Melvill, Crawford, P. Argyle, Sutherland, Eglington, Leven, Forfar, Cardross, Ruthven, Balfour, G. Campbell, C. Campbell, A. Murray, J. Brodie, H. Mackay, G. Monro.

At Edinburgh the 10th day of December 1690
yeass.

Sederunt,

- | | |
|----------------|-----------------|
| E. Crawford P. | L. Cardross |
| E. Sutherland | L. Carmichael |
| E. Mortone | L. Ravbrig |
| E. Cassils | L. Abercrombly |
| E. Forfar | L. Fountainhall |
| Vicet. Stair | L. Blackbarony |
| L. Raith | Sir John Hall |

VOL. X.

The following letter direct from his majesty to the Privy Council was read, ordered to be recorded whereof the tenor follows:
Supra Scribitur.

W. R.

Right trusty and intirely beloved cousine and councillor, right trusty and right weell beloved cousins and councillors, right trusty and weell beloved cousins and councillors, right trusty and weell beloved councillors, and trusty and weell beloved councillors, wee greet you weell. Whereas we have full assurance upon undeniable evidence of a horrid plot and conspiracy against our government, and the whole settlement of that our ancient kingdom, for introducing the authoritie of the late king James and Popery in these kingdoms, and setting up an intire new forme of government, whereof there has been several contrivers and managers, and Navill Pain, new prisoner in our castle of Edinburgh, hath lykways been an instrument in that conspiracie, who having neither relation nor business in Scotland, went thither on purpose to maintain a correspondence, and to negotiat and promott the plot: And it being necessary for the security of our government, and the peace and satisfaction of our good subjects, that these foule designs be discovered: Therefore we doe require you to make all legal inquire into this matter; and we have transmitted several papers and documents for your information, some whereof have been read amongst you; and particularly wee doe require you to examine Navill Penn strictly; and in case he prove obstinate or disingenious that you proceed against him to torture, with all the rigour that the law allows in such cases; and not doubting your ready and vigorous applications for the furder discovery of what so much concerns the public safety, we bid you heartily farewell. Given at our court at Kensingtontoun, the 18th day of November, Javaj (1690) and ninety years, and of our reign the second year. By his majesty's command (Sic. Sub.) MELVILL.

The lords of his majesty's privie council doe hereby give order and warrant to lieut. col. James Murray, lieut. governour of the castle of Edinburgh, and in his absence the next commanding officer present, to bring along Navill Pain prisoner in the said castle, in presence of the provost of Edinburgh one of the said lords their own number; and that under ane sufficient guard and list the said Navill Pain in presence of the saids lords, without admitting any person whatsoever to speak with him on the way as he comes from the said castle to the said lords, or in the said castle before he come forth thereof.

The above prisoner being brought to the bar, and being several times removed and called in again, and being asked several questions anent

protests that he may be heard against the relevance of any such pretendit confession, notwithstanding it.

a conspiracie against the government, and for restoring the late king James, whereof the council had strong and evident presumptions of his knowledge; he denied all knowledge of or accessions to the foresaid conspiracie; and the councill having by the earle of Crafurd, their president for the tyme, intimate to the prisoner that the councill has certain and sufficient evidences of his knowledge of and concerne in the plott and conspiracie, and therfor required him to be ingenious and frank in his confessione, oyrwayes they would (in respect of the great and clear evidences against him) put him to the torture; and the prisoner having still refused to make any acknowledgment, and in a boasting maner bid them doe with his body what they pleased; the councill resolved to proceed to torture; but first called for and read at the board (the prisoner being removed) one former warrand of councill for putting this prisoner and others to torture, in respect of the evident presumptions against them, signed by their majesties commissioner and fifteen lords of councill of the 4th of August last.

It being moved att the barr, Whether Navill Paine the prisoner in case of his disengenuity or refusal to answer notwithstanding of the torture he is to be put to this night, may be put to new torture the morrow; the same went to the vote, and carried in the affirmative, that he might be putt to the torture again upon interrogators not coincident with these, which he shall be this night interrogate upon.

The prisoner, being again brought in, was put to the torture of the thumbiekins; and being examined upon several interrogators answered to the whole negative.

December 16, 1690.

D. Hamiltoune P.	L. Raith
E. Crafurd	L. Cardross
E. Errol	L. Ravilrig
E. Mortoun	L. Aberurquhall
E. Forfar	L. Fountainhall
Visct. Stair	L. Blackbarrony

Anent the Petition given into the lords of their majesties privy council by Francis Paine nevy to Henry Nevill Paine, shewing that the petitioner being informed that his said uncle was committed closs prisoner after torture; and that his own physicians and chirurgions have not liberty to attend him, and seeing these circumstances may endanger his life; and therefore humbly craving their lds to allow him the benefite of open prisone, and to allow his ordinary phisitions and chirurgions to attend him, since they only could know his constitutione, as the said petition bears: The lords of their majesties privy councill having considered the above petitione, they grant the desyre thereof, and allows the above Henry Nevill Paine the benefit of open prisone, and allows his

HIS MAJESTY'S ADVOCAT answers to the first branch of the defence primo, that albeit, the pannall had been tortured, upon his acces-

ordinary phisitions and chirurgions to attend him; the governour, lieut. governour, or other inferior officers of the said castle being always answerable for his safe custody.

December 30, 1690.

Sederunt,

D. Hamiltoune P.	L. Cardross
E. Crafurd	L. Carnichaell
E. Errol	L. Ravilrig
E. Cassils	L. Aberurquhall
E. Forfar	L. Fountainhall
Visct. Stair	L. Blackbarrony
L. Raith	L. Stevenson

The following letter direct from his majesty to the councill being this day read, was ordered to be recorded, whereof the tenor follows:

Subscribitar

W. R.

Right trusty and entirely beloved cousine and councillor, right trusty and right weel beloved cousins and councillors, right trusty and weel beloved cousins and councillors, right trusty and weel beloved councillors, wee greet you weel. Whereas we understand that Navill Paine hath been most obstinate and disingenuous, when examined by you concerning the late plott and conspiracy against us and our government, notwithstanding of our inclinations of favor toward him upon a true discovery; It is therfor our will and pleasure, and wee doe heerby authorize and require you to cause secure him in closs prisone, and that no person be suffered to meet speak or correspond with him in any manner of way, except his keeper, and also phisitions and chirurgions when allowed by you; until our furdur order: So not doubting your ready compliance with these our commands, wee bid you hearily farewell. Given at our court at Kensingtonne, the 23d day of December Jajvaj and nyntie and of our reign the second year. By his majesties command. (Sic Sub.) MELVILL.

The lords of their majesty's privy council in obedience to and prosecution of his majesties commands in his letter under his royal hand direct to them of the date at Kensingtonne, the 23d day of December instant, authorising and requiring them to cause secure Navill Paine in closs prisone, and that no person be suffered to meet speak or correspond with him any manner of way except his keeper and also chirurgions and phisitions when allowed by the said lords, Doe hereby recommend to the governour of the castle of Edinburgh where the said Navill Paine is prisoner; and in absence of the governour they give order and warrand to the lieut. governour of the said castle, to secure the said Navill Paine in closs prison; and discharges them to suffer any persone to meet,

tion to the crimes libelled, and in the tortor had denied the same, yet that could not infer an absolute liberation of the pannall, since no man's own pertinaciousness and obstinacie

speck or correspond with him except his keeper, and also physicians and chirurgions when allowed by the said lords, until his majesties further pleasure.—(*Sic Sub.*) Hamilton P. Craford, Errol, Stair, Raith, Cardross, Carmichael, C. Campbell, A. Murray.

Hume (*Hist.* vol. pp. 171, 172, *Edinb.* 8vo. 1792) speaking of the duke of York's behaviour during his abode in Scotland (what he says on the subject, is a most striking illustration of the truth of Mr. Laing's remark cited in a note to vol. 8, p. 135, of this Collection) after saying that "his treatment of the enthusiasts was still somewhat rigorous;" adds, "It is even asserted that he sometimes assisted at the torture of criminals, and looked on with tranquillity as if he were considering some curious experiment." In the note he refers to 1 Burnet 583 (see the passage quoted vol. 6, p. 1222) and to 2 Wodrow, 169. He says, "this last author, who is much the better authority, mentions only one instance, that of Spreul, which seems to have been an extraordinary one." I confess I am in doubt what is here meant by "extraordinary instance." Mr. Laing's observation upon this matter is valuable, and exhibits a curious instance of the disingenuousness of sir John Dalrymple.

"Hume considers Spreule's as an extraordinary case. He was examined on the ordinary questions—was Sharp's death murder? &c. and on an imaginary plot to blow up the palace together with the duke. Dalrymple informs us that Wodrow had gained credit by appealing to the council records, which he, sir John, had examined, but found no reason for the imputation that the duke attended when Spreule was tortured. In the first place, although the acts of council, in which its proceedings were never inserted, are still preserved, the council records from 1678 to August 1682, though inspected by Wodrow, have been missing from the public offices above fourscore years. Secondly, Wodrow does not appeal to the council record, but to the more unsuspecting testimony of Spreule himself, who was alive when he wrote. The council record is transcribed by Wodrow; but as the duke's attendance was voluntary, his name is not inserted in the committee appointed to superintend the torture."

In this place it may be excusable to resume the topic of Burnet's veracity; in proof of which I have just now fallen upon a remarkable testimony. The bishop (See vol. 5, p. 1504) and after him Mr. Laing (see vol. 5, p. 1371,) relate, that the conviction of the marquis of Argyle was produced by a base perfidious communication by Monk of some letters written to him by Argyle. Mr. Laing (note 1,) at the end of the fourth volume of his History, asserts the truth of this fact, and in refutation of an

should be of advantage to him, and that was not only to make disingenuitie a remission, but was a way to tempt and invite all pannalls and criminalis to conceal truth by ther obstinacie,

objection which had been made in the Biographia to the statement, he corroborates the reference to Burnet by others, and then adds the testimony in favour of Burnet which I have transcribed into this Work. See vol. 8, p. 135.

Since the publication of Mr. Laing's History, Mr. Rose has in his "Observations on Mr. Fox's Historical Work," objected to the evidence of Monk's base interposition against Argyle. It is always curious and I think always useful, to shew how the truth will escape the most sagacious minds which are disposed to rely too much on speculative arguments in contradiction to testimony. I therefore insert the whole which Mr. Rose states, and then subjoin a most indisputable proof that bishop Burnet's representation is not false.

The following are Mr. Rose's reasonings and evidences:

CHARGE AGAINST MONK OF HAVING FURNISHED EVIDENCE FOR THE CONVICTION OF THE MARQUIS OF ARGYLE.

"On considering the evidence accessible to every one, when Mr. Fox wrote, respecting the share Monk is represented to have had in the death of the marquis of Argyle, it will be found that the charge against him for so-in-famous an act rested, as has been observed, on the assertion of bishop Burnet, which appears to have been satisfactorily refuted by doctor Campbell, who, notwithstanding his political principles, was most zealously attached to the family of Argyle. In his Lives of the Admirals, he states, in contradiction to the bishop, that the fact cannot be true; in support of which he adduces reasons, referring to proofs not only of Monk's innocence as to that charge, but of his being an advocate for mercy even to the regicides: and further arguments, with reference to authorities, are adduced by the same author, in the article of Campbell (Archibald) marquis of Argyle, in the Biographia Britannica, to prove the falsehood of the charge.

"Wodrow, an historian zealously attached to the Presbyterian cause, who lived soon after the event, and was remarkably industrious in searching records, and collecting anecdotes, especially such as affected leaders in that party, is entirely silent on the point. The reliance, however, placed by Mr. Fox on this anecdote appeared to call for a further attentive investigation, in order to ascertain the truth or falsehood of it. Without resting, therefore, on the industry which had been applied formerly, a diligent search was first made amongst the records of the parliament, the council, and the Justiciary in Scotland, to discover whether any trace of the fact alledged could be met with in the proceedings on the trial of the marquis:

which would be extremely prejudicial, both to the interest of the commonwealth in the discovery of crimes, and to the souls and consciences of criminals in denying obstinately

but a charm in those periods rendered that search ineffectual. Recourse was next had to a collection of all the publications during the civil war, and some years after the restoration, supposed to be complete; several of them written after the death of the marquis, and some by persons devoted to his memory; giving accounts of what was most interesting respecting him, and of what passed at his trial, and to his latest moments: in no one of which is there the remotest allusion to papers of any sort having been read, previously to passing sentence on him, in aggravation of his offence.

“No better success attended a most diligent search in a collection of the books and pamphlets, printed in the reigns of king Charles the first and second, presented by his Majesty to the British Museum, in which there are no less than seven different tracts respecting the trial and execution of the marquis, published in London and Edinburgh in 1661; one intitled the last proceedings against him, ‘containing, *inter alia*, a speech of his, in which he expressly denies having had any epistolary intercourse with Cromwell, or any of that ‘sectarian army.’

“The inquiry, however, did not end there. Thurloe’s State Papers having been referred to in the Biographia Britannica on the subject, an examination was made through that voluminous collection, whether there had been any communication between the marquis of Argyle and Monk; but nothing of the sort could be found: on the contrary, there is, besides the passages referred to in the Biographia, the heads of a discourse between the exiled king and Don John of Austria, on the state of Scotland in the end of 1656, which afford strong presumptive evidence that no confidential letters, especially of such high importance to the writer as those alluded to, were written by the marquis.

“Skinner, chaplain to Monk, in his Life of the General, who would not have ventured to make a false assertion, at a time when the means of contradicting it were in the hands of every one, in giving an account of the Trial of the Regicides, says, ‘In the number of the commissioners, the duke of Albemarle was one; wherein he gave the world one of the greatest instances of his moderation; for, though he knew more of the guilt and practices of these criminals than most of those who sat on the bench, and some of them had been his greatest and most inveterate enemies, yet he aggravated nothing against them; but left them to a fair trial, and the methods of their own defence; when he could have offered matter against some of them that would have pressed them harder: and, by a generous way of forgiving injuries, he had a little before saved the life of sir Arthur Hasbidge,

then occasion, nor does the latter impart in laws any more than a presumption of innocence, ‘*et adumbratum veritates speciem*’; but so it is that in laws presumptions can be taken off

‘and afterwards procured his estate also, by owning a promise made to him, when there was no man among them all who had more maliciously exposed or traduced him.’

“In order, however, to leave no source of information untried, recourse was had, last of all, to the newspapers of the time, in which particular accounts of the proceedings on the trial of the marquis at Edinburgh were given from day to day; but not a syllable of the pretended communication made by Monk is to be found in them. It is hardly possible to conceive that stronger evidence could be found in any case to establish a negative, than is here produced to prove the falsehood of the bishop’s charge. We must therefore believe, that if Mr. Fox had informed himself fully on the subject, he would have been induced to forbear the positive condemnation of Monk, and the consequent severe censure upon him.”

And in his Appendix, Mr. Rose inserts the following Articles:

REPUTATION of Bp. Burnet’s Charge against Monk, that he produced confidential Letters of the Marquis of Argyle on his Trial, which led to his Condemnation. From the Biographia Britannica.

“It is very clear, that what bishop Burnet relates, concerning the transactions of these times, he must have received from other people, and that several years after; for at the time of the marquis of Argyle’s death, he could not be much above eighteen years old; we need not wonder, therefore, that in the circumstances relating to great events, before those times, in which he came to have a share in business, he might be misinformed, for that is all, that either is or ought to be contended for, on this occasion. After giving us an account of a very learned speech prepared by the earl of Loudon, and which Craufurd tells us, was spoken by him in justification of the marquis, the bishop proceeds thus: ‘but while it was very doubtful, how it would have gone, Monk by an inexcusable baseness had searched among his letters and found some that were writ by Argyle to himself, that were hearty and zealous on their side. These he sent down to Scotland. And after they were read in parliament, it could not be pretended, that his compliances was feigned or extorted from him. Every body blamed Monk for sending these down, since it was betraying the confidence that they then lived in. They were sent by an express, and came to the earl of Middleton after the parliament was engaged in the debate. So he ordered the letters to be read. This was much blamed as contrary to the laws of justice, since probation was closed on both sides. But

by clear probation 'et cedit presumptio veri-
'tatis,' so that by the same consequence tortor
can be taken off by a clear probation, as pre-
sumptions can be, and judges and magistrates,

'the reading of them silenced all farther de-
bats. All his friends went out: and he was
'condemned as guilty of treason. The mar-
quis of Montrose only refused to vote. He
'owned he had too much resentment to judge
in that matter. It was designed he should be
'hanged as the marquis of Montrose had been;
'but it was carried, that he should be beheaded,
'and that his head should be set up where lord
'Montrose's had been set.' It is evident from
hence, that if our author's account of the
matter be right, the marquis of Argyll had
nothing to complain of, for these letters sent
down by Monk fixed the fact so fully upon him,
that even his friends gave up his defence, and
withdrew. But the marquis, when he received
sentence, as well as in the whole course of his
defence, insisted, that he had complied no far-
ther than other people had done who were
then his judges; and the same thing he says in
his speech; and hence it is, that I am apt to
believe, that there is some mistake or misap-
prehension in this matter; and that though
Monk might give his assistance to raise a man
whose abilities he might fear, and whose in-
fluence he very well knew; yet he nei-
ther sent down any such letters, nor had any
such to send; and in support of this opinion,
I shall offer my reasons, and draw them into the
narrowest compass possible. I. This matter
was very narrowly looked into at the time it
happened; has been very carefully reviewed
since; and accounts of it have been given by
persons of opposite sentiments; yet none of
these mention Monk's letters. The great mi-
nisters of those times, and those who were
dearest in the taking the marquis's life, re-
moved, so far as they were able, all the minutes
relating to his process, which they would not
have done, had he been convicted on the tes-
timony of these letters, because, the recording
them had justified their proceedings. All
things tending to justify the bringing the mar-
quis to a trial; condemning and putting him
to death, were carefully published in Eng-
land, as bishop Kennet shows very largely;
but nothing is said of these letters. Sir
George Mackenzie wrote a vindication of the
government of king Charles 2, in Scotland, in
which he passes over entirely this whole trans-
action, which surely he would not have done,
if it could have been so easily vindicated, as
by transcribing these letters. Mr. Wodrow
collected every thing he could meet with re-
lating to this process, and has preserved the
names of the witnesses that proved the mar-
quis's compliance, but he says nothing of
Monk's letters, neither is there a syllable of
them in the State Trials; except the trans-
cribing this passage from bishop Burnet. II.
It seems to be inconsistent with another part
of the bishop's own account; for he says, the

being obliged and forced for the publick good
to putt persons suspect of guilt to tortor, how
soon they are apprehendit for preventing
farther danger. If this tortor be way of inqui-

king instructed his commissioner not to pro-
ceed to sentence, or at least to execution,
till he had reviewed the proceedings; for
which there had been no occasion if the king
had known any thing of these letters, since
what satisfied the marquis's friends as to his
guilt, would undoubtedly have satisfied his
majesty also upon that subject. III. There are
some circumstances in the account this prelate
gives of the marquis, which may easily in-
duce us to believe, that he might be misled in
regard to his story. As for instance, he men-
tions his being upon ill terms with his son lord
Lorne, and having actually had thoughts of
disinheriting him. Under the usurpation, it
was necessary for the marquis to disclaim
the conduct of lord Lorne for his own safety
and preservation; but this never deceived the
people in power; and therefore it is strange,
that it should impose upon the bishop. In the
marquis's advice to his son and to the rest of
his children, there is nothing that looks that
way; and in the next article, we shall see, that
lord Lorne's zeal for his father, had like to
have cost him his own life, as the marquis's
coming to London on his son's letter, actually
cost him his. The bishop speaks of an
attempt made by the marquis to make his
escape out of the castle; but he says, that
fearing it might hasten his execution, his
heart failed him. It is not easy to conceive
how this can be reconciled to the story of
Monk's letters. Before they came, the bishop
tells us the affair was very doubtful, and in
such a situation, it is not probable the marquis
would attempt an escape. After sentence was
passed he never was in the castle, and conse-
quently could have no opportunity of escaping
from thence. It is however true, that he really
intended an escape from the castle, and was
once in complete disguise for that purpose, but
laid aside his design, because he would not
desert the sentiments which he had espoused.
He chose rather to die like an honest man,
than to draw an imputation of guilt upon
his character by flight; but his conduct would
have been absurd, if his letters to Monk had
proved him already guilty, or even if he knew
such letters had been in Monk's power. The
bishop says expressly, that the marquis wrote
his letter to the king the day before his exe-
cution; the letter itself shews, that the mar-
quis wrote it that very day. It seems there-
fore possible, that bishop having this ac-
count from some good hand, in his opinion,
might set it down without considering it very
carefully. IV. We have many things said by
Clarendon and Edward of the marquis's cor-
respondence with Cromwell and sir Henry
Vane, though neither have vouchsafed us any
proof. On the other hand, Whitelocke and
other writers on that side, give him quite ano-

sition should preclud all future probation, then it behoved necessarie to followe that either the magistrat should be forced to leave crimes undiscovered, by not putting persons suspect

ther character, and represent him as a person always suspected and dreaded. We have of late years had great discoveries made of the correspondence under Cromwell's government; all which clearly proves that the marquis of Argyle was never considered in any other light than that of a concealed royalist, as his son, the lord Lorne, was a declared one. There is a letter of his to king Charles 2, which I have seen, and is now in print, that proves he had a great correspondence with king Charles 1; and in which he tells the king, that no body could restore him but the Presbyterians; which the king afterwards found to be true. V. Lastly, It is so far from being a fact, that he had any close connection with Monk in the management of affairs, while he governed Scotland, that I am able to prove he was his mortal enemy, and represented him in the blackest colours to both the protectors. He accused him to Oliver as not deserving the money that was paid him as a debt for maintaining the Scots troops in Ireland upon the credit of the public faith; and the following letter will fully shew, that he did not consider his going up to Richard's parliament as a compliance with that government, but as an endeavour to overturn it. This letter is directed to Thurloe, and runs thus :

' My Lord ;

' My lord keeper and myself have done our best to get those men chosen you have wrote for; but my lord of Argyle and some others whom my lord keeper will acquaint you with, have endeavoured all they can to get all Scotchmen chosen. But, I doubt not, but there will be three chosen of those five you sent the names of; and I have taken care, that as many as come out of this country, shall be there with the first: and if the writs come in time, which I hope they will, they shall be all sent to Dr. Clarges. The marquis of Argyle himself endeavours to be chosen, notwithstanding he is sheriff of Argyleshire; neither do I guess he will do his highness's interest any good; but when my lord keeper comes up, he shall acquaint you with the business. Which is all at present from

' Your lordship's very humble servant,

' GEORGE MONCK.'

' Dalkeith, Dec. 30, 1658.'

From Dr. Campbell's Lives of the Admirals.

" But the bishop is not content with barely characterizing this noble person, he charges him with three glaring crimes; which as they relate to the most eminent actions of his life, we shall briefly consider. The first is the murder of the marquis of Argyle. This nobleman was questioned before the parliament of Scotland, for concurring with the late rebellious

to the tortor, or should be forced to absolve pannels, and suffer them to remain unpunished, and goe loose in the common wealth, by wanting the future opportunitie of leading a just

powers. He pleaded, that he complied with them only, and made a very strong defence: but the bishop says that Monk, having several letters of his, which fully shewed that his inclinations as well as his actions were with the prevailing party; he sent these down, which were read in parliament, and by this breach of private friendship he brought the marquis to the block. Now to this I say, that the fact cannot be true for many reasons: I shall mention only a few. First, the marquis in his defence complains, that he was surprized into being present at Oliver's proclamation as protector, by general Monk's sending for him to the council, without letting him know what was to be done. Would he have complained of this, and have passed by the letters; or would not this complaint have been ridiculous if there had been any such letters? Second.—The marquis died with an appeal to God for the sincerity of his defence, and wrote a letter to the king, affirming the same thing, a copy of which I have seen. Would so wise a man, as the marquis certainly was, have done this, if, as Burnet says, his own letters had made the thing so plain, that his friends had nothing to say? Third.—This does not at all agree with Monk's character. He was an advocate for mercy to the regicides in the House of Lords; he was silent on the bench at the Old Bailey, when commissioned to try them; and, which is much more to the purpose, he saved sir Arthur Haslezig's life and estate, (the bitterest personal enemy he had in the world) by owing a promise to him, which some say he never made. This seems to shew him of no betraying spirit. Fourth.—There was no occasion for Argyle to write any such letters, for Monk never was in England after Oliver became protector; and it is hard to understand, why the marquis should apply to him in Scotland, when he could so easily have audience of Cromwell in London where he often was. Fifth.—But the thing is now out of doubt; for by the publication of Thurloe's papers it appears, that Monk never considered the marquis in this light, but always represented him as a secret friend to the king and an active enemy to the protector's government."

In direct and complete contradiction to all this, Sir George Mackenzie, who had been one of the procurators for the marquis of Argyle, (see the Life of Sir George Mackenzie prefixed to his Works) expressly says, (*Laws and Customs of Scotland in Matters Criminal, Part 2, Tit. 25. S. 3.*) " The marquis of Argyle was convicted of treason upon letters written by him to general Monk, these letters being only subscribed by him and not holograph, and the subscription having been proved ' per comparationem litterarum' which

probation against them, and could ther be any thing more absurd or inconvenient for societie, as that if a person being instantlie taken for burning a town, though he should deny (when it was necessary to discover the truth by a preparatorie tryall) should notwithstanding be convicted, upon a clear and palpable probation, of which no man alive could doubt, and howe terrible a thing would it be to the common interest of that place, to see this man who had burnt the capital city of the kingdome, efter the same could be clearlie proven against him, going up and down at his libertie, because he had been so obdurate a rascal as to have denied a palpable, and clear truth when he was put to the question, therefor. Whereas many wicked persons, might and would be tempted to escape by this doctrine, so on the other hand neither the common wealth, in general, nor any honest man in particular, could suffer any detriment or hurt by the position, laid down by his majesties advocat, which asserts only, that no man can be put to a tryall, efter tortor upon *inditis conjecturae*, or presumptions, which his majesties advocat confesses, are

were very hard in other cases, seeing 'comparatio literarum' is but a presumption, and mens hands are oftentimes and easily imitated, and one man's writ will differ from itself at several occasions."

Mr. Laing, who had in his History noticed this transaction before the publication of Mr. Rose's work, observes (4 Hist. 230) "The humanity of William was desirous rather to prevent than to punish their designs [the plots of Sir James Montgomery and his associates] and there are few examples in history of a plot so extensive, detected and suppressed without a single execution." And he concludes his tenth book by remarking, "that notwithstanding the incessant plots and conspiracies of the Jacobites, and the jealous fears that invariably render new governments rigid and cruel, not a single person punished on the scaffold, nor was there a noble family in Scotland ruined by forfeitures during his lenient reign."

July 23, 1684. The following act of council was made, "Whereas the boots were the ordinary way to expiscate matters relating to the government, and that there is now a new invention called the thumbkins, which will be very effectual to the purpose and intent foresaid, the lords of his majesty's privy council do therefore ordain, that when any person shall, by their order, be put to the torture, the said boots and thumbkins both be applied to them, as it shall be found fit and convenient." 2 Crookshanks's History, p. 227.

At the time of the Revolution, the meeting of the estates of the Kingdom of Scotland, in their Declaration, containing the Claim of Right, and the offer of the crown to their majesties king William and queen Mary (act 13) Declare, that the using of torture without evidence, or in ordinary crimes, is contrary to law.

fulhie purged and taken off by a preceding tortor. But this will be a verie clear way, lyke wayes to encourage a man to confess that which is the truth, and no more, because they will knowe that though they should deny obstinatlie on the tortor, ther obstinacie could be of no advantage to them, nor secure them against a clear subsequent probation.

2do. His majesty's advocat does assert that the most can be pleidit in law upon that ground, is that no man be tried upon the principal and chieff poynts for which he was tortured. But so it is that the pannall was never tortured upon the same poynts for which he is nowe to be tryed, for he was then only tortured upon his accession to the king's excommunication, his correspondence with Cargill, and with the rebels in Holland and Ireland, and his being in accession to the keeping his majestie out of the proclamation, and abuseing Mr. Welsh upon that account. Whereas he is nowe only to be tryed for his being in armes with the rebels at Bothwellbridge, Hamilton mair, and other places in and about that place, and tyme, which are points absolutlie different from these for which he was subjected to tortor.

3o. All that can be pleidit in such a case is that wher a person tortured denies upon the tortor he ought not thereafter to be tryed *ex eodem capite*. Because ther by a denyall he clears himself and the judges, but this pannall would never deny upon the tortor nor acknowledge the judges, but continued in an insuperable obstinacie.

4to. Ther could be no necessity to examine the pannall upon his accession merelie upon this rebellion and his being at Bothwellbridge, and the places adjacent, because it is offered to be proven that previouslie to his tortor he confest his cryme clearlie and liquidlie.

Sir George Lockhart for the pannall duplys, that the defence humblie offered to the lords of justiciary in behalf of the pannall is in itself so unanswerable foundit upon the common lawe, the lawe and custome of nations, and the opinion of the most eminent criminalists extant and the practice of the most famous tribunalls in Europe, that it neither is nor can be eleidit by the pretences insisted on in the replie made be his majesties advocat to the said defence, for *Imo*. It is not controverted, but if the accuser in a criminal lybell, of whatever nature or purport the same be of, doe only make use of a presumptive probation without subjecting the pannall to tortor, the lawe in that case considers the concurrence of adminicles and presumptions adduced be the accuser and offered in behalf of the pannall. And then the rule in lawe insisted on by my lord advocat precedes the 'presumptio cedit veritati' according to the pregnancie of the adminicles or presumptions urged and made use of in behalf of or against the pannall; but when the accuser in criminal lybells, not trusting to any probation that he is able to adduce against the pannall, does recurre to and make use of the extraordinary remedie

of tortor, as *medium explorandi et indagandi veritatem*, in which tortor, as being that which the law looks upon to be *res fragilis*, and by which the innocent is as oft oppress as nocency discovered, in that case the common principles of law and the customes of nations has proceeded with that equalitie of justice, that as in case an innocent person forced by the extremitie and violence of the tortor to confesse the crime behoord to, be condemned upon that confession, so the paritie of reason and the equalitie of justice does absolutlie requyre that if the person subjected to tortor '*patientia sua viciorum vim tormentorum absolvendus est non solum ab instantia sed etiam a crimine,*' and the reason is most evident, because the accuser by recurring to that extraordinary and subsidarie remedie of tortor, does place the whole vigor and effect of the affaire upon what shall be the effect of the tortor, and that whether the person subjected to the tortor confesse the crime and be condemned, or by inducing the violence or tortor purge all manner of probation that was competent against him as to the said crime.

So. It is true that if either the judge competent or the perswearer of the accusation doe not subject the pannel to the tortor, nor interrogate him in the tortor '*super ipso crimine et factis principalibus* but only (as lawyers expresse it) '*pro ulteriore veritate indaganda* as *super mandatoribus et adjutoribus et feneratoribus vel circumstantiis delictum aggravantibus*;' in that case lawe allows that the tortor cannot operat as to the principal fact and crime, because as to that he was not subjected to the tortor; but that does not at all concerne the poynt in question, in respect it is positivelie offered to be proven that this pannel was subjected to the tortor, not upon any speciall coppee of particular presumptions exhibit and delivered to him, nor upon these special poynts descendit upon by my lord advocat, but was subjected to a most violent tortor twice repeated *super ipso crimine*; and the principal deeds tybbell'd; and particularlie was interrogat in the tortor if he was not present with the rebels at Bothwell-bridge, Hamilton, and Glasgow, and the other places tybbell'd, and upon all which he suffered and endured the violence of the tortor and did howayes acknowledge these crimes, and what can be more absurd and unreasonable, and of more dangerous consequence to the lives of his majesties subjects, than that persons accused as guilty of crimes may in the first place be subjected (be way of simple explication and tryall) to undergoe the most horrible paine and violence of tortor, and notwithstanding that many tymes their members may be torne and lacerat, and disabled for all their lives, yea and according to the strength or weakness of their temper may ruse the hazard of their lives, that yet the same persons notwithstanding of their suffering such an extraordinary violence of tortor, should not reddeem themselves from the hazard of farder tryall as to these crimes: for if this doctrine be once laid down as a foundation of criminal procedor in any nation, the first en-

quiries shall be over, by subjecting persons to the extraordinary violence of tortor, which the lawe in no case allows but as the last and extraordinary remedie, and in *subsidium*, and upon the issue whereof the whole import of the tryall is to depend and be determined. Yea tortor is of itself of so extraordinary a nature as the customes and policies of many nations does reprobate and does not at all allowe the use of tortor, even as the last remedie, and whereupon parties confuting are to be condemned or denying to be acquitt, but the law and custome of this and all other nations cannot allowe tortor to be made use of to this mean effect, that when parties have undergone the outmost extreme and violence of the tortor they are still lyable to farder enquiries and tryalls as to the same crimes.

3°. Ther is no shadowe of prejudice to the publick interest, or to his majesties interest, as to the tryall and punishment of crimes, because the just and regular way of procedure is fullie competent, viz. That his majesties officers before they bring pannalls to tryall are to use their outmost enquiry for probation, and if after all enquiry and diligence, the samen cannot be hade, in atrocious crimes, such as the crime of treason and others, which the lawe calls *crimina excepta*, ther is then place as the last refuge to the extraordinary remedie of tortor for the tryall and conviction of these crimes, but in *quocumque statu processus* tortor is made use of be lawe, and the common opinion of lawyers, and the custome of nations putts that moment and weight upon such an extraordinary violence and extremitie, that it excludes all farder probation and all farder enquiry. And that this defence is no groundless assertion, but is received and owned by the opinion of the greatest criminalists extant, and the practices of the most famous tribunalls, the lords of justiciary are desyred to cast their eyes upon Farin, quest. 40. in that title '*an convictus debeat tortura et si detur super torturam illatum consequenter purgata inditia et plene probatus.*' Julius Clarus, quest. 69. num. 38. When he expresslie asserts that if tortor be once adhibit, and if the pannel endure the violence of the same, he does purge all manner of probation competent as to that crime, '*quasi puram veritatem dixisse videatur,*' and as he says '*quod communiter totus mundus ita tenet et hanc esse communem observantiam etiamsi delictum fuisset contra ipsum plene probatum;*' and that upon the sounder ground and reason, that it wer unjust and unreasonable, that after pannalls in order to the explication and tryall of crimes hade ruse the hazard of their lives, and at best had their members torne lacerat and disabled, they should be again subjected to new enquiries and tryall for the same crimes, and thereafter undergoe punishment, which would be to suffer double for the same crime, and the same opinion is also asserted by Gomezius, cap. 13. De Tortura Heorum, num. 28: and who attests it to be the practice of the whole judicatories of the

kingdome of Spain, and thinks it is so just and irrefragable, that he adds these words 'Et certe istam sententiam et conclusionem semper tenui legendo et nunc firmiter teneo fundamentaliter scribendo et ab eo non esse residendum in iudicando et consulendo,' and the same is also the opinion of many others as *Corpus. quest. 125 De Effectu Torturae. Damadensis in his Prax. Rerum Crim. cap. 29: de Confessione Reorum in Tortura,* and the same authors doe also cite the decisions of the most famous tribunalls and judicatories, as to the same poynts, as may be evident upon perusal thereof, and as far as no positive law and act of parliament in this kingdome for the use of tortor except in so far as it is foundit upon custome consonant to the laws and customes of other nations, and to the principles of the common lawe, so it is most just and reasonable that the effect of tortor be interpret in this kingdome according to the principles of the common lawe and the lawes and customes of other nations, and with that equalitie of justice, that as confessions though extorted by the violence of tortor are 'per se' sufficient to condemne without any other probation, so the violence and extremitie of tortor being endured, it does purge and take off all other manner of probation. Lyke as the custome of this nation is no ways contrair; but most consonant with the principles and grounds of lawe above mentioned, and the authoritie of lawyers and the practices of other nations in all cases where the pannall was subjected to tortor, 'super ipso crimine facti principalli,' and not interrogat only as to extrinsecick points, as is evident from that famous case in the journalls and records of the justice court, annis 1632 and 1633, of John Toshach who was persecuted as guilty of statutorie treason, for wilfull fyre raising and burning the house of Frenndraught, wherein the pannall being subjected to tortor not simple as to the whole matter of fact as it was lybelled, but precislie upon this individuall poynt, if he entered the transe and vault, of the house of Frenndraught, with a lighted candle in his hand, about ten or eleven o'clock at night, befor the house was burnt, which he denied, and being subjected to tortor and having endured the violence thereof, and thereafter persecuted for the same crime at the instance of sir Thomas Hope his majestie's advocat, and the said defence that he was subjected, and hade endured the extremitie and violence of tortor being then plead, also the king's advocat did urge the same grounds nowe insisted on by my lord advocat, and wer most peremptorie urged and prest to proceed upon pretence of a newe probation, efter the case hade long dependit from August till November and from then to February, and the privie councill advisd with the said defence albeit it did not concerne the wholl poynts and circumstances lybelled, but only a point having ano attentencie with the crime itself. The justices efter they hade ruminated and long considered; they neither did nor could repell

the said defence, and certaintie the case here is in fare stronger termes, the pannall being subjected to tortor upon the formall crime, and all the steps gradations and circumstances relating thereto, and in the forsaid case the pannall being subjected upon a speciall point of probation, viz. one Domingo, who was adduced against him, whereas here ther was no speciall coppie of any particular evidences or presumptions adduced or exhibit to the pannall, but he indefinitely subjected and interrogat as to the crime. And as to that pretence that the pannall before he was tortured hade confessed the crime, as to himself, and was only tortured as to his accomplices and other points not nowe insisted on. It is answered it does not at all eleid the defence, but resolves in a denyall thereof, that the pannall was not subjected to tortor for the crimes and facts lybelled, which it is offered to be proven he was, and being proven in justice he ought to be assolyed, and as there is no such pretendit confession produced in writt under the pannall's hand, which tho it were is in lawe no sufficient probation, as being but extrajudiciall, and cannot be made use of as a mean of probation before the inquest, being contrair to the act of parliament, so though ther wer a confession in writt, if the partie hade been subjected to the tortor upon the crime (which is impossible to believe that ever his Majesties Advocate either did or would suffer) the extremitie and violence of the tortor did in lawe and upon the grounds forsaid take off and purge all manner of probation for the said crime.

2do. It neither is nor can be sustained, without the endangering of all mens lives that the depositions of witnesses can be made use of to prove pretendit confessions whereupon to inferre pannalls guiltienes, the confessions themselves not being extant, lyke as when the pannall was desyred to subscribe a paper containing his confession, he absolutlie refused the same, so that the said pretendit confession can never be obrudrit nor made use of.

His *Majesty's Advocat*, to lett the world see the gentle government they are under in this king's reigne, declares that he will not insist upon the former point in its latitude, though he reserves it still to his majestie to make use of, when it shall be necessar. But at present he declares (off consent) that it shall be relevant for the pannall to prove that he was tortured upon this verie point by command of the privie councill, and that this point of his being at Bothwelbridge, was one of those points upon which he was advertised, that he was to be subjected to the tortor and for refusing wherof any of the stroaks of torture was given him. And for verifieing of the contrair produces the Commission of Privie Councill itself, be vertue whereof he was tortured, of the whilk the tenor follows:

'Edinburgh the sexteint day of November 1680. The lords of his majesties privie councill having by severall clear testimonies found

that they have verie good reason to beleave that there is a principle of murdering his majestie, and those under him for doing his majesties service, and a design of subverting the government, both of church and state, intainted and caryed on by the Phanaticks, and particularly by Mr. Donald Cargyll, Mr. Robert Macquhair and others ther accomplices, and that John Spreull and Robert Hamilton have bein in accession thereto. They ordaine the said John Spreull and Robert Hamilton, nowe prisoners, to be subjected to the torture upon such interrogators as relate to these three points, to which they have good reason to beleave they came give much light and discovery, first, by what reason and means this murdering principle is taught and caryed on, who wer accessorie to the contrivance of murdering, and who wer to be murdered, and also as to the lord St. Andrews murder.

2do. If there was any newe rebellion intendent, by what means it was to be caryed on, and who was to bring home the armes, or if any be alreadie brought, or to be brought, and by whom, or who wer the contrivers and promoters of the late rebellion at Bothwell-bridge.

3to. Who wer ther correspondents abroad and at home, part'lie at London or else wher, and what they knowe of bringing home or dispersing seditious books or pamphlets, and such particular interrogators as relate to these generall:—and the saids lords doe hereby give full power and commission to the earles of Argyle, Linlithgow, Perth, and Queensberrie, the lords Roasse, Thesaurer—deput, Register, Advocat, Justice Clerk, Generall Dalzell, Colintoun and Haddo, to call the saids John Spreull and Robert Hamilton, and to examine them in the torture upon the interrogators forsaid, and such other particular interrogators as they shall think pertinent relating to the forsaid generall heads, and to report to the council. Extract by me. Sic subscribitur. W. PATERSON.

Sir George Lockhart, for the pannall du-plyes, that the pretence insisted on in the replie is most irrelevant, and ther is no necessitie that the pannal should offer to prove any such qualifications, that he was interrogat as to the crymes, libelled by the authoritie of the lords of privie council, it being sufficient that he was tortured by a committee, apoynted by the lords of Privie counsell, and in ther presence examined and interrogat as to the crymes lybelled, and the pannal was not in the least to examine or consider who interrogat him, ther being nothing more ordinary then that either the president of the council or any other counselor present, will interrogat, and no lawe ever requyred more then that the pannal was *de facto* interrogat upon the crymes nowe lybelled, as the pannal was, and which is offered to be proven, and it wer to charge the committee with the danger of unjust and arbitrarie and illegall procedor, to suffer

or allow the pannal to be interrogat upon any point that was not warrantable, whereas the pannal was not only interrogat upon the crymes lybelled, but also the samen wer marked and drawn up as his pretendit confession, and the samen offered to him which he refused; and the pannal's procurators oppose the council's commission, which contains not only the particular interrogators, but also a generall, and ordains him to be examined not only as to particular interrogators, but also as to what relates to the generall.

THE INTERLOCUTOR.

The Lords Justice Generall, Justice Clerk, and Commissioners of Justiciarie, having considered the dittay and debate, they find the dittay relevant, and remits the same to the knowledge of the assize, and repells the defence foundit upon the tortor, in respect the commission of the privie counsell did not warrant the pannal to have been putt to the question upon any of the crymes mentioned in the dittay.

The lords continue this action and cause till Monday next, and ordaine the witnesses and assizers to attend, ilk person under the pain of two hundred merks.

CURIA JUSTICIARIE, S. D. N. Regis tenta in Prætorio Burgi de Edinburghe, decimo tertio die Mensis Junii 1681, per honorabiles viros Willelmum Comitum de Queensberrie, Justiciarium Generalem, Ritchardum Maitland, de Duddop, Justiciaria Clericum, Robertum Dominum de Nairn, Dominos Jacobum Foulis de Collingtoun, Davidem Balfour de Forret, Davidem Falconer de Newtown, et Rogerum Hoge de Harcarsa, Commissionarios Justiciarie dicti S. D. N. Regis.

Curia legitime affirmata.

Intran

John Spreull, Apothecarie,
Robert Ferguson, of Letterpin,—Prisoners.

Indyted and accused for the crymes of treason and rebellion mentioned in the dittay.

Persewer.—His majesty's Advocate.
Procurators.—*Ut ante.*

Mr. Walter Pringle, advocate, as Procurator for John Spreull, the pannal, alleedges that it is humble conceaved, that notwithstanding of the Interloquitor and Commission produced, the defence ought to be sustained, and the pannal takes instruments upon production of the commission, and contendit, that albeit ther had bein such a commission granted; the committee had thereby ane clear and evident power to interrogat the pannal upon the crymes lybelled. In suae fare, as by the second generall interrogatar, the committee is expresse impowred to interrogat the pannal,

in these words, viz. By whom, and who were the contrivers and promoters of the late rebellion at Bothwellbridge. And by the third article of the said commission, at the end thereof they are expressie impowered, to examine him in the tortor, upon the foresaids interrogators, and such other particular interrogators as they shall think pertinent relating to the foresaids generall heads, from which it appears most evidentlie, that the commission is as ample and expresse, as that they might have interrogat him if he was at Bothwellbridge, or a contriver, or promoter of the said Rebellion, that being a most pertinent interrogator, and relating to the foresaid generall, and the pannall subsumes, that he was accordinglie interrogat thereupon, and offers to prove it.

Mr. David Thores farther adds, That by the said commission, the committie were appoynted sole judges of the pertinencie of the other interrogators, to be proposed to the pannall, and the said committie having judged the samen pertinent and propounded the same, and he having answered in the tortor theranent, and denyed the samen, his denyall most absolve him, and the committie are only answerable for propounding thereof, in case it shall be found to have bein ane interrogator, not allowed by the commission, which is impossible it can be.

His Majesties Advocate oppons the Interloquator, and commission which bears no power to examine him upon his own being ther. And in fortification of the commission offers positivie to prove, That it was expressie argued and concludit in councill (in contemplation of this debate) that he should not be interrogat upon his own accession to Bothwellbridge, and that, the first thing was done in the committie, was againe to conclude be unanimous consent that he should not be interrogat, upon his own being in the rebellion *simpliciter*, which is now the only thing insisted on, and this intimat to him tuintie severall tymes, so that tho ther were any thing debatable in the generall, as it is not, this takes it off.

Sir George Lockhart oppons the commission, whereupon the pannall does again, and again, take instruments and protests, it may lye and remaine in the clerk's hands: and commissions wherupon so bye and important effects have followed as the tortor of a person, ought not to be subject, 'ex post facto,' to glosses and interpretations, the commission being as clear as can be, that it contains a generall warrant in the words abovementioned: and as for these pretences, that the contrair was resolved and concludit, in privie councill, and in the committie, and intimat to the pannall, the alleadgence is no ways relevant because whatever was debated or argued in privie councill, in law, 'tantum creditur ex iudice quantum apparet ex actis,' and the commission being under the clerk of privie councill's hand, it cannot be

taken away nor redargued by any probation of what was argued, debated, or verbalie concludit in councill, and the same apawer is repeated to the arguing and debating in the committie and intimation made to the pannall, because the commission of its own nature bearing a general clause, the committie might argue and intimat and 'ex post facto' alter ther opinion, and interrogat, and it is ane unanswerable demonstration, that the committie's procedor was so in respect it is positivie offered to be proven that the pannall was subjected to tortor, upon the ground that he refused to signe the confession, as it was drawn up and offered to him, and that the confession which was offered did bear, amongst other articles, ane answer as alleadged, made be the pannal to the interrogator, tutching his own accession to the rebellion, and certainlie it passes all naturall understanding if this doe not evince that the pannall was interrogat tutching his accession, and that the committie approved the same, and that it was drawn up as an article in his alleadged confession, so that the defence upon the tortor, neither is nor can be eleidit upon pretence of the said commission.

The Lords Justice Generall, Justice Clerk and Commissioners of Justiciarie, having considered this with the former debate, they find no newe matter alleadged for the pannell, and therfor adhers to ther former interloquitor, and remitts the dittay to the knowledge of the assyse as formerlie.

ASSISA.

John Trotter, merchant.
John Brown, merchant.
James Nicolson, merchant.
John M'rales, armourer.
William Bannatyne, wreiter.
Francis Brown, vintiner.
John Lawe, goldsmith.
Charles Robertson, vintiner.
David Lindesay, late balyie.
William Lauder, turner.
Alexander Reid, goldsmith.
James Middleton, armourer.
David Robertson, vintiner.
William Steinson, late balyie.
Alexander Abercrombie, vintiner.

The Assyse lawfullie sworne; no objection in the contrair:

Robert Ferguson of Letterpine confesses he was in armes with the rebells at Bothwell-bridge in June 1679, and acknowledges that it was a rebellion, and comes in the king's will and throws himself on his mercie, and begs pardon, and is content to take the bond* never to

* Concerning this bond, Wodrow, after relating the removal to Edinburgh of the prisoners taken at and after the affair at Bothwel, writes thus:

"After the prisoners were thus lodged in the Grayfriars church-yard, the council met

ryse in armes against the king nor his authority, and has renounced and is content to renounce his estate in the king's favours,

Sic subscribitur. R. FERGUSON.

His Majesties Advocate for Probatione against John Spreull adduced,

John Layng, Chirurgeon, in Hamiltoun, aged twenty seven years, purged of partial councill,

several times while the duke of Monmouth was in the city, and then moderate measures were pursued. After several meetings, it was agreed upon, that a bond should be offered to all the prisoners in the church-yard, upon the signing of which they were to be set at liberty. Yet I find it noticed, that a good many of them had not the offer of it at first, the managers resolving that some hundreds of them should be sent to the plantations, as they gave out, to satisfy the king in this matter. But I have reason to think the king would have been very easy in this; and the reserve was rather to satisfy themselves, and the cruel disposition of too many of the clergy. We have seen that transportation was first proposed by the council

“What I meet with in the Council Register asto this bond, is, July 4, before the duke went off: ‘The lords of his majesty’s privy council, in obedience to his majesty’s letter, of the date June 29, (inserted before App. N^o 31), ordain such of the prisoners as were taken in the rebellion, (except the ministers, heritors and ringleaders, who are to be prosecuted by the justices and others, to be sent to the plantations, to the number of three or four hundred, conforma to the list brought in by the committee, and to be approved by the council) to be set at liberty upon their enacting themselves, not to take arms against his majesty or his authority; and appoint the clerks of council to see the said prisoners enact themselves, and to intimate to them, that if they, or any of them shall hereafter be in arms at field-conventicles, the persons so taken shall forfeit the benefit of his majesty’s indemnity, and thereupon to dismiss them; and appoint one of the bailies of Edinburgh to attend.’

“Thus this matter stood as it was first ordered. This bond was extended and put in form: and I have seen two copies of a bond pressed after Bothwel; the one hath a plain relation to the indemnity, and I suppose was what was made use of up and down the country; and the other I take to be that which was offered to the prisoners. It may not be unfit to insert them both here, being but short. The first runs thus:

‘I being satisfied with his majesty’s Act of Indemnity, dated the 27th of July last, and enacting myself to the effect underwritten; therefore I bind, oblige, and enact myself, that I shall not hereafter take up arms against his majesty, or his authority. As witness my hand, &c.’

“The other Bond, which, I suppose, was

solemnly sworne, and examined, depones, that in the month of June 1679, the pannall sent for the deponent to the house of one David Marshall in Hamilton, about sitting of accounts betwixt them, the pannall, John Spreull, and the deponent, having trysted to meet at Hamiltoun, about that tyme befor he went to Ireland for clearing thereof; that ther being some confusion in the accounts be reason of some pay-

offered to the prisoners at Edinburgh, was to the same purpose; but a little adapted to their circumstances, and follows:

‘I being apprehended for being at the late rebellion; and whereas the lords of his majesty’s privy council, in pursuance of his majesty’s command, have ordained me to be set at liberty, I enacting myself to the effect underwritten: therefore I bind, oblige, and enact myself in the books of the privy council, that hereafter I shall not take up arms, with out or against his majesty, or his authority. As witness my hand, &c.’

“The exact numbers of such who took this bond, and of those who refused it, I cannot pretend to give; it is certain the most part by far fell in with it: and I find it said, that many of these who signed the bond did it under the thoughts, that their rising was not against his majesty’s authority, and consequently that it did not bind them up from any such appearance, when occasion offered again. I find about four hundred continued in the church-yard, as refusers, though, as hath been hinted, many of them had not the bond in their offer at first. The rest, it seems, either subscribed the bond, or were silent when notars signed it for them, which was reckoned enough where they could not write; and so they were dismissed.

“But then as to the persons thus liberate by the council’s order, we must not think their sufferings were at an end; some instances to the contrary have been already given. The most part of them were tossed and harassed upon their return to their houses, for no other reason than their being at Bothwel, as likewise their friends and relations upon their account; yea, their neighbours, and such as dealt with them, were distressed for converse and communing with them. They had no pass given them; and though the council had done with them, the army had not; and those made little or no distinction betwixt such as had been taken, and were liberate, and those who had not been taken.

“And it deserves our remark further, that both the prisoners now dismissed, and many others who had escaped from Bothwel, after the first brush was over this year, returned to their houses and possessions, and, there being no sentence against them, they resorted openly to Kirk and market, fairs, and other public places; yea, some of them were put into public employments, as procurators, sheriffs, and sheriff-clerks in courts. This could not but make the most prudent and cautious se-

ment made to John Spreull's wyff, he gave John Spreull some money, and delayed the fitting of the accounts till another tyme. Depones that immediatlie he sawe John Spreull take horse and ryd away, and that he hade hulsters and pistols, and that he rode towards his own house at Glasgowe. Depones that he used to see the pannall oft tymes befor the rebellion, rying with hulsters and pistols. Depons that the soume which he gave him was within twentie pounds Scotts. Depons ther was no person in company with them when this past but themselves two. Depons, that David Marshall in whose house he was, was not out at the rebellion. Depones he does not remember whether he sawe a mail pilion behind him or not. Depons that the pannall hade said to the deponent, that he hade come straight from Ireland, and that he was going for Glasgowe. Being interogat if ther past any discourse betwixt the pannall and him, ament the rebellion and rebells who wer in armes then, depons ther past nothing betwixt them theranent as he remembers; depons that this was the tyme when the rebells wer at and about Hamiltonn, and that the deponent was

owing the pannall more money, and this was about eight dayes before Bothwelbridge, and depons that he did not see the pannall in company with any of the rebells, the time of the rebellion. And this is the truth as he shall answer to God.

Sic subscribitur, JO. LANG.

Mr. Walter Pringle objects against David Caldwell that he cannot be admitted a witnes against the pannall, because it is offered to be proven, that since the pannall was cited upon this lybell, he has been examined and deponed upon oath upon the contents of the lybell, and neither by the laws of this nor any other nation, came any previous inquisition be taken in examining of witnesses against pannalls, after a criminal persuit is raised and the pannall cited.

Sir George Lockhart adds, that the objection is most relevant and of most extraordinary importance as to the lives of the people, that pannalls efter they are actued, the witness cannot be adduced nor sworne against them, but in judgement and in presence of the pannall and inqueist; and the reason is most evident, be-

tified, that either they were not at Bothwel, or, if they were, the government was fully reconciled to them. Yet, in the year 1682, and afterwards, when the matter of reset and converse was pushed as criminal, not only with intercomanded persons and fugitives, but such as were held and repute to have been in the rebellion, though no sentence had ever past upon them, multitudes were brought to trouble, and every body was open to it; and some, as we may hear, were condemned precisely upon reset and converse.

"Of these four hundred who remained in this inclosure, it was reckoned about a hundred got out, some one way, some another, without any direct compliance. Divers had interest made for them by their friends among the counsellors. Some, by climbing over the walls of the church-yard with the hazard of their lives, and others by changing their clothes in the night time, and, especially after their huts were put up, got out in womens clothes.

"A great deal of pains was taken upon such who remained, by those at Edinburgh, who were of opinion the bond might be subscribed without sin; but very little ground was gained. They began now to be inured to their hardships, and, by their mutual conversation, they strengthened and heightened one another's scruples ament the bond, and their spirits became more and more sowed by the severities they were under; and many turned peremptory against all terms with their prosecutors. The bond was once and again offered to them, now, I believe, without exception, when the offerers were pretty much assured few of them would take it; yea, they had frequent alarms, every week, that the council would put them all to death. But as their troubles grew, so did their firmness and resolution.

"While the prisoners continue thus at Edin-

burgh, the managers send directions through the west and south to the persons underwritten, to offer the bond to such as had been in the rising, and were not heritors or ministers, and a power to enquire after others. The persons thus impowered were, the lord Collingtoun for the shire of Edinburgh, the earl of Wintoun for Haddingtoun, the earl of Linlithgow for Linlithgow, the marquis of Montrose for Perth, the earl of Roxburgh for Roxburgh, the laird of Haynisk for Selkirk, the earl of Carnwath for Lanerk, the earl of Queensberry for Dumfries, the earl of Glencairn for Air, the earl of Wigton for Dumbartoun, the earl of Nithsdale for Kirkcudbright, sir William Murray of Stenhope for Peebles, earl of Mar for Stirling, lord Ross for Renfrew, the earl of Hume for Derwick. Those persons, in a letter from the council, July 17, have the following directions and powers given them, 'That whereas his majesty, by his letter June 29, hath ordered, &c. as above, the council impowers them to call before them such who were in the rebellion, and are not heritors, ministers, or ringleaders, whether it be those who were not apprehended, or, being apprehended, have escaped, and have not taken the bond, and to offer it to them, and upon their signing it to dismiss them, certifying them, that if they shall hereafter be in arms, or at field-conventicles, they shall forfeit the benefit of the king's indemnity; that, in case of refusal to sign the bond, their persons be secured in prison. Further, they are impowered to inform themselves what heritors, ring-leaders, and ministers within their shire, were in the rebellion, or did contribute to the sending out of persons thereunto, and to seize and imprison them, and with all diligence report their names to the council.'

2 Wodrow, 70.

cause the pannall, 'in omni actu prejudiciali' that concerns his lyff, is to be confronted with the wytnesses, and they to be interrogat upon the mutuall interrogators of the pannall, and any other points which may tend to clear his innocence, and not the witneys predetermined by depositions upon oath without the presence of the pannall, which in lawe is *proditio testimonii*, and, not to insist upon any unnecessary debate, this was so found and determined the eight of January 1672, in the case of the present justice general, and the Johnstouns of Earshage, and severall tymes senayue, and it is farder addit, that as this is uncontraverted lawe, so my lord advocat in his own treatise of Criminnalls doth sett down the formaid decision, and doth assert the same not only to be his own opinion, but ane uncontraverted principle to be observed by the justice court in all tyme thereafter.

His Majesties Advocat alleedges that *proditio testimonii reprobata* by lawe is that which is *ultronia*, but not that which is taken by the authoritie of a judge, as to which ther can be no prejudice to the pannall nor presumption of fraud, malice, or desaigne, and it is necessary in many cases, especialie in that of rebellion, the horror and aversion wherof hes allowed many things to be done, which are not otherways allowed, as that *socii criminis*, and other persons exceptionable may be received, and the particular reason why it is neceysar is to the end that it may be known what witneyses are to be secured, who otherways would not come. Lykeas efter solemne debate this was expresslie repelled in March last in the verie case of this rebellion, and being fullie debate in counceill, the justices themselves wer commandit to examine and did accordinglie examine, and as ther is no hazard upon the one syd, so ther might be great hazard to the commonwealth upon the other, since this tendit verie much to clear what is the true probation, for cane ther be any danger in receiving them upon oath whatever may be otherways, for if they be honest witneyses they will depone nothing contrair to truth being upon oath, and the act of parliament appoynts that the probation that is to make against the pannall be led in his presence, and the advocat confesses that depositions taken upon oath without his presence cannot be repeated, nor should the justices take notice of them, and the reason the act of parliament appoynts that the witness should be received in the pannall's presence, is to the end that the pannall may clear the judges by farder interrogators, which that previous tryall does not hinder, not being to be foundit on, and so efter the lybell is given ther can be no farder be done by way of inquisition, for farder burdening of the pannall, yet for clearing what witnesses are to be secured for fear they abstract themselves for being in the same cryme, which is in this case, they may be examined, or otherways the counceill would be forced to secure hundredths of witnesses, which would be most inconvenient for

the lidges, and the advocat declares he makes no use of any of the previous depositions.

Sir George Lockhart replies that the objection made against the witneys, is in itself most just, and foundit upon the solid and clear grounds of lawe and reason, for albeit 'in judicio inquisitionis,' befor a person be cited as guilty of a cryme ther is place in order to the information of the judge, or of his majesties advocat, to take tryall and to hear the declaration of witneyses to this effect to grant warrant either for the apprehending or citing of criminalls according to the importance of the cryme, yet 'in judicio accusationis,' and efter a partie hes gott his indytmnt, and is cited to answer, ther can be no procedor made in that proces, but where the partie is present. And it is not of the least weight that the advocat declares that he does not make use of the depositions of the witneys already taken because they already attained ane effect prejudiciall to the pannall which is to limit and predetermine them, so that they can depone upon no point nor circumstance contrair to what they have already deponed without hazard of being infamous, and perjured, and the lawes and customes of all nations is so tender as to this poynt, that witneyses cannot be so much as examined, and ther depositions taken, 'ad futuram rei memoriam,'* and much lease efter the intending of a criminall proces, wherupon the pannall is cited, and the lawe upon the same consideration requyres to the end that the witneys may depone nothing but truth, that they should be examined, and depone in presence of the pannall,† and confronted with him and

* "Witnesses are sometimes received 'in criminalibus ad futuram rei memoriam,' for the defender, but never for the accuser, and that because the accuser might blame himself for not pursuing sooner, which is not in the defender's power, and 'testibus non testimonii creditur,' whereas depositions, 'ad futuram rei memoriam,' are only *testimonis*: And yet with us the justices sometimes declare in court, when they continue diets, that they will receive the depositions of witnesses to ly in *retentis*; but this form is not allowable in my opinion, except both parties consent, because by act of parliament all probation should be led in presence of the assize." Mackenzie, part 2, tit. 21, sec. 17.

† "Witnesses must in our law be received in presence of the pannel and assize, and that the pannel's presence may overawe the deponer, and that the assize may judge by the deponent's countenance, gestures, and assurance, how far he should be believed; and advocates are to be present, that they may interrogate upon emergents: And this is much juster than the laws of other nations are, who allow neither advocates nor party to be present, whilst the witnesses depone." Gomez, de Delict. cap. 1. num. 65. And in this also we agree with the civil law, L. Custodes, ff. de publ. judiciis." Mackenzie, part 2, tit. 26, sec. 16.

it is ane absolute invasion altogether, inconsistent with the act of parliament, to pretend that wher the 10 act ii. parl. king James 6. does in positive termes requyre that the wholl proces and probation should be used befor the assyse in presence of the partie accused and his prosecutors, that the said act may be thus evadit and rendered illusorie, that the witneys may be sworne and examined; the pannall not being present and the same witneys againe repeated, efter they are concludit by the first examination, which is not to interpret the act of parliament, but absolutelie to subvert it,* and the lords of justiciary are desyred to consider of what dangerous consequence this wer to all mens lives and fortunes, and the pannall repeats the former practiques and the lawes and customes of nations and the opinion of all criminalists as to this point: And as to the pretence that the contrair was desydit in March last, in a persuit against the Cledesdale heritors. It is answered the pretence is groundlesse, and it is confidentlie alleadged, that since the fundation of this court, ther was never a witnes examined efter accusation upon oath, the pannall being absent, and never any advocat did desyre or attempt it, and it is downright contrair to the act of parliament, and all that was done in the first case was only the naked examination of the witneys, not upon oath, and to convince the lords that this is consonant to all the lawes in the world; and that ther is no exception, except in the speciall case wher pannalls are contumaciouslie absent, and doe not appear upon citation, and even in that case ther can be no farther procedor made, not so much as to examine witneyses to lye *in retentis*, except in the case of open rebellion and public sedition. And that be virtue of a late act of parliament, before which the witneyses could not have been examined so much as in that case.

The Lords Justice Clerk and Commissioners of Justiciary repell the objection foundit upon the depositions taken, be order of council, in respect they doe not allowe his majesties advocat to adduce these depositions against the pannall as ane probation, and ordaines the witneys to be received.

Sir George Lockhart takes instruments that it is acknowledged that ther wer other depositions taken of the pannall's witneyses without his presence.

Mr. Walter Pringle objects against the said David Caldwell, that he cannot be received a witnes because he is *socius criminis*.†

The Lords repell the objection in respect he has taken the bond appoynted by his majesties indemnitie, and that it is in the cryme of treason that he is cited to be a witnes.

* See also Mackenzie's Works, Vol. 2, p. 351.

† As to *Socii Criminis*, see Mackenzie, Part 2. Tit. 26, sec. 10, and Hume's Commentaries, cap. 13, 15. vol. 2. pp. 175, 177.

Sir George Lockhart takes instruments that it is acknowledged that the witnes was in the rebellion and has taken the bond.

PROBATION.

David Caldwell,* in Monkland, aged 30 years, married, solemlie sworne and purged of par-

* "In the Trial of Spreull for treason, June 13, 1681, it was strenuously objected by sir George Lockhart for the pannel that David Caldwell could not be admitted a witness, having, since his citation, been examined on oath respecting the contents of the libel. The court repelled the objection, 'in respect they do not allow his majestie's advocat to adduce these depositions against the pannel as ane probation.' But the decisions of this period in trial for state crimes are no authority." 2'Hume's Commentaries, p. 188, Note 1.

The same author, in another part of his work, (vol. 1. p. 130) thus writes of the previous examinations or precognitions, as they are called in the law of Scotland. "The entire care of conducting these enquiries, has now devolved on the sheriffs, justices of peace, and other inferior judges; a great improvement certainly of our more ancient practice, in which it was novise uncommon for a precognition to be taken at instance of the lord advocat or his deputies, before the supreme judges themselves, or some of their number, who were afterwards to sit in the trial. And indeed, Mackenzie, in his Observations on the Statutes, has taken notice of a letter from the king to the court in 1683, wherein he particularly directs them to observe this practice in case of treason, at any time when that privy council shall desire it. Nay, sometimes, the evidence in the trial, was nothing more than a simple adherence to those previous testimonies, not uncommonly taken upon oath; which seem to have been produced and read over to the witnesses, in presence of the same judges who had before examined them. Thus in the trial of George Graham and Elizabeth Ramsay, Nov. 11, 1663, for theft, three witnesses adhere to their depositions, taken by the justice-depute on the 20th September preceding, and whereof the tenor is inserted in the record. The evidence is chiefly of the same sort, in the trial of Muir of Caldwell, and others, August 16, 1667, for treason; as also in that of William Barclay, Nov. 12, 1668, for murder. A still more singular course of inquiry, is that which was held after the commencement of process. Nov. 14, 1679, in the case of Tullock, Martin, and others, accused of rape. 'The said day the lord justice-general made report to the remnant lords, that according to the recommendation made be their lordships to him upon the 10th instant, he had examined parties and witnesses in the affair above-mentioned, and found the complaint altogether groundless and malicious. The lords therefore deserted, and be their presents desert, the dyet simpliciter, and discharge all new letters to be raised, or dittay to be taken up

tial council, depons, he thynks he sawe the pannall John Spreull, ryding in arms half a myle from Hamiltoun, upon the high way, on the Fryday befor the defate of the rebells at Bothwelbridge, and that he sawe some men with them, but does not knowe if they wer rebells. Depons he was within the breadth of this house to the pannall when he sawe him, and that he sawe some of them have armes, and depons, he never sawe John Spreull befor. Depons, that the pannall, and these that wer in company with him, wer half a myle distant from the bodie of the rebells; Being interogat if the pannall was reput one of the rebells; depons, he does not knowe if he was reput as one of them, being interogat if John Spreull not being reput one of the rebells, why he and those rebells who wer with him did not apprehend him then. Depons he was not in a capacitie. Depons that he mett the pannall in the high way, and parted with him at Moderwell, half a myle from Hamiltoun in the way towards Edinburgh, which is within half a myle to the place wher the corps of one of the rebells, who was killed by his majesties forces lay, to whose buriall the deponent was going, and depons, that Moderwell was in his road to the said buriall, and depons he never sawe the pannall since, till he saw him in the castle of Edinburgh, and depons, that he thinks the pannall is the man he sawe then, depons he spoke to the pannall at that tyme, about the drought and deepness of the watter, and of no other matter, depons he did not knowe any of the persons, who wer ryding with John Spreull at that tyme, except on man whom he sawe severall tymes thereafter ryding throwe Hamiltoun Muir, with the rebells, who was called on Russill, in the parish of Monkland, and that he sawe the same Russill in company with the rebells befor; and, this is the truth, as he shall answer to God.

Sic Subscritur. DAVID CALDWELL.

James Hamiltoun, in Hamiltoun, called *Nepos*, aged 40 years, unmarried, purged and sworne. Depons he sawe John Spreull, the pannall goinge single alone throwe Hamiltoun, towards James Mortoun, apothecary, his shope, with a sword about him, and ther was no person speaking with him, and this was four or five dayes before the defate at Bothwelbridge, and depons, that at that tyme ther wer a great many of the rebells within the town of Hamiltoun, and that he did not hear the pannall to be reput on of them, at that tyme, depons that the rebells wer goinge up and down Hamiltoun, lyke a faire, but he did not hear, ner see the pannall speak to any of them, depons that dureing all the tyme of the rebel-

against the defenders for the crymes above specified in time coming.' Certainly, in every point of view, it is better, and more suitable, that the judges, like the assize, should enter on the trial, without any previous knowledge or impression of the case."

lion, he did see non using or wearing armes on the streets of Hamiltoun, when the rebells wer ther, but those that he suspected to be rebells. Depons he has seen some persons at his owne house the time of the rebellion, who hade cloath bags behind them and swords about them, whom he convoyed out of the town to the foord, and who did not converse with any of the rebells, and this is the truth as he shall answer to God.

Sic Subscritur. JAMES HAMILTON.

James Millar in Milrohaugh aged 25 years, unmarried, purged and sworne, depons he sawe on who was designed John Spreull ryding on Hamiltoun Muir, in June 1679, and that he was within a verie little distance from him, and that he sawe him ryding upon a gray horse with armes up to the rebells; and that he thinks this pannall is like him, and resembles the man that was designed to him to be John Spreull, but dare not positivlie depone that this pannall is that man who was so designed to him, nor dare he depone positivlie that it is not; he depons that he never heard that John Spreull the pannall, was amongst the rebells efter that, and this is the truth as he shall answer to God.

Sic Subscritur. JAMES MILLAR.

John Spreull, wreitter, in Glasgow, aged 27 years, unmarried, purged and sworne, depons. That the deponent being with a company of the rebells about twentie or thretie, he mett the pannall in a road about half a myle eastward from the Haggis, about four or fyve dayes before the break at Bothwelbridge, on horseback, with another ryding with him, and knowes not whither they hade armes or not, nor what collor the pannall's horse was; depons that he himself hade made use of two horses the tyme of the rebellion, whereof one was brown, and another gray; depons he did not see the pannall, at Hamiltoun muir nor Hamiltoun in company with the rebells, nor any other place, to the best of the deponent's memorie, and being interogat, if the pannall was reput, by any of the rebells, or by him, to be one of their number, depons he cannot remember; and being interogat, when he put away the gray horse, depones he thinks it was some fewe days before the break, and thinks it was four or five dayes, but cannot be positive; depones that the deponent himself hade a perriwig, the collor of his owne haire, and lighter, and depones that the pannall, the tyme foresaid, that he mett him, hade no perriwig, but his own haire; and this is the truth, as he shall answer to God.

Sic Subscritur. JO. SPREULL.

John Aird, merchant, in Glasgow, aged 56 years, married, purged and sworne, depons. That to the best of his knowledge, on the Tuesday, befor the defate at Bothwelbridge, he sawe John Spreull, the pannall, in company with Mr. John Welsh and a woman standing

in a room within the deponent's owne house, in Glasgowe, the deponent having lifted the speck and looked in, and this is the truth, as he shall answer to God.

Sic Subscritur, JO. AIRD.

George Peirs, Cordener, in Glasgowe, aged 24 years, married, purged and sworne, depons, he sawe a person, who was designed to him to be John Spreull, ryding in Hamiltoun muir, on a bay horse, with a velvet cape and a cloack, and that he was ryding alone, but knows not, if it was John Spreull, the pannall, or John Spreull, Mr. John Spreull's son, knows not if he hade armes or not, and that he heard it said that John Spreull, the pannall, was amongst the rebells, and this is the truth, as he shall answer to God.

Sic Subscritur, GEORGE PIERS.

John Spreull, writter, in Glasgowe, being re-examined, depons, it was a black hatt that he hade, when he was with the rebells, on Hamiltoun muir, and that he hade a black hatt all the tyme of the rebellion.

Sic Subscritur, JO. SPREULL.

Charles Mowatt, apothecary in Glasgowe, aged 40 years, married, purged and sworne, depons he sawe John Spreull, the pannall, at Kilmarnock, in a change house in June 1679, and that he said he was newe come from Ireland, and he craved of the deponent ane account he was resting him, and that the other John Spreull was reput to have bein in the rebellion.

Sic Subscritur, CH. MOWATT.

James Mortoun, apothecary, in Hamiltoun, and aged 30 years, married, purged and sworne, depons, That John Spreull, the pannall, came in to the deponent's shope, in Hamiltoun, the tyme of the rebellion, and craved him money, but hade no armes, and the deponent trysted him another tyme to gett his money; depons the rebells wer in the toun of Hamiltoun the tyme the pannall came to his shope, and that he took a blank bond from him for his moneey, as he hade done befor; and this is the truth as he shall answer to God.

Sic Subscritur, JA. MYRTOUN.

Dr. Thomas Alstoun, doctor of medicine, aged 26 years, married, purged and sworn, depons he never sawe the pannall befor he sawe him in the pannall, nor heard that he was out at the rebellion befor he was questioned upon the lybell; and this is truth as he shall answer to God.

Sic Subscritur, THO. ALSTOUN.

His Majestic's Advocat, in farder probation, adduced the confession mentioned in the debate, alleadged emmitted be the pannall in presence of the lords of privie councill.

Sir George Lockhart, for the pannall, alledges, That any pretenalit confession which his majestic's advocat alledges was emmitted by the pannall befor the lords of his majestic's

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privie councill, cannot be repented as any mean of probation in this process; first, because the pannall being able to writt, ther is no subscribed confession produced under his hand, but on the contrair a coppie of a pretendit confession being drawn up and *ex incontinentie* offered to the pannall, he did immedietelie disowne, disclaim and reject the same.

2do. In the case of all judiciall confessions wher the pannalls are not able to writt, it is the irrefragable opinion of lawyers that the confession should be immedietly drawn up and signed by the clerk of court, and acquiesced to by the pannall, but it is most unwarrantable to pretend that the terms of pretendit confession *ex post facto*, and after a long intervall of tyme, can be proven by the depositions of any witneesses of what qualitie, reputation or integritie whatsomever; and the reason of laye is most evident, because a confession being of so great importance as to men's lives and fortunes, witneesses may mistake as to the tenor, and context and sense, and the way and maner of expression, all which may make a great differece and alteration as to the true sense and import of such confessions, and ther cannot be a preparative of more dangerous consequence then to lay such fundations that depositions of witneesses should be taken to make up pretendit confessions *ex post facto*, and after ane intervall of tyme.

3o. The said pretendit confession, though it wer produced under the pannall's hand, yet it cane make no faith as being a confession extrajudiciall and not taken *coram competente judice* as to the proces, and the crymes and such extrajudiciall confessions, even the consist- ing in writting and taken incontinent, are in lawe revocable 'et fidem non facit in processu criminali.' And wherin all lawe is so clear and positive that it is but reputed ane extrajudiciall confession the taken a *judice competente*, if it is not *pro tribunale*, as may appear by Mathews page 370, in that title 'de confessione spontanea per totum.' And by Julius Clarus Quest. 54, and by the authorities and practices of criminall tribunalls by him as great length cited, and the most that ever such pretendit confessions either did, or could operat in but *indicium ad torturam* which the pannall hes suffered and undergone, and was subjected to the same upon that verie account that he refused to owne or subscribye the said pretendit confession. Lykeas suitable and consequentall to the opinion of lawyers and the practise of nations as to this poynt the 90 act of the 2nd parl. K. Ja. 6, does positivelie and in expresse terms requyre that all writs and documents made use of as a mean of probation should be taken in face and in presence of the inquest, and so does suppose that it must be taken by the justices *sedentes pro tribunale* in a formed court, the inquest being sworne and present. Wheras this pretendit confession is alleadged to have been taken 'extra circum juris'; the lords of his majesties privie councill being no ways judges competent to the crim-

nall proces and the crymes lybelled, and to irrogate and inflict the condigne punishment of the same: all which defences the pannall propones *separatim*, eather of them being 'per se' et *separatim* relevant. And that ther is no lawe or precedent upon record wher ever the like was heard of or sustained that a pretendit confession should be made up in a criminall proces to import forfeiture of a man's lyff or estate upon the pretendit depositions of witneysses in respect whereof, &c.

His *Majesties Advocat* replies, that as to the first, the notsubscribing of the confession by the partie cannot prejudice the probation, since the confession being read to him deliberatlie and reiteratlie it shall be offered to be proven that he could not disowne the confession, which being it is against lawe and reason that the pannall's contumacie should be of advantage to him, since that wer to make one cryme defend another, and it is the constant custome of the justices and assysers, foundit upon excellent reason, to find confessions to be sufficient tho not subscribed by the partie, and thus Gogar, Skein, Stewart, &c.; and all dyed upon confessions which they refused to subscribe.

To the 2d, that this confession was writen and read to the pannall *ex incontinentem*. And it is positivelie offered to be proven that the pannall being advertis'd of his danger and all the articles read to him one by one, he positiveli acquiesced in them all excepting only that he did not say that was a rebellion, 'et *exceptio firmat regulam*,' and this hightens and lessens not the cryme, and that ther wer blanks in it at the end of the lines, wherupon by order of the council that was scored the most unnecessary, yet to complye with him and then againe read to him, and then he had nothing to say.

To the 3rd, His Majesty's Advocat is unwilling to stretch any debatable poynt, and following the temper and example of the king, his master, that the people may knowe howe happie they live under his government, does not debate that this confession tho taken *in judicio* and wher the pannell was advertis'd of his hazard, yet that it is only sufficient being adminiculat by, and joyned with other pregnant grounds, evidences, and presumptions, in which conjunction his majesties advocat debates, that it is one of the strongest and validest probations; for who cane knowe a man's accession, better then himself, and tho writts may be forged, and witneysses may depon falslie against a man, yet the lawe hes concludit certaintie that a man cane never confess falslie to his owne hurt, and therefore, even a confession taken 'coram iudice incompetente' is concluding, except the confessor cane showe what induced him to erre, for which his majesties advocat does cite Mascard Couclus. 352, num. 2. That 'iudex competens potest cogere confesum ad perseverandum in confessione coram iudice incompetente factâ nisi doceat de errore et de causa variand.' which is a most reasonable

conclusion, and as it wer against all sense, that a man's deliberate confession should not prove against himself, so the interest of the pannall is sufficiently secured by being allowed a libertie to correct himself wher he cane prove his error, and why he should varie from his former confession, which this pannall cannot doe, and if he cane, his majesties advocat is content to admitt it to his probation, and that such confessions are valid, if other arguments concurre, he cites Clarus § finale. Quest. 55. num. 4to. wher it is stated that such a confession is only sufficient 'ad torturam nisi cum huiusmodi' 'confessione concurrant alia argumenta,' as in this case wher it is most clearlie proven by witneysses beyond all exception, that this person was actualie upon the place, and conversed actualie with the rebels, and all that is wanting is whither he was ther *animo delinquendi*, and what was his designe, which being that of which a man himself is the most competent judge, his owne confession must be therfor the most concluding and solid probation, and since it is confest, as indeed it cannot be denied, that a confession, even 'coram iudice incompetente' is sufficient to subject a pannall to torture, it most be therfor verie clear that such a confession is of itself a verie great and strong probation, since by our, nor by no lawe, a mane cane be subjected to torture, but upon evident and strong grounds and presumptions. Nor did this pannall suffer the tortor upon this poynt, nor upon no part^e of his confession, so that his confession has not taken effect by tortor, but is yet to take effect, and his confession is therfor nowe produced, for to convince that the thing which he himself best knewe, and confest was true. To which is joyned not only the depositions of the witneysses already adduced, and that he cane give no reason of his variation, but that the said John Spreull is universallie known to be of these principles, that led men to Bothwell-bridge, and to be the great ringleader ther, and that he will not yet call it a rebellion, and howe cane any man of common sense, besid reason alleadge that he who wished so well to that partie, traffecting so much for them, was so oft with them, and will not disowne it to the hazard of his lyff, being infalible proven to have been upon the place in armes, and to have confest that he was ther. That confession is *materia rei similis* and wher ther is no shadowe why he should have emitted that confession, the confession emitted, as said is, should not operat against him, being adminiculat as said is.

Sir George Lockhart duplyes, that the pannall's procurators doe not at all conceive themselves in the least streated by the instances descendit on by his majesties advocat, of Gogar, Skein, and these other traitors, who were justice condemned, in respect they doe nowayes relate to nor concerne the poynt in question, but on the contrair retorts the instances, in *suas fere* as in the case of all these pannalls they wer

• Sic in orig.

asted judicially before the justices, and they did repeat the same judicial confessions in presence of the justices and the inqueist, and rane to the highest transports of furie and treason in disowning the king's authority, and the authority of all judicatories derived and acting by vertue of his majesties authority, and so wer in 'crimine fraglante' and owneing and committing of treason in the face of the court, so that what collor or pretence of lawe can be urged from these instances to the poynt nowe in question.

2do. There is no lawyer, and the lords of justiciary are desyred to cast ther eyes upon the lawyers produced, if ever it did enter into the thought or imagination of any lawyer, that a pretendit confession of crymes import forfeiture of lyff and estate, not extant nor produced under the hand of a judge, wher the partie cannot wreitt but offered to be proven by the depositions of witneyses, was ever heard of or sustained, which not only the generall principle of all lawe has reprobated, but even the lawe of this kingdome even *in judicio civili*, wher the import is nothing else but a pecuniary interest for parties confessions being but 'nuda emissio verborum,' depositions of witneyses are not admitted to prove the same, even to the value of one hundreth pounds Scots, and it is a nottor and known case that a pretendit judicial confession alleadged, made before the lords of session, in the case of Oseburn and Buchanan, tho produced under the clerks hand, was not sustained to be binding or make faith unlesse it had been subscribed by the partie: and one decret given by the English judges for the tyme, upon that ground against Buchanan, was reduced since, his majesties restoration, by the lords of session, as being absurd, irrelevant, and contrair to lawe, and it wer a strainge stretch and consequence that if the depositions of witneyses cannot be admitted to prove a confession, even as to the meanest civil effect, that they should be allowed, and sustained, in a criminal proces or witneyses heard to depose, as to the tenor of parties confessions thereupon to make any mean of probation, and against which the act of parliament above-mentioned is repeated, against which ther neyther is nor case be any thing answered. As to these pretences that extrajudicial confessions tho taken 'coram iudice incompetent' may be adduced 'in modum admiuiculi nisi doceatur de errore,' does not at all concerne the poynt; because it is only true wher 'constat et apparet de veritate actus' by production of the confession itself, in which case it is acknowledged that whither it be the case of judicial confessions or extrajudicial, if the partie be able 'docere de errore' he may retract and be heard against the confession, but here the poynt debated, is that the confession 'de natura sua requirit scripturam,' and most be 'reducta in scriptis incontinenter' when a partie emits it, whither it be a judicial confession or extrajudicial, which is not in this case, and is not the subject of probation by witneyses,

that being to lay a foundation for drawing the lyes and reputations of all men, into evident hazard, and the pannall's procurators oppons the authorities cited, and the lawe said well that 'nisi tota lege perspecta,' it is absurd 'de ea judicare,' and the words immediately following the place cited by Clarus, does clear the citation, and downright militates against his majesties advocate, and as to all the concurrence and qualifications of the other adinicles insisted on by his majesties advocate, they are neither proper to be debated nor answered *hoc loco*, but on'y proper to be represented to the inqueist, and then shall be sufficientlie taken off, answered and satisfied.

Mr. David Thoris farther adds and repeats the decision of this court in the case of Robertson, who having confest the murder before three commissioners of justiciary and the king's advocat, and the confession being subscribed by the three Lords, Advocat and Clerk, the Lords refused to sustain the said confession either as 'plenam' or 'semiplenam probationem.' In respect it was not taken by four of the justices (who are only a quorum) 'pro tribunale sedente.'

The Lords Justice General, Justice Clerk, and Commissioners of Justiciary having considered the debate, they refuse to sustaine the confession (to be proven by witneyses) as a mean of probation either plenarie or adiniculat. His majesties advocat desyres the pannall should be interogated be the lords of justiciary whither or not he thinks the being at Bothwelbridge a rebellion.

The pannall answers that he conceaves he is not obliged to answer, because it is not the cryme lybelled, and he may be as well interogated upon any poynt of treason. The lords having interogated the pannall if he acknowledged the ryseing at Bothwelbridge to be a rebellion, The pannall answered that it was not a part of the cryme lybelled, and that his future lyff should witness him to be both a good subject, and good Christian. His majesties advocat closes the probation, and protestis for ane assyse of error against the inqueist in case they assolzie.

The Lords ordaine the assyse to inclose and returne their verdict to morrowe at 8 o'clock.

CURIA JUSTICIARIE, S. D. N. Regis tenta in Pretorio Burgi de Edinburgh, decimo quarto die mensis Junii 1681, per Nobilem et Potentem Comitem Gulielmum Comitem de Queensberry, Justiciarium Generalem, Ritchardum Maitland de Duddop, Justiciarie Clericum, Robertum Dominum de Nairn Dominos Jacobum Foulis de Colintoun, Davidem Balfour de Forret, et Davidem Falconar de Newtoun Commissionarios Justicie dicti S. D. N. Regis.

Curia legitime affirmata.

The persons who past upon the assyse of Robert Ferguson of Letterpin returned ther

verdict in presence of the saids lords, whereof the tenor follows :

The Assyse all in on voice finds Ferguson of Letterpin to be guilty of rebellion, and being at Bothwelbridge by his own confession. *Sic Subscribitur, WILL. STEVINSON, Chan.*

The lords for severall cauyses moving them, continued the pronouncing of Doom and Sentence against the said Robert Ferguson of Letterpin till the second Monday of November next.

The persons who passed upon the assyse of John Spreull, returned ther verdict in presence of the saids lords whereof the tenor follows :

‘The Assyse, having considered the Depositions of the whole witneyses, led and adduced against John Spreull, *una voce* finds nothing proven of the crymes contained in the Lybell, which may make him guilty.

‘*Sic subscribitur, WILL. STEVINSON, Chan.*’

The pannall and his procurators takes instruments upon the verdict, and craved the pannall John Spreull may be sett at liberty.

His majesties advocat produced ane act of Council ordaining him to be detained in prison; whereof the tenor follows : “Edinburgh, the fourteint day of June, 1681. The lords of his majesties privie council doe hereby give order and warrand to the justices, notwithstanding of any verdict or sentance returned or to be pronounced by them thereupon, upon the criminall dittay latie persewed against John Spreull, to detaine him in prison untill he be examined upon severall other poynts, they have to lay to his charge. Extract by me.

“*Sic subscribitur, PA. MENZERS.*”

The Lords Commissioners of Justiciary, in respect of the said Act of Council, did remit the said John Spreull back to prison.

316. Trial of DAVID HACKSTOUN, Laird of Rathillet, for Treason and Sacrilegious Murder.* 32 CHARLES II. A. D. 1680. [Now first printed from the Records of Justiciary in Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis tenta in pretorio burgi de Edinburgh, 30 die Julii 1680, per honorabilis viros Gulielmum Comitum de Queensbery Justiciarium Generalem, Ritchardum Maitland de Dudop, Justiciarie Clericum, Dominos Jacobum Foulis de Colintoun, Robertum Nairn de Strathurd, Davidem Balfour de Forret, Davidem Falconer de Newtoun, et Rogerum Hoge de Harcars.

Curia legitime affirmata.

Intran

David Hackstoun, of Rathillet, Prisoner.

YE are indyted and accused, that wher notwithstanding from the lawe of God, the lawe of nations, and the municipall lawe of this kingdome, and the alleadgiance of the subjects thereof, ther lye great obligations and bonds upon them and you, to maintaine and defend the royall and sovereigne power and authoritie of the king's majestie, and that be the common lawe, the lawe of nations and acts of parliament of this kingdome and constant practice thereof, the ryseing of his majesties subjects, or any number of them joyning and assembling together in armes without, and contrary to his majesties royal command, warrand, and authoritie, and the abaiung, assisting, recepting, intercommuning, and keeping correspondence with such rebels, and supplieing of them with levies of men, horse, money, armes, and fur-

nishing of them, with meat, drink, powder, ball, or other munition bellicall, are most detestable, horrid, hynous, and abominable crymes of rebellion, treason and *lese majestie*, and are punishable with forfaitour of lyff, lands, beretages, and escheat of moveables, and be the first act of the 18 parliament king James 6th, the estates of parliament faithfullie promise perpetually to obey, maintaine, and defend the prerogative royal of his sacred majestie, his aires, and successors, and privileged of his hynes crown, with ther lives, lands, and goods, and be the 5th act, 1st 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, 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 leagues with foreign princes, or estates, or amongst themselves, without his majestie's special authoritie and approbation, first interponed thereto, and all his majesties lediges are discharged upon any pretext whatsoever, to attempt any of these things, under the paine of treason; and be the 7 act, 1 session of his majesties first parliament, the late Solemne League and Covenant, or any other covenant, or public oath is discharged to be taken be any of his majestie's subjects, upon ther highest perill. And be the 2d act, 2d session of his majesties first parliament, it is statute and ordained, that if any person or persons shall herester plott, contrive, or intend death, or destruction to the king's majestie, or any bodiely harme tending to death, or destruction, or any restraint upon his royal person, or to deprive, depose, or suspend him from the style honour and kingdome

* With respect to the union of heterogeneous Charges in one Dittay, see in this Collection the Case of Nairne and Ogilvy, A. D. 1765.

name of the imperial crown of this realme; or any other of his majestie's dominions, or to suspend him from the exercise of his royal government, or to levie warr, or take up armes against his majestie, or any commissionat by him, or shall intyse any strangers to invade any of his majestie's dominions, and shall by writing, printing, or other malicious and advised speaking, expresse and declare such ther treasonable intentions, every such person or persons, being upon sufficient probation legallie convict thereof, shall be doomed, declared, and adjudged traitors, and shall suffer forfeiture of lyff, honour, lands, and goods, as in the cases of treason. Yet ye the said David Hackston of Rathlet, a disolut, flagitious, and wicked treacherous villdin, shacking off all fear of God, conscience, and sense of duty, allegiance, and loyaltie to your soveraigne, and native prince, upon the saittie of whose sacred person and maintiance of whose soveraigne aithoritie and princie power the quyetnes, stabilitie and happietes of the people does depend, ye have most perfidiously and treasonable presumed to commit, and are guilty of the crymes above mentioned. In saae fare as ye and the bloodie and sacratigious murderers of the late arch-bishop of St. Andrews, did goe into the Western shyres, and did treasonable joyn in armes with Robert Hamilton, brother to the laird of Prestoun and his accomplices, disolut and flagitious persons, to the number of three score and upwards, and upon the twentie nyth of May 1679, a day appoynted for a solemne thanksgiving for his majestie's restauration to the royall government of this kingdome, goe to the borgie of Ratherglen, and there proudlie and treasonable, efter reading acts of ther own coynge, shacking off your allegiance to his majestie, ye most treasonable and wickedlie burnt severall acts of parliament asserting his majestie's prerogatives and establishing the government of the church, drownd out boniefyres sett on, in commemoration of that day, and thereafter ye and they contineing and abyding in your treasonable armes ye and your rebellious associats to the number of did waylay a fewe and small partie of men, under the command of the laird of Claverhouse, and ye and your accomplices did most cruellie murder, and kill severall of his majestie's souldiers under his command, and ye being proud and insolent of your treasonable cruelties, murders, and villanies, and having assembled and convocat the number of two or three thousand men in armes upon the day of June 1679, or aue or other of the dayes of the said moneth, ye and your accomplices did most treasonable attacke and assault a small partie of the king's forces within the town of Glasgow, by whom ye and your accomplices were repulsed, and defate, and yet being encouraged and imboldened with confluence of your numerous and rebellious accomplices, who did swell and growe to the number of ten or twelve thousand, did robb, pillage, and search for horse, armes, powder, ball, and other instruments of warr, throwout the shyres

of Wigton; Stewartrie of Kirkcudbright, Dumfries shire, Renfrew, Lanerck, and other shyres, within this kingdome, and ye having robbd his majestie's dutiefull and good subjects, and treasonable quartered upon them; ye did supplie shelter and protect Mr. John Welsh, Mr. Samuel Aroat, forfait and declared rebels for the rebellion 1666; and ye and your accomplices having marched to Hamilton Muir, did take the boldnes upon you to issue proclamations, and print declarations, bearing the treasonable grounds of your rebellion; and did presume to modell and give your rebellious associats the name of ane army; and you did modell and forme yourselves in troups, compenys, and regiments, naming colonells of regiments, captaines of compenys, commanders of troups, and other officers, under the command of the impious and bloodie murderers of the late archbishop of St. Andrews: and ye and your rebellious and treacherous accomplices, did incamp at Hamilton Muir, for severall dayes together in June 1679, ye did obstinatlie continue in armes, ye did make detachments for risinge and plundering of the countrie, to make provisions for ther rebellious camp, and that notwithstanding of ane proclamation issued furth by the lords of his majestie's Privie Council, declairing your said insurrection to be a manifest and horrid rebellion, and hie treason, and commaunding you and your rebellious accomplices to desist and lay down your rebellious armes, and yet ye did most treasonable continue and abyd in armes, and ye did beat parlies be drum, and did take the boldnes and presumption to send your commissioners to the royal camp; and ye and your rebellious accomplices did treasonable requyre the subversion and overturning the government of the church, and prouddie and insolentlie boasted of your treasonable armes in which ye and your accomplices did treasonable continue until the twentie second day of June 1679, that his majesties forces did assault and attacke them at Bothelbridge, wher by God's blissing upon his majesties forces, and be the valout and condict of James duke of Buccleugh and Monmouth his majestie's generall, and officers and souldiers under his conduct; ye and your numerous and rebellious army wer dispat, routed, and vanquished, and yet ye persisting, and abyding, in ane series and tract of rebellion and wickednes, as if ye had bein made for no other end, then to be aneemie to government (and so to mankind) and to deminish and lessan that aithoritie which by your duty and allegiance ye ought to have maintained; and under which ye have bein so long protected, ye and Mr. Ritchard Cameron, Mr. Donald Cargill, and others your impious, bloodie, murdering accomplices did drawe, contrive and forme, two most treasonable papers,* the one called the Fanaticks New Cove-

* As to these two Papers, (the Queens-ferry Paper and Sanghar Declaration), see the case of Mr. Donald Cargill, in the next

nant (taken from Mr. Donald Cargill, at Queensferrie, the third of June 1680) the other called the Declaration of the true Presbyterian Antiprelatick and Anti-Erastian, persecuted Party in Scotland, off the tenors following.

“ We under subscribers for ourselves, and all that joyne with us and adhere to us being put to it by God, our consciences and men, doe bind our soules with a solemne and sacred bond, lest on the one hand we should be caryed away with the streame of apostacie and defection of the church in this tyme, and the other hand lest we should (not being so engaged) evanish in vanitie, and be without a right rule in good designs. We have judged it our duty againe to covenant with God and one another, and to publish this declaration to the world of our purposes, that men may know our most inward thoughts, the rules we walk by, and the outmost ends we have befor our eyes for this intent, that those who are lovers of God, zealous of his reigning in glory, and desyrous of reformation, and the propagation of his kingdome, may have occasion no more to be jealous of our intentions, and others may have no ground to load us with odious and fould aspersions; but that all knowing the truth of us, if they shall strive against us and the truth with us, shall doe it without excuse and against conviction, and that those who shall joyn with us may doe it upon solid and undoubted grounds, and both they and we may expect grace from him faithful-ly to persewe and happie to be successful in so good purposes. It is true we are not ignorant of the great unkindfulness, failing, counteracting and mocking, that has been in our former vows and covenants with God, and of the great judgments, that hath and are like to follow such impious and sinfull dealing with God in such weighty matters (for which we both ought and desire to be humbled before him) which cannot but make us with great trembling of heart enter into newe ones, knoweing both our own weakness and readiness to relapse, and the great hazard and danger of such relapses, yet the desire of recovering and preserving a remnant, and the conviction of this is the most convenient mean, the zeal to God's glory and Christ's reigning (which is the highest and most acceptable duty man canne performe to God) hoping for his mercies (who is witness to the integrity of our hearts and rightnes of our intentions) that he will instruct, direct, accept, and prosper us, we goe forward declaring that

year, 1681. Wodrow has in his Appendix Nos. 46, 47, printed these two Papers; his representation of them is more full than that in the Record of Justiciary. There are also frequent variations of phraseology, between the two; and Wodrow's report is much the more correct as to orthography and punctuation. I have inserted from Wodrow the most important passages which do not appear in the Records of Justiciary.

nothing else, but what we here expresse, is our designe.

“ I mo. We covenant and swear, that we take the only true and living God, Father, Son and Holy Gost, to be our God, and betakes ourselves to the merits and righteousness of his Son as the only righteousness, that canne justifie us before God, and that we take his scriptures and word to be the object of our faith and rule of our conversation in all things, and that we shall give up ourselves to him to be renewed, instructed, and in all things ruled by his spirit according to that word, and shall earnestly endeavour by his grace to render to him that love, worship and obedience that his word requires and his goodness ingages us to. 2do. That we shall to the outmost of our power advance the kingdome of Christ established throughout the land, (if at any tyme herefter God shall give us this opportunity,) righteousness and the true reformed religion, in the truth of its doctrine, in the puritie and power of its worship and ordinances, and in its disciplin and government, and free the church of God from the thraldome, tyrannie, ineroachment, and corruption of Prelacie on the one hand, and Erastianism on the other, and that we shall, to our power, relieve the church and subjects of this kingdom (we being called thereto by his giving of us power, power being God's call to doe good) of that oppression that hath been exercised upon their consciences, civil rights and liberties, that men may serve him holie, without fear, and possess their civil rights in quietnes without disturbance.*

3^d “ That we shall endeavour to our outmost the extirpation of the kingdom of darkness, and whatsoever is contrair to the kingdom of Christ, and especially idolatry and popery, in all the articles of it, as we are bound in

* In Wodrow after the second head follows: Thirdly, “ That we confess with our mouth, and believe with our hearts, that the doctrine of the reformed churches, especially that of Scotland, contained in the scriptures, summed up in our confessions of faith, and engaged to by us in our covenants, is the only true doctrine of God, and that we purpose to persevere in it to the end; and that the pure worship required and prescribed in the scriptures, without the inventions, additions, adorings, or corruptions of men, is the only true worship of God, and the Presbyterian government exercised by lawful ministers and elders in Kirksessions, Presbyteries, Synods and General Assemblies, is the only right government of the church, and that this government is a distinct government from the civil, and ought distinctly to be exercised, not after a carnal manner by the plurality of votes, or authority of a single person, but according to the Word of God, so that the Word makes and carries the sentence, and not plurality of votes.” And that which is the 3d head in the text, in Wodrow is the 4th.

our nationall covenant, and superstition, will worship and prelacie with its hierarchy, as we are bound in our Solemn League and Covenant, and that we shall with the same sincerity endeavour (God giving us assistance) the overthrow of that power, that hath established that prelaey and erastianism over the church, and exercises such a lustful and arbitrary tyranny over the subjects, seeking again to introduce idolatry, and superstition in these lands contrair to our covenants, and in a word that we shall endeavour the extirpation of all the works of darkness, and the relicts of idolatry and superstition (which are both much enlarged and revived in our tymes) and execut righteous judgement impartiallie (according to the word of God, and degree of wickedness) upon the committers of these things, but especially blasphemy, idolatry, Atheism, sorcery, perjury, uncleanness, profanation of the Lord's day, oppression and malignancy, that being thus zealous for God he may delight to dwell among us.

4th. Seriously considering that the hand of our kings has been against the throne of the Lord, and that now for a long tyme the succession of our kings and the most part of our rulers with him, hath been against the puritie and power of religion and godlieness, and freedom of the church of God, and hath degenerat from the vertue and good government of ther predecessors unto tyranny, and hath of late so manifestlie rejected God, his service and reformation, as a slavery, as they themselves call it in ther publict papers (especially in these last letters to the king and duke of Lauderdale) disclaiming ther covenant with God, and blasphemously inacting it to be burnt by the hand of a hangman, governed contrary to all right lawes, divin and human, exercised such tyranny and arbitrary government, opprest men in ther consciences, and civil rights, used free subjects (Christian and reasonable men) with less discracion and justice then ther beasts, and so not only frustrated the great end of government (which is that men may live godlie, holly and peaceably under them, and might be maintained in ther rights and liberties from injurie and wrong) but hath also walked contrary to it, so that it can no more be called a government, but a lustfull rage exercised with as little right reason, and with more cruelty then in beasts, and they themselves can no more be called governours, but publict grassators, and publict judgments which all men ought as earnestly to labour to be free of, as of sword, famine or pestilence, raging amongst us, and besides hath stopped (instead of punishing) the course of lawe and justice against idolaters, blasphemers, atheists, murderers, incestuous, and adulterous, and other malefactors, and instead of rewarding the good, hath made butcheries and murthers on the Lord's people, sold them as slaves, imprisoned, faulted, banished, and fined them upon no other account, but for maintaining

the Lord's right to rule consciences against the usurpations, of men, for fulfilling ther vowes, and repelling unjust violence, which innocent nature allows to all; of all which and more particulars we can give (we speak as befor God) innumerable and sure instances.

[But that we may see if there be any thing that stands in our way; there are but three things that seem to have weight that we know. First, Whether the deed and obligation of our ancestors can bind us. Secondly, Whether the covenant doth bind us either to this man or his posterity. And thirdly, Whether there yet be any hope of them and their posterity.

1st. As to the first. Our ancestors, their transactions and obligations neither did, nor could bind us, they did not buy their liberty and conquest with our thraldom and slavery; nor could they, liberty and freedom being a benefit next to life, if not in some regard above it, that they could not give it away more than our lives, neither is it in the power of parents to bind their posterity to any thing that is so much to their prejudice, and against their natural liberty. It is otherwise indeed in things moral. Neither did they bind us to any thing but to a government, which they then esteemed the best for the commonwealth and subjects; and when this ceaseth, we are free to choose another, if we see it more conducive for that end, and more free of these inconveniencies. 2ndly. The covenant doth not, for it only binds us to maintain our king in the maintenance of the true established and covenanted religion; and this we have not; neither can they require homage upon the account of the covenant, having renounced and disclaimed that covenant: and we being no otherwise bound, the covenant being the coronation compact, without the swearing and sealing of which our fathers, or rather we ourselves refused to receive him for king, and them for rulers; and if they were free to refuse him for king, upon the account of not subscribing of that covenant, we are much more free to reject him upon his renouncing of it, this being the only way of receiving the crown of Scotland; and reigning also, not being an inheritance that passes from father to son, without the consent of tenants, but an (and the more men plead for this, the more we are concerned to look to it) office, which, all say, is given ad culpam, non ad vitam. Wodrow.]

Neither can it be thought that his hope of ther returning from these courses, having so oft shewed ther natures and enmities against God and all righteousness, and so often declared and renewed ther purposes and promises of persevering in these courses, and suppose they should dissemble a repentance of these evils and professe to returne to better courses being putt to straits: or for ther owne ends (for upon no other account can we reasonably expect it) and though it might be thought that ther might be pardon for what

is done (which we cannot yet see to be without the violation of the laws of God, and a great guiltinesse on the land, from which guiltinesse the land can never be free but by executing of God's righteous judgments upon them for omitting so greatlie deserved and so necessarily requisite a justice) yet they cannot be beloved after they have violated all ties that humane wisdom can devise to bind men, and beside ther will be something of follie found to think to bind a king that pretends to absolutnes, and our fathers or rather ourselves at first judged it not warrantable to receive him without consenting to and swearing of the covenant, and if so the renouncing and disclaiming thereof we ought at present to judge to be a just and reasonable ground of rejecting him. Upon these grounds being assured of God's approbation and men's whose hearts are not utterly byassed and ther consciences altogether corrupted, and knowing assuredly that the upholding of such is to uphold men to bear down Christ's kingdom, and to uphold Satan's, and the depriving of men of right government and good governours to the ruining of religion, undoeing of human societie, we then seeing the innumerable sins and snares that are in giving obedience to ther acts; on the other hand seeing if we shall acknowledge ther authoritie and refuse obedience to ther sinful commands, the endless miseries that will followe and siding with God, (who we hope will accept and help us to a liberation from ther tyranny) against his stated and declared enemies, doe reject that king and these associat with him from being our rulers because standing in the way of our right free and peaceable serving of God, propagating his kingdom and reformation and overthrowing Satan's kingdome according to our covenant, and declares them hence furth to be no lawfull rulers, as they have declared us to be no lawfull subjects upon a ground far lesse warrantable, as men unbyassed may see, and that after this we neither owe nor shall yeald any willing obedience to them, but shall rather suffer the utmost of ther cruelties and injustice untill God shall plead our cause, and that upon these accounts, because they have altered and destroyed the Lord's established religion, overturned the fundamentall and established laws of the kingdome, taken altogether away Christ's church and government, and chainged the civil government of this land (which was by king and free parliaments) unto tyrannie, wher non are associat to be partakers of the government but only those who will be found by justice to be guilty of criminalls, and all other excludit even those who by the laws of the land by birth had a right to and a share in that government, and that only because not of the same guiltinesse and mischievous purposes with themselves, and also all free elections of commissioners for parliament and officers for government, are made void by ther making these the qualifications of ad-

mission to those places, which by the word of God and the laws of this land wer the cause of ther exclusion before, so that non cane look upon us, or judge us bound in allegiance to them unless the say also we are bound in allegiance to devills, they being his vicegerents and not God's.

5th. We then being made free by God and ther own doings, he giving the laws and they giving the transgression of that law, which is the cause that we are loosed nowe from all obligations, both divine and civil, to them, and knowing that no societie of men that hath corruption in them (which alwayes is ready to begett disorders and doe injuries unless restrained and punished by lawes and government) can be without lawes and government, and withall desyreing to be governed in the best way that is least lyable to inconveniences and tyranny, we doe declare that we shall sit up over ourselves, and over all that God shall give us power, government, and governour, according to the word of God, and especiallie according to that word, Exod. xviii. ver. 21. Moreover thou shalt proutide out of all the people able men, such as fear God, men of truth, hating covetousness, [and place such over them to be rulers of thousands and rulers of hundreds, rulers of fifties, and rulers of tens. Wodrow]. And that we shall no more commit the government of ourselves, and the making of lawes for us to any one single person and lineal succession, we not being tyed as the Jews wer by God to one family government, not being an inheritance but an office, which must be squared, not to the interest and lust of a man, but to the good of the commonwealth; and this kind of government by a single person, &c. being most lyable to inconvenience (as sad and long experience may now teach us) and aptest to degenerat unto tyrannie. Moreover we declare, that these men whom we shall set over us shall be engaged to govern us principally by that civil or judicial lawe given by God to his people of Israel. [No man, we think, doubting but it must be the best so far as it goes, being given by God; and we having no body of law of our own, but some few imperfect Acts of Parliament, and sometimes following the canon, and sometimes the feudal, and sometimes the civil, which occasions great contentions among the people, especially those who are naturally litigious, to the exhausting and enhancing of the substance of the kingdom to some few men, and squeezing of its inhabitants. Wodrow.] But especiallie that we shall be governed by that law in matters of lyff and death, and in all other things also so farr as they reach, except only that lawe (viz. agent slaves) which does not agree with that Christian liberty established in all Christiandom (only violated by our tyrannies, and some others of late), and that of divorces and polygamy, the one being not a lawe, but a permission granted upon the account of the hardness of ther hearts,

' the other being a sinful custom contrary to
' the first institution of marriage creapt in unto
' the church; we knowe that men of malignant
' and perverse spirits, that has not a higher
' God then a wicked being, which suits only
' with ther lustful licentiousness, and it may
' be others with them that seemed to be of
' better principles, will raise an ignorant clamour
' upon this, that it is a fyfth monarchy,
' and we fyfth monarchy men, and will labour
' to amuse the people with strange termes, and
' put odious names on good things to make
' them hatefull as ther way is; but if this be
' ther fyfth monarchy, we both are and ought
' to be such, and that according to his word.

6. ' It being the work of the ministers of
' the gospel, to preach propogate and defend
' the kingdom of God, and to preserve the doctrine,
' worship, discipline, government, liberties
' and priviledges of the same from all corrup-
' tions and encroachments of rulers and all
' others. And seeing that the ministers of
' the church of Scotland (at least the greatest
' part of them by far) not only were defecti-
' ve in preaching and testifying against the
' acts of these rulers for overthrowing religion
' and reformation, abjuring our covenant
' made with God, establishing a government
' in the church, which that king calls his
' own government (and so not God's) contrair
' to our covenant; against inacting of that
' blasphemous (so Calvin calls that suprema-
' cy) * of Henry the eight, upon which

* Among the matters alleged against Charles 2d, in the bond which Wodrow, (vol. 2, p. 139) mentions to have been signed by Camerou and others in Nov. 1690, were "usurping to himself the Royal Prerogatives of Jesus Christ, and encroaching upon the liberties of the Church, and so stating himself both in opposition to Jesus Christ the Mediator, and the free government of his house."

By the Act of Supremacy, (1st Act of the 2d Parliament of Charles 2d Nov. 16, 1669,) after reciting "how necessary it is, for the good and peace of the Church and State, that his majesties power and authority, in relation to matters and persons ecclesiastical, be more clearly asserted by an act of parliament," it was "Enacted, asserted, and declared, That his majesty hath the supreme authority and supremacy over all persons and in all causes ecclesiastical within this his kingdom; and that by vertue thereof, the ordering and disposal of the external government and policy of the Church doth properly belong to his majesty and his successors, as an inherent right to the crown; And that his majesty and his successors may settle, enact, and emit such constitutions, acts and orders, concerning the administration of the external government of the Church and the persons employed in the same, and concerning all ecclesiastical meetings, and matters to be proposed and determined therein, as they in their royal wisdom shall think fit. Which acts, orders, and constitutions, being

this prerogative is foundit, and from which it is derived, and is no less if not more injurious to Christ, and invading to his church) and sacrilegious prerogative given to a king, over the church of God, and against the other acts and encroachments of his church, and hundreded others also who were willing and would have testified against them, and censured some that did it (for which together with other causes in ther trust and administration, we may say God hath left them to doe worse things) but also hath voted in that meeting (which they are pleased to call 'ane Assembly of Ministers' but howe justlie lest men judge) ane acceptation of that liberty foundit upon and given by vertne of that blasphemous and arrogated, and usurped power, and hath appeared before ther courts, to accept of that liberty, and to be inacted and authorised ther as ministers, and so hath willinglie (for this is ane illicit act of the will, and not ane act of force and constraint) translated the power of sending out, ordoring, censuring, (for as they

recorded in the books of council and duly published, are to be observed and obeyed by all his majesties subjects, any law, act or custom to the contrary notwithstanding."

But by the Articles of Grievances, &c. (18th of the Acts and Orders of the meeting of the estates of the kingdom of Scotland, April 13th 1689) it was declared, "That the 1st Act of Parliament 1669, is inconsistent with the establishment of church government now desired, and ought to be abrogated." And accordingly it was abrogated by the 1st Act of the 2d Session of William and Mary. And by the 5th Act of the same Session, Presbyterian Church Government was fully established. Several Acts, &c. contrary or prejudicial to, inconsistent with, or derogatory from it, were rescinded, and the Confession of Faith was ratified. Of this Confession the 25th chapter maintains the exclusive ecclesiastical supremacy of our Saviour, "There is no other head of the Church but the Lord Jesus Christ."

Another act for securing Presbyterian church government was passed June 12th, 1702. And by two acts of Sept. 1703, (by the former of which Presbyterian Church Government was secured and confirmed, and by the latter it was declared to be High Treason to impugn the authority of the Convention Parliament or even to attempt an alteration in the Claim of Rights,) the maintenance of the Presbyterian Religion was, as Mr. Laing has observed, indirectly aided by the penalties of treason. Lastly, on January 16th, 1707, (the day on which the act ratifying and confirming the Treaty of Union was enacted) another act was passed, for securing the Presbyterian Church Government, ordaining, among other things, "that all future sovereigns of Great Britain should, on their accession, swear and subscribe inviolably, to maintain and preserve that system of Church Government." As to the passing of this act, see 4 Laing, 354, 355, 356, Edition of 1804.

accept of their liberty from them, so they submit to their censures and restraints, at least all of them who wer yet tried with it, and others of them appeared and acknowledged before their courts, that they would not have done these things, that they wer charged with, if they hade thought it would have offended them. Ministers, departing from the court of Christ, and subjection, to the ministry, to the courts of men and subjection to the magistrate, (which hade bein impious, and injurious to Christ, and his church, although they hade been righteous, and lawfull rulers,) and by their changing of courts, (according to common lawe) hath changed their masters, and of the ministers of Christ are become the ministers of men, and bound to answer to them, as oft as they will, and as by the acception of this liberty, in such manner, they have translated the power, so they have given up, and utterly quit the government, and a succession of a presbyterian ministry; for as these wer not granted them, of their masters, so they exercise their ministry without them, and so by these (as the ecclesiastic government is swallowed up in the civil) if the rest hade followed them, the ministry should have bein extinct with themselves, and the wholl work of reformation hade bein buried in oblivion, not so much as the remembrance of it kept up: these together with the other of their commissions in preaching the lawfulness of paying that tribute, declared to be imposed, for the bearing down, of the true worship of God, (which they falslie termed seditious conventicles,) and ther adwiseing these poor prisoners to subscribe the bond, and consequence could not but so advise all others if putt to it (for the hazard, that men were in, will not make a real change of the morality of that action,) and besides the rest may be putt to it upon the same hazard, and so if the one should advise (which consequently they must doe,) and the other should subscribe, this would altogether close that door, which the Lord hath made use of, in all the churches of Europe, for casting of the yoke of the whore, and restoring the truth and puritie of religion and reformation, and freedom of the churches, and should have stopped all ingresse for men when once brought under tyranny, to recover their liberty again. These ministers, then not being followers of Christ, who before Pontius Pilate gave a good confession, which was, that he was a king, and no king, if he have not power to order his house and subjects, and they not following him, nor his ministers, if not asserting and maintaining of this his kingly power, against all incroaches and usurpers of it, and besides we being commanded, if any brotler walk disorderlie, from such to withdraw, and although in the capacity we now are in, we neither have nor assume, to ourselves, authority to give out definite and authoritative sentences, of deposition and suspension against these ministers,

yet we declare, which is proper for us to doe, that we neither can nor will hear preaching, nor receive sacraments from these ministers, that hath accepted of, and voted for that liberty, and declares all who have encouraged and strengthened their hands, by hearing and pleading for them, all those who have traffiqued for ane union with them, without their renouncing, and repenting of these things, all those who doe not testify faithfullie against them; and efter doe not depart themselves suitable to their testimonies, and all who joyn not in public, with their brethren, who are testifieing against them, we declare that we shall not hear them preach, nor receive sacraments from them, at least till they stand in judgement before these ministers, and be judged by them, who have followed the Lord, and kept themselves free of these defections and as our hearts have cleaved to these ministers, whill they wer on the Lord's side, and subjected ourselves to them, so we shall still cleave to those that abydy following him, and shall be subject to them in the Lord.

7. Then we doe declare, and acknowledge, that a gospel ministrie is a standing ordinance of God, appoynted by Christ to continue in the church untill the end of the world, and that none of us shall take upon him, the preaching of the word or administering the sacraments, unlesse called and ordained thereto, by the ministers of the Gospel, and as we declare that we are for a standing Gospel ministrie rightlie choisen, and rightlie ordained, so we declare, that we shall goe about this work in tyme to come with more fasting and prayer and more carefull inspection into the conversation, and holinesse of these men that shall be choisen and ordained, the want of which formerlie hath bein a great sin, both in ministers, and people, which hath not bein the least cause of this defection.

[This will meet with the same measure as the former. The former was a Fifth Monarchy, so this will be a Separation. There is both malice and ignorance in this calumny. Malice in striving to make us odious; for there is nothing that will make us more odious to the world, than to tell them we think ourselves more holy than all, and will have no communion with others: But we abhor such thoughts, and whatever we know of our sincerity, yet we know nothing of our perfection, and so see nothing whereupon we may compare, much less exceed others, but the contrary; and if any were to be shut out upon that account, we judge ourselves would be the first. There is ignorance in it, if not a deep deceit; for separation; as the scripture and divines take it in an evil sense, cannot be attributed to us; for if there be a separation, it must be where the change is, and that is not in us; we are not separating from the communion of the church, and setting up new ordinances, and a new ministry, but cleaving to the same ministers, and following the same

ordinances, when others have slidden back to new ways, and have a new authority super-added, which is like the new piece in the old garment.

Eighthly, We bind and oblige ourselves to defend ourselves, and one another in our worshipping of God, and in our natural, civil and divine rights and liberties, till we shall overcome, or send them down under debate to the posterity, that they may begin where we end; and if we shall be pursued or troubled any farther in our worshipping, rights and liberties, that we shall look on it, as a declaring war, and take all the advantages that one enemy doth of another, and seek to cause to perish, all that shall, in an hostile manner, assault us, and to maintain, relieve and right ourselves of those that have wronged us, but not to trouble or injure any, but those that have injured us, there being most lawful for us, being many that are wronged upon such an account, and by such persons who have nothing now over us, but power and usurped authority, which we shall neither answer nor acknowledge, if we can do otherwise, hoping that God shall break off that part of the yoke, and free us of that power and tyranny, that we have cast off upon his account, and will give us judges as we had at the beginning, and counsellors as we had at the first. [Wodrow.]

Followes the tenor of the other Reasonable Paper, called, The DECLARATION and TESTIMONIE of the True Presbyterian, Anti-Prelaticke, and Anti Erastian persecuted Party in Scotland.

It is not amongst the smallest of the Lord's mercies to this poor land, that ther hath bein always some who have given a testimony of every course of defection which we are guilty of, which is a token for God that he does not as yet intend to cast us off altogether, but that he will leave a remnant in whom he will be glorious, if they (through his grace) keep themselves clear still, and walk in his way and method, as it hath bein walked in and owned by him in our predecessors (of truly worthy memory) ther tyme, in ther carrying on of our noble work of reformation, in the severall steps thereof, from popery and prelacy, and lykways from erastian supremacy so much usurped by him; who (it is true as far as we knowe) is descendit from the race of our kings, yet he hath so fare devoidit from what he ought to have bein by his perjurie and usurpation in church matters, and tyrannie in matters civil, as is known by the whole land, that we have just reason to believe that one of the Lord's great controversies against us, is that we have not disowned him, and the men of his practices, whither inferior magistrates or any others, as enemies to our Lord and his crown, and the true protestant and presbyterian interest in ther hands our Lord's espoused bride and church. Therfor albeit we be for government and governours such as the word of God, and our covenants

allows, yet we for ourselves and all that will adhere to us, as the representatives of the true presbyterian church and covenanted nation of Scotland; considering the great hazard of lying under such a sin, doe by these presents disowne Charles Stewart, who hath bein reigning, or rather (we may say) tyrannazing on the thron of Scotland, and government thereof, (forfaulted severall years since by his perjurie, and breach of covenant with God and his church), and usurpation of his crown and royall prerogatives therein, and many other breaches in matters ecclesiastick, and by his tyrannie and breach of the very *legis regnandi* in matters civil, for which reasons we declare that severall years since he should have bein denudit of being king ruler or magistrate, or having any power to act or be obeyed as such, as also being under the standard of Christ captain of salvation; we declare war against such a tyrant and usurper, and all the men of his practices as enemies to our Lord Jesus Christ his cause, and covenants, and against all such as have strengthened him, sided with him, or anyways acknowledged him in his usurpation and tyrannie civil and ecclesiastick, yea and against all such as shall strengthen, side with, or anyways acknowledge any other in the like usurpation and tyranny, fare more against such as would betray or deliever up our free reformed mother church, unto the bondage of Antichrist the pope of Rome.

By this we homologate the testimony given at Rutherglen, the twentie nyath of May 1679, and all the faithfull testimonys of these that have gone befor us, as of these also who have suffered of late, and we doe disclaim that declaration published at Hamilton, June 1679, chiefly because it takes in the king's interest, which we are severall years since loosed from, because of the forsaid reasons and others which may efter this (if the Lord will) be published. As also we disown and by this resents the reception of the duke of York, a profest Papist, as repugnant to our principles and vows to the most high God, and as that which is the great (though alace too just) reproach of our church and nation. We also by this protest against his succeeding to the crown, and whatever hath been done or any are essaying to doe in this land (given to the Lord) in prejudice of our work of reformation.

And to conclude, we hope none will blame us for, or offend at our rewarding these that are against us as they have done to us, as the Lord gives the opportunity. This is not to exclude any that hath declined, if they be willing to give satisfaction according to the degree of their offence. Given at Sanquhar the 22 June 1680.

By which wicked, treasonable, and seditious papers above repeited, ye and your treacherous accomplices, murdering and bloody ministers and preachers, have plotted, contrived, and intendit the death of the king's majestie,

and the ruins of his government and authoritie, and the deprivation, deposing, and suspending of him from the style, honour, and kinglie name of the imperial crown of this realme, and has contrived and plotted the suspending of his majestie and royall familie from the exercise of the royall government, and ye and your accomplices have declared his sacred majestie to be ane usurper, and ye did adhere and owne the forsaid treasonable and seditious papers in presence of the lords of his majesties privy councill, upon the twentie fourth day of July instant, and that ye might accomplish these, your treasonable designs, iniquitous, detestable, and horrid resolutions, you and your accomplices to the number of ane hundreth, horse and foot, did in the moneths of March, Apryll, May, June and July in this instant year of God 1680, upon ane or other of the days of ane, or other of the saids moneths, the said year ryse and continue in armes without his majesties authoritie and approbation, and did declare and levie ware, and take up armes against him, and those commissionat by him. And upon the

day of July instant, or ane or other of the dayes of the said moneth, did invade, attacque, assault, engage and feight with a partie of his majesties forces, under the conduct and command of the laird of Earleshall (ane of his majesties commissionat officers), and did wound, kill and murder severall of his majesties subjects and souldiers under his command, off the which seditious, treasonable and wicked papers, convocating, ryseing, and continueing in armes of his majesties subjects, without and contrary to his majesties authoritie and command, killing and murdering his majesties subjects and souldiers, and of the other crymes above mentioned, ye are actor, airt and part.*

* Mr. Hume, in his Commentaries, very copiously treats of this matter of Airt (art) and Part; he not only investigates the substance and meaning of the charge itself, but traces to a considerable extent the history of Scotch practice respecting it, illustrating the several variations which have taken place in the structure of the libel, so far as relates to this particular. By what is called the 153rd act 12th parliament of King James 6th, (it is not the 153rd act either of his 12th parliament, or of his reign, but all the acts passed from the commencement of his ninth parliament, August 1584, to the conclusion of his fifteenth, December 1597, are designated by one succession of numbers, in which this stands the 153rd.) concerning the relevance of libells in cases criminall, "It is statute and ordained, seeing that diverse exceptiones and objectiones rises upon criminall libelles, and parties are frustrated of justice, be alledged irrelevantie thereof: that in time cumming, all criminall libelles sall containe that persones compleined on, ar airt and part of the crimes libelled; quhilk sall be relevant to accuse them thereof; sua that na exception or objection take awaie that part of the libell, in time cumming."

which being found be ane assyse ye ought to be punished with forfeiture of lyff, land and goods, to the terror of others to commit the like herefter.

What Mr. Hume in his Commentaries says concerning the charge of art and part, is to be found in the first volume, pp. 299, 300, 384, 413, from which I have extracted the following passages for the purposes of shewing the uncertainty of the original technical meaning of this phrase, and of imparting a notion of its present application:

"What we have here," says he, "principally to attend to, is the wide compass, according to our law, of the meaning and application of such a charge. It includes, in the first place, all those relative and less immediate degrees of guilt, the *ope et consilio* of the Roman law, wherein a person is involved, if he be concerned in occasioning, preparing, or facilitating the criminal deed, or in ratifying or approving of it, after it is done.

"But in our practice, this is a small part of what falls under the compass of such a charge; for it relates equally to all interference and assistance in *ipso actu*, at the very time of perpetrating the deed; whereby the person thus concerned is not a relative or accessory offender, but a principal in the guilt. "By *art* (says sir George Mackenzie) is meant that the crime was contrived by their art or skill, *corum arte*; by *part* is meant, that they were sharers in the crime committed, when it was committed, *et quorum pars magna fui*." According to some, the phrase is to be considered as a corruption or abridgment of the Latin phrase, of *artifex et particeps*. But whatever be in this notion respecting the origin, it is certain that such is the purport and fixed construction of the phrase; and that the books of adjournal present us with frequent instances of libels which bear a conclusion of art and part, subjoined to a narrative of such circumstances, as go to prove the pannel's presence and co-operation at the doing of the deed.

"But the charge of art and part has been understood with us in still another and s broader, and certainly not so obvious a sense; so as to be applicable even to the case of a simple and indivisible act, which is set forth in the libel as executed by one person only, without the assistance or company of any other. Thus, Margaret Ramsay, March 5th 1662, is sent to trial on a charge of child-murder, which proceeds as follows: "For that having borne and brought furthe ane living man chyld on the 1st October 1661, immediately after birth thereof, cruellie and unnaturalie murdered and killed the said chyld, and was the only actor, airt and part of the doing thereof." The accusation of William Dods, August 20th 1663, is drawn in the same style. After relating that he lay in wait, alone, for Andrew Hardie, by the side of the highway, and there assaulted and stabbed him with a durk, the libel concludes thus: "and sua was cruellie

And sichlyke, ye the said David Hackstoun of Rathlet are indyted and accused, that wer notwithstanding be the lawe of God, lawes and acts of parliament of this kingdome, the

and unnaturallie murdered by the said William Dods, and he was the only actor, airt and part thereof." William Dods was convicted on this libel. So likewise, January 8th 1664, James Arthur was convicted (among other offences) of the theft of certain goods from the house of Thomas Henderson; as to which article the libel closes with these words, "and was the only actor, airt and part of the said theft." In the same year, June 29th 1664, Malcolm Brown was sent to an assize on a libel for murder, which relates that he killed the deceased with a blow on the ear; and it finishes thus, "and sna was cruellie killed and slayne be the said Malcolme Brown, and he is only actor, airt and part thereof." Farther still, Novr. 16th 1666, the indictment of William Moncreiff for the murder of William Home, relates that he stabbed him with a durk, (no other person being by, as far as is alleged); and then it concludes, "and sua he was cruellie killit be the said William Moncreiff, and he was the only actor, airt and part thereof." This man also was convicted. On the 21st of the same month, another conviction was obtained; that of Thomas Mow, Novr. 21st 1666, for the slaughter of Robert Wright, by shooting him, of malice, aforethought, "and he (says the libel) was the only actor, airt and part thereof."

[Here Mr. Hume introduces later cases supporting the same doctrine.]

"In our practice, and especially in its application to cases of an alleged solitary and unassisted act, or of one which is libelled to have been done by several persons, all of them present and active on the occasion, the general charge of art and part has a double meaning, and serves to more than one purpose. In the first place, although, according to the prosecutor's information, and as stated in his libel, which he must frame in conformity to it, [By the law of Scotland the pannel may require any private prosecutor to swear to his belief of the justice and sufficiency of the grounds of his accusation. See Hume's Comment. 205] the deed was that of the pannel only, without the help or presence of any other person; yet it may happen that the prosecutor has been deceived in this respect, and that it turns out in the trial, that the thing was truly done by another, with the assistance, or at the command, or procurement, or the like, of the pannel. Now in that event, the general charge of art and part still serves to convict the pannel, as one substantially concerned in the deed, and equally liable as the principal actor in the full pains of law. But farther, in all cases, and especially those of the character above-mentioned, our charge of art and part has relation not only to the mode and quality of the

crimes of murder and manslaughter, especially sacrilegious murder committed upon a father of the church, the archbishop and primate of the kingdome, and one of the lords

pannel's guilt, but also to the mode and course of evidence, which are to serve towards his conviction of the charge. The meaning of it is, that though there may not be evidence against the pannel, by the direct testimony of persons who saw him do the deed, strike the mortal blow, take the purse, or the like, as charged in the libel; or though the prosecutor may fail to establish the precise story and train of circumstances, there related, in confirmation of the pannel's guilt; yet still he will establish such a story, and shew such circumstances and presumptions of one kind or another, such indications, or *tokens*, as they were formerly called, of the pannel's having been concerned on the occasion, as shall, by reasonable inference and construction, serve to convict him of the matter libelled; and this either as principal actor or as accomplice, according to the nature of the case, and the circumstances that shall be proved.

"That these are the several uses and applications of our charge of art and part, and that such is its broad and various construction in practice, is plain from the history of the form and tenor of this member of an indictment. It appears from the statute of James 6, 1592, c. 153, that, according to the course of custom at that time, the prosecutor was in the use of libelling the matter of his accusation much at large; with a full detail of the pannel's concern in the story, whatsoever it was, and of the circumstances which seemed to involve him in the guilt of the case. And as this was usual in the accusation, so the prosecutor's hope of success, was to depend on his establishing the precise state of facts and train of presumptions related in his libel. For if the proof produced any other series of circumstances, how conclusive soever of the pannel's guilt, or if he should appear to have had a different, though equally criminal sort of concern in the business, the libel was not proved, and it behoved the jury to return a verdict in his favour. Now here was an obstacle to the course of justice, because, after employing all due pains, the prosecutor might sometimes be misinformed, or imperfectly instructed, with regard to the circumstances of the fact; and thus he might be short of the truth in libelling his grounds of charge against the pannel, in which case the libel might fall to be dismissed; or, on taking the proof, the evidence might turn out very differently in such particulars, from what he had reason to believe. To correct, therefore, this prejudicial and unnecessary strictness, our legislature consented to a new law, [the statute 153, 12 Parl. James 6, printed above, which he recites.] Thus, under the broad and positive injunction of this law, a general charge of art and part became an ordinary, or rather a necessary, and an unexcept-

of his majesties most honourable privie council, are punishable with the pains of death and confiscation of moveables; yet ye the said David Hackstoun of Rathileit, having conceived a cruell hatred and deadlie malice against a reverend father in God, the deceast James archbishop of St. Andrews, primaf and metropolitane of this kingdome, and one of the lords of his majesties privie council, ye and your accomplices did upon the third day of May 1679, cruellie, sacrilegiouslie, and inhumanlie assault the said archbishop when he was traveling securlie in his own coach to St. Andrews within two myles of the said city, and upon Magusmuir did most wickedlie and furiously discharge severall shotts of pistolla, carrabins,

tionable member of "all criminal libelles," without exception even of those, where, according to the story told in the libel, there may seem to be no room, strictly speaking, for a charge of accession. Because it may turn out in the trial, that this story is inaccurate or imperfect; and yet a new state of facts, or a new train of circumstances may appear, in evidence, sufficient, in its own nature, to involve the pannel, in one character or another, in the guilt of the case, and competent therefore to be proved in terms of the act of James.

"In conclusion, it appears, on the whole, that under the general charge of art and part, as authorised in the statute of James, the prosecutor has a twofold advantage. Being not only freed from the necessity of setting forth the mode of the pannel's accession, or the detail of circumstances which press the suspicion of guilt on him; but having a security also against the effect of all such variations of his proof from the libel, with respect to the manner of doing the deed, as do not alter or take away the fundamental charge. For instance, in the case of Nicol Muschet, [he being in November 1720 indicted of the murder of his wife, the charge in the dittay was that on, &c. he did in a most cruel and barbarous manner under cloud of night carry Margaret Hall his spouse to the king's park at Holyrood-house, and then and there did wilfully and wickedly murder her, by cutting her throat almost quite through, and giving her several other wounds whereof she died; with a charge of art and part subjoined, which was sustained, and Muschet was convicted.] If it had appeared in evidence that the pannel was not himself the actor on the occasion, but had procured and hired another to dispatch his spouse in the manner libelled; or that he had an associate in the business who did the deed, while he watched at a convenient distance, to prevent interruption; still the libel would have been good against Muschet. For still true it was, that, time and place foresaid, Margaret Hall, his spouse, was murdered by cutting her throat, and that the pannel was art and part thereof, as libelled.

"Or state the case, that John and James are indicted of murder, as actors, or art and part;

hagbuts and musketts upon the said coach, within whilk the said archbishop and his daughter wer for the tyme, and his grace having oppined the coach door, and come fourth to you, and falling down upon his knees begging mercy, or tyme to recommend his soull to God, and pray for you his murderer, so cruell inhuman and sacrilegious were ye, that without piteeing his gray hairs, or the screaks of his weeping daughter, or respecting his character, or office, ye did most furiously and cruellie give the said archbishop many bloodie cruell and mortall wounds in his head, and other places of his body, and left him, dead and murdered upon the place in a most cruell and lamentable manner,* and in token of your

and that the deed is related in the libel as done by John who stabbed the deceased with a sword, while James held his hands, and disabled him from standing on his defence. Though it turn out on the trial, that the fact was otherwise, inasmuch as it was James who stabbed the deceased with a sword, while John held his hands; still the indictment shall be good to convict both John and James. Because still the bottom and substance of the accusation, the time, and place, and manner of the murder, by stabbing with a sword, are all true; and both pannels are guilty thereof art and part; which clearly falls under the compass of the general charge in the libel.

"The charge of art and part is suitable equally to accusations of every sort; as much so to indictments on a British statute which creates some new offence, formerly unknown in our practice, as to one laid at common law, or on any of our old Scottish acts. For although in virtue of such a statute, the crime or guilt be made the same for both parts of the kingdom; it no wise follows that the way of prosecution and trial in the two countries is to be the same too, nor that our practice shall be bent and accommodated to the English. On the contrary, as in each country the prosecution must be before its own courts and magistrates, so must it also be conducted in each, according to its own custom and form of process, no matter though in consequence of the different rules respecting the trial of accessaries, the issue of the prosecution in the two countries may sometimes happen to be different."

* Concerning the archbishop Sharp, and an attempt upon him; which had been committed some years before, see in this Collection, vol. 6, p. 1207, the Trial of James Michel.

Wodrow's account of this transaction, and his reflections upon it, are as follows:

"Bishop Sharp had been some days in Edinburgh, putting things in order for his going up to court: he had, upon the first of May, got the proclamation anent arms (published May 14,) passed in council with some struggle; and May 2, in the afternoon, he went over the

guilt of the foresaid horrid, impious and sacrilegious murder, ye did not compear in the town of St. Andrews upon the threiteint day of

Firth, and came to captain Seton's house in Kennoway, where he lodged all night. If any body came that night to Kennoway enquiring about him, as the printed accounts by the prelatick party say, I am assured it was none of the people who fell in with him to morrow. May 3, he went homeward to St. Andrews, and took Ceres in his way, stopped there, and smoked a pipe with the episcopal incumbent.

"The persons before spoken of, nine in number, some of whom were gentlemen of good families, being fond of a meeting with Carmichael, came abroad pretty early upon the Saturday morning, and traversed the fields up and down searched the hills above Cowpar, and some other places, for some hours, but did not find him. The reason of their not finding him, as the above accounts bear, was, that when Carmichael came out to his hunting about Scotstarbet, a shepherd thereabout advised the bailly to go home, for some gentlemen had been enquiring about him, at him, and were very desirous to meet with him: and Carmichael, not without some fear, returning from his sport, went homeward.

"They continued searching till near the middle of the day, and by this time they were come about a mile to the eastward of Ceres; and being wearied, and beginning to despair of meeting with Carmichael, they were just talking together of parting and quitting their project, when a boy, a servant of Black a farmer thereabouts, came up with them, and informed them, that the archbishop's coach was in Ceres, and within a little to come up towards Plebshole, not far from them.

"This, as some of them in their accounts say, did very much surprise them, and raised many thoughts of heart; the incident was so odd, that just when parting, and giving over their search for the servant, the master should fall into their hands: that when they had missed the enemy they were looking for, their arch-enemy and fountain of all their wo should fall in their way.

"One of them said, It seems he is delivered into our hands, and proposed they should cut him off, having such an occasion. Mr. Hackstoun of Rathillet opposed the motion, as being a matter of blood, and, as he thought, of the last consequence to this nation and church, and what required more deliberation by far. But what he very strongly urged was not of weight enough to stop them from the attempt. I find some accounts add, that after reasoning upon this head, one of them prayed for conduct and direction; and after that Rathillet told them, though for what he saw, they seemed to be clear to go on, yet he was not at all satisfied in his own mind about it. However the rest went forward in their design, and he would not part with them.

the said moneth of May 1679, nor in the town of Cowpar upon the sexteint day of the said moneth, nor within the town of Kirkaldig upon

"In their going towards the coach, one of the company proposed that some one should take the leading and command of the rest, and that they should exactly obey his orders whatever fell out, and Rathillet, notwithstanding his opposition, was generally named, but he told them there had been a difference betwixt the archbishop and him in a civil process, wherein he reckoned he was wronged by the primate; and thought in any other case he would not refuse to do them all the service he could, yet by no means could he at all act in this matter; and he was of opinion, that it was very improper, though he could joyn with them, that he should command them, since it would give the world ground to say, that what they did, was from personal pique and revenge, which he protested he was free of. They all declared their having no personal grudge at the man, but at his way and practice, and so chose another of their number to be their leader.

"By this time they were come to a little village about two miles from St. Andrews, called Magus, near to which they descried the bishop's coach; whereupon one of them, upon a fleet horse, rode up to the coach, to see if the bishop was in it. The bishop noticing him, cried out to the coachman to drive. The gentleman hearing this, cast his cloke from him; and pursued at full speed; the rest did the like, and came up as fast as they could; only the person who had the debate with the bishop kept at some distance, and did not at all engage in the action.

"While pursuing a little this way in Magus-muir, one of the bishop's servants, named Wallace, turned upon them, and cocked his piece; but two of them coming up, soon dismounted him, and took his carbine from him. Mean while, as the coach drove furiously away, they shot their musquets at it, but could not stop it, till the person upon the fleet horse came up to the coach, crying out, Judas, be taken. The primate called the more violently to the coachman, Drive, drive, drive. The coachman kept off the gentleman's horse from him with his whip; but he came up with the postilion, and called him to stop; and he driving on, he struck him over the head with a sword, and dismounted him, and straightway cutted the traces of the coach, and stopped it.

"By this time the rest were come up, and found the bishop and his daughter in the coach. The captain ordered him to come out, that no prejudice might befall his daughter, whom they would not willingly hurt. This he refused; whereupon two of them, the rest being taken up in dismounting and securing the servants, poured in their shot on the bishop's body, his daughter shrieking and weeping most bitterly, and were mounting their horses to go off, assuring themselves he was killed. But one of them heard his daughter say within a little, O!

the twentieth day thereof nor in the town of Dumfermlin, upon the twentieth third of the same month, dayes and places appointed for examination of the heritors, tennents, cottars

there is life in yet; upon which he got again to the coach, and called the captain, and the others, who found the bishop safe and whole, not in the least touched.

“Whereupon the captain commanded him to come out, and some discourse passed ’twixt them, which I shall set down, as left under the hands of some who were present. While the bishop lingered, and cried for mercy, the commander said, ‘I take God to witness, whose cause I desire to own in adhering to the persecuted gospel, that it is not out of any hatred of your person, nor from any prejudice you have done or could do to me, that I intend now to take your life, but because you have been, and still continues to be an avowed opposer of the gospel and kingdom of Christ, and a murderer of his saints, whose blood you have shed like water.’ Another of them said, ‘repent, Judas, and come out.’ All the bishop answered was, ‘Gentlemen, save my life, and I will save yours.’ The first replied, ‘I know it is not in your power either to save us, or to kill us; I again declare, it is not any particular feud or quarrel I have at you, which moves me to this attempt, but because you are an enemy to Christ and his interest, and have wrung your hands in the blood of his saints, not only after Pentland, but several times since, and particularly for your perjury, and shedding the blood of Mr. James Mitchel, and having a hand in the death of James Lermont, and your perfidious betraying of the church of Scotland; These crimes, added he, and that blood cry with a loud voice to Heaven for vengeance, and we are this day to execute it.’ And again he ordered him to come out, and prepare for death, judgment, and eternity. The bishop still refused, and cried for mercy, and offered him money to spare his life. The captain said, Thy money perish with thee, and told him, he allowed him time to pray, and commanded him again to come out. The bishop still refused. One of the company, at some distance cried, ‘seeing there have been so many lives, unjustly taken by him, for which there is not the least sign of repentance, we will not be innocent, if any more be taken that way.’

“Then one of them fired a pistol at him in the coach, which it seems did not touch him, and another wounded him with a sword; at which the bishop cried out, *Fy, fy, I am gone*: yet the wound was not mortal. And being again called to come out of the coach, he said, *I am gone already, what needs more?* Then they stepped near him, to pull him out; upon which he cried, *I know ye will save my life, I will come out; and accordingly came out.* And being again pressed to pray, he fell down upon his knees before the captain, and said, *For God’s sake, save my life, save*

and servants dwelling within the shires of Fyff and Kinross, before the sheriff depts of the said shire commissionat for examining of them, in presence of the witneyses who wer

my life; offering him money, and promising to lay down his episcopal function. The commander told him, he had been without mercy, and needed expect no mercy, and he could not spare his life, and again pressed him to prepare for death, and pray. One of these present, Andrew Guilan, told my informer, that they were stunn’d to see his carriage, and that by no means would he be prevailed with to pray; and another observes, that they were mightily surpris’d at his obdurateness, and that there was not the least sign of concern about him as yet. This Andrew was present, and did not touch him, but endeavour’d to secure his daughter from hurt and danger, when she would interpose ’twixt the actors and him.

“Instead of offering to pray, he, seeing Rathillet at some little distance, crept towards him on his hands and feet, and cried, *Sir, I know you are a gentleman, you will protect me.* Mr. Hackstoun answered, *Sir, I shall never lay a hand on you; and rode a little off, for all this time he did not alight.*

“The bishop finding this art to fail him, turned to them, and begged they might save the life of an old man, and promised he would obtain them a remission, it being capital to attempt the life of a privy counsellor. The captain warned him that they would not spare him longer; if he did not address God presently, they knew what to do. The bishop’s courage still continued, and he proposed some new desire; upon which they discharged another shower of shot upon him, whereupon he fell back, and lay as dead.

“But one of them giving him a prick with his sword, he raised himself; then they began to imagine shooting would not do, and the commander order’d them all to draw their swords. Andrew Guilan’s expression to my informer is, that, upon the sight of cold iron, immediately his courage failed; and though before he still insisted in his petitions, and seem’d not to regard their warnings much, yet now he made hideous and terrible shrieks as ever were heard.

“The commander seeing no warnings would prevail with him to go about any thing like preparation for death, with a shabble struck him on the face, and one of his chops fell down: he essay’d to speak somewhat, but was not understood. They redoubled their strokes, and wounded him in several places, and killed him outright.

“After the bishop was killed, the captain received any arms which the servants had, who were five, two riders, a footman, the coachman, and postillion. He order’d them to deliver all their papers; they said, they had none: then he went to the coach, and got a little trunk, and finding nothing in it but hoods and clothes belonging to the bishop’s daughter, it was set

present at that execrable murder; and notwithstanding his majestic proclamation, dated the fourth of May the said year, requiring them thereto, bears certification, that such of the

in again. He found another little box with papers, which he seized. In a trunk upon the coach he found a few more papers, and a large bible full of fine cuts, and the pictures of Christ and the New Testament Saints, and some passages of the history of the Bible in Taliduce, and a case of very fine French pistols, all which they took. The rest of the trunk contained clothes and furniture, which they did not touch, taking nothing but papers and arms.

“ In the bishop’s pockets they found neither silver nor gold, but only some letters and papers, and a whinger with silver roves, and knives-conform. Several of the forementioned accounts bear, that they found on the bishop a box with some pistol-ball, threads of worsted, and other odd things in it, which they knew not what to make of.

“ This is all I have met with as to the material circumstances of this fact, and I have given it as I found it in papers which are writ by persons present, who only indeed could give accounts of this matter; and they agree, as far as I can learn, with the accounts which went up and down after the murder was committed. All this took up about three quarters of an hour about mid-day, ’twixt twelve and one of the clock, Saturday May 3, this year.

“ As they went off, they met a man very well mounted, and asking him what he was, he answered, one of my lord St. Andrews’s servants, whom, it seems the bishop had sent off to pay his respects to some persons about: they dismounted him, took his arms from him, and drove away his horse to shift for himself, as they had formerly done to the other two riding servants, and thus rode away in a body to a place three or four miles distant from Magusmeir, where this action was done.

“ The actors in this bloody tragedy could not but wonder at their own preservation, and that, when this fact was a doing in the open fields, at the height of the day, in this season of the year, and so many peeces discharged, they were neither interrupted or discovered; and this was the more strange to them, that there were soldiers lying upon every hand of them, in Largo, Balchristie, Ladernie and Cowpar, all within a very few miles of the place, beside parties of troopers continually ranging up and down the shire; and yet they got off without observation, and continued together till night, looking over the papers they had got.

“ Among the papers they found, these are the most considerable. A gift of noventies of several gentlemen’s estates in Fife, and elsewhere; to Alexander Lestry of Kinnivie, with instructions and informations how to prosecute, in order to the eviction of the lands, the patron of the bishoprick of Dunkeld, in favours of Mr. Andrew Bruce archdeacon of St. Andrews, several presentations to churches whereof the

tenants, cottars, servants and others, as should be absent, should be reputed as accessory to the said cryme, and that the foresaid proclamation did supersede all execution upon letters king is patron, instructions to conjunct deputies, and new gifts of the heritors fines, a paper about popery, whereof a full account could not be given when the information whence I take this was writ, several missives, and other papers of no consequence.

“ After they had lookt through the papers, they continued together in the foresaid house till the evening, and then separated, and every one shifted for himself the best way he might. This is the best account I can give of this matter; and in the matters of fact there is a concurrence of two or three accounts I have seen, none of which that I know of have been printed, and therefore I have given them at the more length.

“ They are indeed all upon one side; and therefore, in a matter of this nature, which only can be fully known by balanced accounts of both sides, I think it but fair the reader should see what is said upon the other side. As far as I have noticed what is printed, there is no very great difference as to matters of fact; there is indeed considerable difference as to the carriage and character of the bishop. The written accounts I have made use of, represent him as most averse to prepare for death, and the printed accounts represent him as a saint. It is my business to give matter of fact as I find it; and therefore that the reader may have the other side of the story, I have insert an account of this matter, published by authority and order of the privy council. The former accounts are taken from the actors’ papers and relations, and this from the bishop’s daughter and servants, and I shall make no reflections on it; only, the matters of fact formerly related in this history, and the known tenor of the primate’s actions, give no foundation for such a character as the bishop gets in this paper.

“ Some other accounts of this matter I have seen, which I shall very shortly pass. One was printed at London, a few days after this fact was done, for D. M. which is the flattest and most insipid account I ever almost saw of any thing, and it deserves no further notice. Another account was published about the same time, intituled, A True Relation of what has been discovered concerning the murder of the Archbishop of St. Andrews: wherein this murder is lodged upon Rathillet, and his brother in law John Balfour of Kinloch; and these two persons are represented to have been wronged by the primate in some civil affairs, and to have murdered him in pique. This paper was answered by another, intituled, A Clear Discovery of the Falshoods of the former, wherein indeed the matters of fact advanced in the former seem plainly enough overturned; but when this is done, very little light is brought to this matter, and therefore I say no more of it: only it appears to me undeniable, that Rathillet was not

or caption, or intercomoning, or any other war- and for securing of any person for any cause, for the space of fourtie eight hours befor and efter the forsaid dyets of appearance,

actively concerned in this matter. And as to John Balfour, though it be true what is in this paper asserted, That he had withdrawn from ordinances for many years, and was very active about field-conventicles; yet a person's doing so will neither make him a saint, nor make the people he joyns himself to, chargeable with every thing he does: and I cannot find that this gentleman had ever any great character for religion among those that knew him; and such were the accounts of him when abroad, that the reverend ministers of the Soets congregation at Rotterdam would never allow him to communicate with them. Indeed upon him I find this action is generally and principally lodged.

"A third account of this matter I find in that virulent pamphlet formerly spoken of, intitled, *The Spirit of Popery speaking out of the mouths of phanatical Protestants*, Lond. 1680. This writer hath little of fact, but what is taken out of the council's narrative: he adds the certificate of a physician and three chirurgeons, who inspected the bishop's body, to prove they found one wound below the right clavicle by a shot; and in the same certificate they declare, they found three wounds in his left hand, which might have proved mortal, though he had had no other. I am so ill a physician, as not to understand how a wound in the hand in itself can be mortal. He adds the names of the murderers in red letters, John Balfour of Kinloch, David Hackstoun of Rathillet, George Balfour in Gilstoun, James Russel in Kings-kettle, Robert Dingwall a farmer's son in Caddam, Andrew Guilan weaver in Balmerinock, Alexander Henderson and Andrew Henderson sons to John Henderson in Kilbrachmont, George Fleming son to George Fleming in Balboothy. As far as I can learn, Andrew Guilan was only called by the actors to look to their horses, or some such thing, but was not active, though present at the action. Two Hendersons were afterwards imprisoned 1682, on this account, and let go. How many other mistakes are in this list, I know not: indeed this writer hath too many false facts and blunders for me to follow; neither shall I consider what he pretends to bring to vindicate this fact from Presbyterian writers, Knox, Naphthali, Jus Populi Vindicatum, since none of his citations come at all up to this case. What follows in point of history, anent the Highland host, the murder at Lowdon-hill, and major Johnstoun, is false, and his misrepresentations are already taken off in the former part of this history.

"The last account of the bishop's death I have met with in print, is in the *Caveat for the Whigs*, Lond. 1711, part 1, p. 57, wherein all the spiteful lies any where published seem to be cast together. It would be tedious to go through the mistakes of this ill natured and

that they might have stiffie come to and gone from the forsaid places at the several dyets of appearance, without trouble or impediment; and also, ye having bein inquired

malicious author in this matter. What he talks of lists of persons to be murdered, handed about with the archbishop on the head of them, of the relenting of the assassiators, their tramping his daughter, and many other things, are unknown to such who were present. The re- counter was certainly undesigned, till they got notice of the bishop's coming that way; and they were so far from being stirred up by field preachers to it, that they themselves had no thought about it till the hour in which it was done. The Christian temper of the primate at his death, which this writer harangues on, is very peremptorily denied by such as were present, as we have seen; and I very much jealous those religious expressions are made for him.

"Thus on both hands, I have laid this affair before the reader, from what I have seen in manuscript and print relative thereunto; and though many remarks might be made upon the whole, yet I shall confine myself to one or two which are properly historical.

"One is, That as none of the real actors were taken, so, when the murder was over, they came out of Fife for their own safety, and joyned themselves to those who attended these field-preachers who set up against the oas and indulgence, of whom before; from which the English papers, yea, the narratives of the after acts of council, as we shall hear, load the risers at Bothwel with being art and part in this action. I do not question but several of them were at Bothwel for their own safety; but it is very ill reasoning, and unfair to lodge this fact upon the whole party, when perhaps not one of a thousand knew them, or what they had done.

"Another is, That this incident of the bishop's murder became not only matter of reproach to the whole suffering presbyterians, as Rathillet fairly insinuated to the actors, though indeed the calumny was groundless, as hath been noticed, but also the occasion of very heavy oppression and persecution. The prelates and council took hold of it, as a handle for prosecuting the cruel designs the primate was cut off from finishing. This was made use of as a shibboleth for many years, to vex poor innocent and ignorant country people with, when seized: and so far is it from truth which Lealy advanceth, *Cassandra*, No. 2, p. 'That the worst of the primate's enemies had nothing lay to his charge but episcopacy,' that he was generally lookt upon as a very ill man; and the impressions of his wickedness, with some other things before suggested, made not a few unwilling peremptorily to judge of this action, which a great many others had freedom enough to condemn as murder. Several were executed as accessory to his death, who were entirely free of it, and many others harassed

whither the murder of the late archbishop of St. Andrews was a murder, you declared that it was non. And farther, the commissioners of justiciary having inquired you whither ye would deny that ye was guilty of the said murder, you did refuse to answer, or deny the

murder, and caused delate these words 'refused to deny.' Off the which cryme of murder and manslaughter ye are actor, airt and part.

And also ye the said David Hackstoun of Rathilet, are indyted and accused of your treasonable declining the judgment of the

upon that score, against all law and justice, as shall be noticed in the succeeding history.

"Upon the whole, though the most part of good people in Scotland could not but observe and adore the holy and righteous providence of God, in the removal of this violent persecutor and spring of the most part of the former severities, at such a juncture, just when upon new and violent projects, yet they could not approve of the manner of taking him off, nor would they justify the actors: and the known Stanza of that excellent man, and, in his time, good poet, sir David Lindsay of the Mount, upon cardinal Beaton's death, could not but come in people's minds, as not unapplicable; with it I end this section and chapter.

As for this Cardinal, I grant
He was the man we might well want,
God will forgive it soon:
But of a truth, the sooth to say,
Altho' the Lowne be well away,
The fact was foully done."

NARRATIVE of the Murder of the Archbishop,
published by authority.

"On the third of May, a day remarkable in the church kalender for the invention of the holy cross, this excellent prelate found his, and I hope obtained his crown, (in which month also, Henry 4, of France, and cardinal Beaton, one of his predecessors, were assassinated). About nine of the clock in the morning he took his coach in Kennoway, a village ten miles distant from St. Andrews, where he lay the night before, accompanied only with four of his servants, and his eldest daughter in the coach with him. About half an hour before he was attacked, his great soul, it seems, presaging what came to pass, he fell on a most pious and serious discourse to his daughter, giving her such pious instructions and directions, as he would have done, if upon his death-bed, whereunto she gave such becoming and satisfactory answers, that he embraced, and formally blessed her: afterward coming near to a farmer's house, called Magus, he says, There lives an ill-natured man, God preserve us, my child. Within a very little time after, the coachman perceiving some horsemen on the spur after them, calls to the postilion to drive on, for those men had no good in their minds. My lord finding the coach run so hard, looked out to see what the matter was, and then perceiving armed men pursuing, he turning to his daughter, said, Lord have mercy upon me, my poor child, for I am gone: upon which, presently three or four of the ruffians fired at the coach, but touched neither of them in the coach; the coachman put faster on, and outrun the most part

of the rogues (my lord's own servants, of which the best armed was wounded in the head by a sword, being mounted on weak hackney horses, had fallen behind before this, and were disarmed at the first coming up) while at last, one of the best mounted overbighed the postilion, and by wounding him on the face, shooting the coach-horse which he led in the back and cutting him in the hams, turned the coach out of the way, and gave the rest the advantage to come up. Then they fired again; one of them had his pistol so near my lord, that the burning calving was left on his gown, and was rubbed off by his daughter, which wounded him two or three inches below the right clavicle, in betwixt the second and third rib, and then another of them on the other side of the coach run him upon the region of the kidneys with a small sword; thereafter they called, Come out; cruel and bloody traitor, but not any offered to lay hands upon, or drag him out of his coach, as is falsly reported in the relation, the assassins being all yet on horseback; whereupon, most composedly he opened the door of the coach himself, and stepped out, and then said, Gentlemen, you will spare my life, and whatever else you please to do, you shall never be questioned for it. They told him, there was no mercy for a Judas, an enemy and traitor to the cause of Christ. Well then, said he, I shall expect none from you, but promise to me to spare my poor child, directing his speech to one, whom it is suspected by his looking him broad in the face, he knew, and reaching forth his hand to him, the bloody villain starts back from my lord, and, by a mighty blow, cut him more than half through the wrist: then said my lord, I hope ye will give me some time to pour out my soul to God, and I shall also pray for you; and presently falling on his knees, he said, Lord, forgive them, for I do; Lord receive my spirit. While thus praying on his knees (one of the traitors standing some paces off, called to the rest, Spare those gray hairs) and his hands lifted up, they struck furiously at him, and wounding him therein in three places, which nevertheless he kept up bleeding to heaven, while one of them cut him to the very bone, a little above the left eye, whereupon my lord said, Now you have done the turn; then falling forward, he stretcht himself out, and laid his head on his arm, as if he had been to compose himself for sleep, when some of the villains from their horses, and others a foot (having alighted) gave him about fifteen or sixteen wounds in the head, and in effect, the whole occipital part was but one wound; after which they rifled his pockets, and took some papers out of them; and so mad was their spite and rage, that even after he was dead,

king's majestic his aires and successors, and of his council and judges, contrair to the 129 act 8 par. king James the 6, whereby it is statut, and ordained, that his hynes his aires and successors, be themselves and ther councils are, and in tyme to come shall be judges competent to all persons his hynes subjects of whatsom-

and the murderers gone some way from the body, one of the furious and bloody assassins returned, and thrust twice or thrice at him with a sword. They robbed his daughter of some gold, and other things she had in a little box (they had wounded her, thrusting at her father, betwixt whom and them she had interposed, herself, by a stab in her thigh, and one of her thumbs) then they took away my lord's bible, night-bag, girdle, and some papers of moment: they also robbed his servants, and took their arms from them, and then went away as they came, and encountered one of my lord's gentlemen he had sent off some time before to salute the earl of Crawford in his name having passed near to his house: one of them called to kill him, for he was one of Judas's servants; others came and took his papers in his fore-pockets, and arms, and bid him begone, for his master was gone home before him. The place where this horrid murder was committed, is called Magus-muir, within two miles, and in sight of the town of St. Andrews.

"Thus fell that excellent prelate (whose character and worthy acts deserve, and, no doubt, will find some excellent pen) by the hands of nine fanatic ruffians; That they were so, is not to be doubted, their names being all now known, and all of them denounced or inter-communed, for frequenting field-conventicles, and the known champions of that party in the shire of Fife; besides their holy sanctified discourse at the time of their bloody actings, shews what temper of spirit they were of. I have done with my relation (attested to me before famous witnesses by my lord's daughter, and those of his servants that were so unfortunate to be spectators of this execrable villany) when I have observed how ridiculous the author of the pretended true one is, where he endeavours to discover the occasion of the murder of the archbishop of St. Andrews; for what need was their of any thing more to provoke them, than his being an archbishop, and the primate of Scotland, and the most active, as well as the most reverend father of this church? Was it not for this reason, that he was, on the streets of Edinburgh, shot at by Mr. James Mitchel, while in his own coach? Was not this the reason that these fanatic books from Holland, both some time ago and of late, marked out his *sacrum caput*, as they termed it, and devoted him to a cruel death, and gave out predictions that he should die so? which they easily might, being so active in stimulating and prompting instruments to fulfil their own prophecies.

'O Lord, how unsearchable are thy judgments, and thy ways past finding out!'

ever estate, degree, function, or condition, that ever they be off, spiritual or temporall, in all matters wherein they or any of them shall be apprehendit, summoned, or charged, to answer to sick things, as shall be inquired of them be our said soveraigne Lord and his council, and that non of them whilk shall happen to

Wodrow also gives the following Instruments, relating to this Murder:

PROCLAMATION, May 4, for Discovery of the Murderers of the Archbishop of St. Andrews.

"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, or messengers at arms, our sheriffs in that part conjunctly and severally, specially constitute, greeting. We being fully, and by legal proofs, assured of the late horrid and bloody murder committed upon Saturday last, being the third of May instant, by ten or eleven fanatick assassins, upon the person of the most reverend father in God, James late archbishop of St. Andrews, primate of all Scotland, which barbarous and inhumane assassination and parricide will (we doubt not) spread horror and amazement in all the hearts of such as believe that there is a God, or a christian religion, a cruelty exceeding the barbarity of pagans and heathens, amongst whom the officers and ministers of religion are reputed to be sacred, and are by the respect born to the Deity which they adore, secured against all such bloody and execrable attempts, a cruelty exceeding the belief of all true Protestants, whose churches have justly stigmatized, with the marks of impiety, all such as defile with blood those hands which they ought to hold up to Heaven, and a cruelty equal to any with which we can reproach the enemies of this true and reformed church: by which also, not only the principles of human society, but our authority and government (the said Archbishop being one of our privy council) is highly violated, and example and encouragement given for murdering all such as serve us faithfully according to the prescript of our laws and royal commands, daily instances whereof we are to expect, whilst field-conventicles, those rendezvous of rebellion, and forges of all bloody and jesuitical principles, are so frequented and followed, to the scandal of all government, and the contempt of our laws: And which murder is, as far as is possible, rendered yet more detestable, by the unmasked boldness of such, as durst openly with bare faces, in the midst of our kingdom, at mid-day, assemble themselves together, to kill in our highway the Primate of our kingdom, and one of our privy council, by so many strokes and shots, as left his body as it were but one wound, and many of which being given after they knew he was dead, were remarkable proofs they were acted by a spirit of

be apprehendit, called or summoned to the effect foresaid, presume, or take upon hand to declare the judgement of his hynes, his airs and successors, or ther counaill, in the premises,

hellish and insatiable cruelty. We have therefore, with advice of our privy council, thought fit, hereby to command and charge all sheriffs, stewarts, bailies of regalities, and baileries, and their deputies, magistrates of burghs, and officers of our standing forces, to search, seek, take, and apprehend the persons guilty of the said horrid murder, or any suspected by them, and to imprison them until they be brought to justice, and all our good and faithful subjects to concur in the taking and securing, as far as is in their power, these assassinate: and in respect there is a company of vagrant and skulking ruffians, who, to the great contempt of all government, do ride through this our kingdom, killing our soldiers, deforeing such as put our laws in execution, and committing such horrible murders, who might be easily discovered, if all such amongst whom they converse, did, according to their duty, endeavour to apprehend them, or give notice where they haunt or resort. We have therefore thought fit, conform to the 144 act, Parl. 12 K. James 6, to command and charge all our subjects, that whensoever any unknown men or vagabonds shall repair amongst them, that they, with all possible speed, certifie any of our privy council, officers of our forces, or any having trust under us thereof; with certification to them, that if they omit the same, they shall be punished with all rigour conform to the said act. And since several of the said assassinate are known to have been tenants in the shire of Fife, whose faces will be known to such of the witnesses as were present, we hereby require and command all the heritors and masters of the said shire of Fife and Kinross to bring their tenants, cottars, and servants, and others dwelling on their lands, to the respective towns at the diets aforementioned, viz. those within the presbytery of St. Andrews, to the town of St. Andrews, upon the thirteenth day of May instant; those within the presbytery of Cowpar, to the town of Cowpar, upon the sixteenth day of the said month; those within the presbytery of Kirkaldy, to the town of Kirkaldy, upon the twentieth day of the said month; and those within the presbytery of Dumfermling, to the town of Dumfermling, upon the twenty third day of the said month, at ten a clock in the forenoon, upon each one of the said days, there to continue and abide till they be examined by the sheriff-deputes of the said shire, who are hereby commissioneate to that effect, and to be seen by the said witnesses; with certification to such of the said tenants, cottars, servants, and others foresaid, as shall be absent, they shall be reputed as accessory to the said crime; and the masters, if they produce them not, or if hereafter they harbour any that shall not compare, they shall be reputed favourers of the said assassination.

under the paine of treason. And he the second act of the second session of his majestie's first parliament, it is statut and ordained, that if any person or persons, shall herefter

And whereas there are some persons under caption or intercommunion in the said shire for several causes, and lest persons who are innocent of that horrid crime, may be thereby debarred from appearing, and vindicating themselves, we have thought fit, hereby to sist and supersede all execution upon any letters of caption or intercommunion, or any other warrant for securing of any persons for any cause, for the space of 48 hours before and after the said diets of appearance, that they may safely come and go without any trouble or impediment whatsoever. And to the end the said cruel murder may be more easily discovered, we do hereby offer, and give full assurance of our indemnity, to any one of the said assassinate who shall discover his complices, and such as hounded them out, and of present payment of the sum of ten thousand merks to any who shall inform who were the said assassinate, if upon his information they or either of them can be apprehended, that they may be brought to condign punishment. And ordain these presents to be printed, and published at the Market-cross at Edinburgh, and at the market crosses of all the royal burghs in the shires of Fife and Kinross, and to be read at all the parish Kirks of the said shires, and jurisdictions within the same, upon Sunday next, being the 11th of this instant, immediately after the ordinary time of divine service in the forenoon, that the same may come to the knowledge of all persons concerned. Given under our signet at Edinburgh, the 4th day of May, 1679, and of our reign the 31st year.

ALEX. GIBSON, Cl. Secr. Concilii.

God save the King.

INSTRUCTIONS [of the Council] to the Sheriff-Deputes of Fife, anent the Trial of the Murderers of the late Archbishop of St. Andrews.

“ That all males, from sixteen years of age and upwards, in each presbytery, meet on the days appointed; that all the ministers be there, and bring with them the communion rolls; That they mark all of them who come not to church on the account of fanatick or popish principles, and that these be set aside: That all such as are of that tribe be examined, and obliged to give account where they were all the 3rd of May, and especially betwixt ten in the morning and three in the afternoon; and that they prove what they say by sufficient witnesses, or that they give up the names of the witnesses that they may be examined there anent: That such as cannot prove a good account of themselves, in manner foresaid, be secured, and their goods seized and secured, till the issue of their trial: That such as shall be absent the said day, be holden as probably guilty of the horrid act, and their goods se-

plott, contrive, or intend death, or destruction to the king's majestic, or any bodlie harme, tending to death or destruction, or any restraint upon his royall person, or to deprive, depose, or suspend him from the crowne, honour, and kinglie name of the imperial crown of this realme, or any others his majesties dominions, or to suspend him from the exercise of his royall government, or to levie warr against his majestic, or any commissionat by him, and shall by writing, printing, preaching, or other malicious and advised speaking, expresse, or declair, such ther treasonable intentions, every such person or persons being upon sufficient probation, legallie convict thereof, shall be deemed, declaired and adjudged traitors, and shall suffer forfeiture of lyff, honour, lands and goods, as in the cases of hie treason, and more especiallie, when the same is done in judgement, and in presence of his majesties commissioners of justiciary, who are the proper judges for punishing of such hynous, detestable, and treasonable crymes. And yet, the said David Hackstoun of Rathilet hes presumed to commit, and is guilty of the said crymes. In suae fare as ye being upon the twenty nyth of July instant brought in presence of the lord justice clerk and commissioners of justiciary, ye did utter the malicious and advised expressions after mentioned, vtz. That ye declined his majesties autoritie, and the autoritie of the commissioners of justiciary as his judges, and did obstinatlie refuse to signe this your treasonable declinator, as being befor persons whom ye treasonable assert are not your judges, and ye refused to answer concerning the murder of the late archbishop of St. Andrews, and you falsly and treasonable asserted the causes of your declinator to be because they usurped a supremacy over the church, belonging allon to Jesus Christ, and have established idolatry, perjurie, and other iniquity in the land, and that in prosecuting their designe and confirming themselves in ther usurped right have shed much innocent

cured in manner foresaid, and their master be obliged to keep the said goods on the ground, or to deliver them presently: That (if it can be conveniently) search be made, in the time of the said rendezvous, in such places as those in the place shall judge most convenient: That the names of the absents be published at all the parish churches, and at the market-cross the next market-day, and a proclamation of the council, containing all their names, prohibiting reset, shelter, or harbour to them; and also ordering all sheriffs, bailies, magistrates, &c. to pursue, apprehend, or kill them in case they resist, or do not submit themselves, and a severe fine on any who refuse or delay to concur in the said duties through the whole kingdom: That the Sheriff-deputes do intimate to the heritors of the said shire, that it is the council's express pleasure, that they give all possible concurrence to them in this examination and trial, under all highest pains."

blood, and that ye therfor falslie (falslie pretending to adhere to Jesus Christ his right and kinglie office over the church,) treasonable declined his majestic and his commissioners of justiciary to be competent judges, falslie and wickedlie pretending them to be oppin enemies and competitors for the crown and power of Jesus Christ, and ye obstinatlie refused to signe this your wicked and abominable declinator dictat from your own mouth, and of the which crymes foresaid ye are actor art and part, which being found be ane assyae, ye ought to be punished with forfeiture of lyff, land, and goods, to the terror of others to commit the like herefter.

Persewer.—Sir George M'Kenzie of Rosehaugh, our Sovereign Lord's Advocate.

The said David Hackstoun being entered on pannall, did, in presence of the justice general, justice clerk and commissioners of justiciary, and assysers, all in judgment, decline his majesties autoritie, and renewe his former declinator (mentioned in the dittay) in the baill words therof, and chairges the lords and assysers who shall judge him by the lawes lybelled to be guilty of his blood, and refuses to answer or deny the archbishop's murder, and being questioned whether he made his escape out of the house of Mortoun, when he was persewed by the archbishop's servants as guilty of the murder, refused to answer; but declaired he made as many remarkable escapes within this two years as that was. The lords finds the dittay relevant, and remitts the same to the knowledge of the assyae.

ASSISA.

Sir John Whytford of Milntoun.

Mr. William Nimmo Gilmour, of Craigmillar.

—Robertson, of Strowan.

Sir Patrick Threpland, of Fenzieis.

Alexander Brand, late Baylie.

Ratray of Craighall.

Milne of Muirtoun.

Blair of Wester Yormock.

Colquhoun of Balvie.

Mr. William Gordon, brother to Lesemoir Blair, of Ardblair.

Wm. Leivingstoun, master of Kilsyth, steward of Balid.

David Swintoun, late baylie of Edinburgh.

PROBATION.

The assyae lawfullie sworne; no objection in the contrair. His Majesties Advocat for Probation adduced the treasonable Declinator emitted by the said David Hackstoun, the witnesses efter deponing, and the other evidences efter specified.

Follows the tenor of the treasonable Declinator,

Edinburgh 28 July, 1680. In presence of the lords justice clerk and commissioners of justiciary, compeired David Hackstoun of

Rathlet, and declares that he declines the king's majesties authoritie, and the authoritie of the commissioners of justiciary as his judges, and obstinatie refuses to signe this declinator, as being befor persons who are not his judges. He refuses to answer concerning the murder of the late archbishop of St. Andrews, and says the causes of his declinator are because they have usurped a supremacy over the church belonging alone to Jesus Christ, and have established idolatry, perjurie and other iniquitie in the land, and in prosecuting their designe in confirming themselves in this usurped right have shed much innocent blood. Therfor the said David, as adhering to Christ his rights and kinglie office over the church, declines them, that that are his oppin enemies and competitors for his crown and power as competent judges, refuses as formerlie to signe this his declinator dictat from his own mouth, wherupon his majesties advocat takes instruments, and requyrs the commissioners of justiciary to sign the same in his presence, and for him. And his majesties advocat takes instruments, that the said David has caused delate the words "refuses to deny" the murder of the late archbishop of St. Andrews, and requyrs Mr. John Vanse, James Balfour, and the macers of court witneyses to the forsaid declinator and declaration. *Sic Subscribitur.* Maitland, Ja. Foulis, David Balfour, Da. Falconar, Roger Hog.

Andrew Bruce of Earleshall, being solemnie sworn, purged of partiall councill, and examined; depons, That he sawe the pannall, David Hackstoun of Rathilee, in his wounds efter the conflict at Ayresmosse upon the place and in the field, and amongst the dead, and in the custody of David Ramsay who made him prisoner, and depons, that the pannall did declair to him the manner of his conduct in manadgeing the conflict with his majesties forces, and that it was upon the two and twentie day of July instant, about four o'clock in the afternoon. *Sic Subscribitur,* AB. OF EARLSHALL.

David Ramsay, gentleman in Claverhouse' troupe, son to major John Ramsay, being solemnie sworn, purged of partiall councill, and examined, depons, he sawe the pannall, David Hackstoun of Rathilee, in armes with the rebells at Ayres-mosse, on the twentie-second day of July instant, and depons that he fought against the deponent personallie, and he heard him give command and sawe him drawe up, and serve upon the left wing of the rebells. Depons he inquired the pannall anent his guiltines of the archbishop's murder, and the pannall would not answer anent that, though he answered anent other questions, and would neither confesse nor deny it. Depons, that the deponent was the person that took the pannall prisoner, and took his sword from him, which he has presentie by him, and that the pannall asked quarters, and begged to saive, his lyff, and the deponent saived him from a stroak, by receiving the same on his own hand, efter he

hade taken his sword, and this is the truth as he shall answer to God.

Sic Subscribitur,

D. RAMSAY.

His *Majesties Advocat* produced the Proclamation mentioned in the dittay, appoynting the hail inhabitants of the shyres of Fife and Kinross, to appear before the sheriff deputies of the said shyres, the days and places therein mentioned to be examined, in presence of the witnesses present, when the archbishop of St. Andrews was murdered, which is dated the fourth of May 1678, with ane Proclamation discharging the receyting and commanding the delyvering up of the said David Hackston, and the other murderers of the said archbishop, and the other rebells therein mentioned to justice, which is dated the twentie sixt day of June, the said year. As also produced the Proclamation containing his majesties gracions pardon and indemnitie, to the persons engaged in the rebellion 1679, wherin the said murderers and others are expresslie excepted, which is dated the 27th of July the said year. * Item produced ane Proclamation† indicting Circuit Courts to be holden, and appoynting the said murderers to be proceedit against therein and hanged in effigie, and promising and assuring ane reward of ten thousand merks to any person or persons who should apprehend the said murderers, particularlie the said David Hackstoun, and John Balfour of Kinloch, either dead or alive, which proclamation is dated the fourteenth of August the said year. Item ane Proclamation‡ appoynting and commanding sheriffs and other magistrates to apprehend and secure the persons of the said David Hackstoun, John Balfour, and the other murderers. Dated the 20th Sept 1679.

Mr. Alex. Malcolm, Advocat, Sheriff Depute of Fife, being solemnie sworn, purged, and examined, depons, that the pannall apperred not before him at any of the four places contained in the proclamation, at the tymes appoynted for examination of the heritors, and others in the shyre of Fife anent the Archbishop's murder.

Sic Subscribitur,

ALEX. MALCOLME.

William Wallace, servitor to the late archbishop of St. Andrews, being solemnie sworn, and purged, depons, he was at the house of Mortoun, searching for the pannall, and the other murderers of the late archbishop of St. Andrews, and that the persons who wer in bed in that house having got from their bed and made ther escape, the deponent did fyre at one of them, and that they left two of the horses upon which the murderers of the late archbishop of St. Andrews did ryd, when they murdered his grace. Depons, that the pistoll which was taken out of the deponent's pocket by the

* Published August 14th, 1679. See it in 2 Wodrow, Appendix, No. 32.

† Published August 14th, 1679. See it in 2 Wodrow, Appendix, No. 34.

‡ See it in 2 Wodrow, Appendix, No. 42.

murderers the tyne of the murder, was found that night, that the deponent and others wer at the house of Mortoun searching for the murderers, and that Abraham Smith the coachman told him he had been struggling with Rathilet in the close, and that Rathilet's sister told the deponent, that her brother Rathilet and Balfour of Kinloch had both of them been ther, and at the murder, and this is the truth as he shall answer to God; farther depons, that be the common bruit and report of the countrey, the pannall Rathilet has always been reput one of the principall murderers, and depons they went to search his sister's house for him, as one of them. *Sic Subscribitur*, W. WALLAES.

Abraham Smith, coachman to the late archbishop of St. Andrews; being solemnlie sworn, purged, and examined, Depons, that he was present when the arch-bishop of St. Andrews was murdered, and that ther was a man having a light coloured cloack ryding on a gray horse at a little distance from the coach, and that when they searched for the archbishop's murderers the deponent wrestled with the pannall in the close of Mortoun, and went twice thrice over other, but he made his escape from him, and the deponent caught his bonnet and pirivige, which pirivick is here produced; and depons that the self same horse on which the man rod who had the light coloured cloack, was taken at the house of Mortoun from the murderers, and that the light coloured cloack was taken in the house; and depons, that the people of the house said that the cloack was Rathilet's cloack, and depons that Rathilet's sister confest and said, that the pannall ber brother was in ther house that night they searched for the murderers, and that the self same pistoll which was taken from the archbishop's man William Wallace, was found in a bed in the house of Mortoun under the strae, with a litle byble here produced, said to be Rathilet's byble. And this is the truth as he shall answer to God, and depons he cannot writt. Depons its the common bruit and oppin fame of the hail countrey, that Rathilet is one of the murderers of the archbishop, and the deponent went to the house of Mortoun to search for him as such. *Sic Subscribitur*, QUEENSBERRY.

James, Marquis of Montrose, being solemnlie sworn, depons the pannall refused to answer whither the archbishop's murder was a murder, but said to the Council that he wished that God by a stroak of his justice might desyd betwixt the council and him which of them wer the greatest murderers;* and depons that

* THE TESTIMONY OF THAT WORTHY GENTLEMAN, DAVID HACKSTOUN OF RATHILLET, WHO SUFFERED AT EDINBURGH, JULY 30, 1680.

His Interrogations and Answers before the Privy Council, Saturday, July 24, 1680.

1. "Whether or not had you any hand in the murdering of the late bishop of St. Andrews? Answered, he was not obliged to answer that

he heard John Pollock prisoner confesse before the lords of the privie council in tortor, that he heard Hackstoun of Rathilet say that he was with the murderers of the archbishop of St.

question, nor be his own accuser. 2. What he would declare as to the king's authority? Answered, that authority that disowns the interest of God, and states itself in opposition to Jesus Christ, is no more to be owned; but so it is, the king's authority is now such, therefore it ought not to be owned. 3. Whether the killing of the archbishop of St. Andrews was murder, yea, or not? Answered, that he thought it no sin to dispatch a bloody monster. 4. If he owned the new covenant taken at the Queensferry, from Mr. Cargal, one of their preachers? Answered, that he did own it in every particular thereof, and would fain see the man that in conscience and reason would debate the contrary. 5. If he were at liberty, and had the power to kill any of the king's council, and murder them as he did the bishop of St. Andrews, whether he would do it, yea or not? answered, that he had no spare time to answer such frivolous and childish questions.

"The chancellor told him, that if he were not more ingenuous in his answers, he would presently be tortured. He answered, That is but a little addition to your former cruelties, and I have that comfort, that though you torture my wounded body, yet ye cannot reach my soul. The chancellor urged him with several other questions, which he refused to answer. But, said he, I would gladly speak a little if I could have liberty, which was allowed him. Then he said, Ye know that youth is a folly, and I acknowledge, that in my younger years I was too much carried down with the spait of it; but that inexhaustible fountain of the goodness and grace of God, which is free and great, hath reclaimed me, and as a firebrand hath plucked me out of the claws of Satan; and now I stand here before you as a prisoner of Jesus Christ, for adhering to his cause and interest, which hath been sealed with the blood of many worthies, who have suffered in these lands, and have witnessed to the truths of Christ, these few years bygone, and I do own all the testimonies given by them, and desire to put in my mite among theirs, and am not only willing to seal it with my blood, but also with the sharpest tortures that you can imagine. Then being interrogate by the bishop of Edinburgh, what he would answer to that article of the Confession of Faith, that difference of religion doth not make void the magistrate's right and authority? He answered, he would not answer any perjured prelate: the bishop replied, he was in the wrong to him, because he never took the covenant, therefore he was not perjured, and so deserved not that name. But some of them asked him, how he would answer that question? He answered, that question was answered long ago by the Solemn League and Covenant, which binds us only to maintain and defend the king in the defence of the true reli-

Andrews, that day of the murder, but did not joy in the act, and that Rathilet told this the Thursday he was taken.

Sic subscribitur, MONTROSE.

gion ; but now the king having stated himself an enemy to religion, and all that will live religiously, therefore it is high time to shake off all obligation of allegiance to his authority. Next day they asked if he had any more to say ? He answered, that which he had to say was said already in every particular thereof ; and, said he, I will not only seal it with my blood, but with all the tortures ye can imagine.

Follows the Extract of the Proceedings of the Privy Council, Edinburgh, July 29, 1680.

“ In presence of the lords justiciary, clerk and commissioners of justiciary, appeared David Hackstoun of Rathillet, and declines the king's majesty's authority, the authority of the commissioners of justiciary, as his judges, and absolutely refuses to sign this declaration, as being before persons who are not his judges. He refused to answer concerning the murder of the late bishop of St. Andrews, and says, the clauses of his declination are, because they have usurped the supremacy over the church, belonging alone to Jesus Christ, and have established idolatry, perjury, and other iniquities ; and in prosecuting their design, in confirming themselves in this usurped right, have shed much innocent blood. Therefore the said David, adhering to Christ, his rights, and kingly office over the church, declines them that are his open enemies and competitors for his crown and power, as competent judges ; refuses, as formerly, to sign this his declaration, dated from his own mouth ; whereupon his majesty's advocate takes instruments, and requires the commissioners of justiciary to sign the same in his presence, as for him ; and his majesty's advocate takes instruments, that the said David has declined his majesty's authority, and the authority of his commissioners, and refused to deny the murder of the late bishop of St. Andrews, and requires Messrs. John Vas, James Balfour, and the men of the court, witnesses to the foresaid declaration. *Sic subscribitur*—Sir Robert Maitland, James Foulis, David Balfour, David Falconer, Rodger Hodge.”

“ Upon Friday, July 30th, being again brought before the council, it was asked of him if he had any other thing to say ? He answered, That which I have said I will seal it. Then they told him, they had something to say to him ; and commanded him to sit down and receive his sentence ; which willingly he did, but told them they were all bloody murderers, for all the power they had was derived from tyranny ; and that these years bygone they have not only tyrannized over the Church of God, but have also grinded the faces of the poor, so that oppressions, bloodshed, perjury, and many murders were to be found in their

Charles Maitland of Hatton, Lord Treasurer Deput, being solemnly sworn depons, that Hackstoun of Rathilet being brought before the lords of his majesties privie council, efter

skirts. Upon which he was incontinent carried away to the scaffold, at the market-cross of Edinburgh, where he died with great torture inflicted upon his body.” A Cloud of Witnesses for the royal prerogatives of Jesus Christ ; or the Last Speeches and Testimonies of those who have suffered for the truth in Scotland, since the year 1680. Edinburgh 1810.

In the same work, are inserted four Letters written by Hackstoun, shortly before his death, from the first of which, dated from the Tolbooth of Edinburgh, July 26th 1680, is extracted the following passage, giving an account of the rencounter at Aird-Moss, (July 20th 1680) and what befel him afterwards.

“ And now, knowing ye will be anxious to know how it was then, and how it hath been since with me : First, we getting notice of a party out seeking us, sent two on Wednesday night late, to know their motion, and lay on a muirside all night ; and Thursday about ten hours we went to take some meat, and sent out other two, and desired them to consult with the first two, who had not come to us, but were lying down to sleep, who all four returned and told us, it was unnecessary to send any for intelligence, they having secured it. Whereupon, after we had gotten some meat, we came to a piece of grass, and lay down, and presently we were all alarmed that they were upon us ; and so making ready, we saw them coming fast on ; and that about three or four hours in the afternoon ; and each one resolving to fight, I rode off and found a strength for our advantage, and drew up quickly eight horse on the right hand with R. D. and fifteen on the left with me, being no more ; the foot not being forty, and many of them ill armed in the midst. The enemy advanced fast, about one hundred and twelve, well armed and horsed ; who sending about twenty dragoons on foot to take the wind of us, we sent a party on foot to meet them, and the rest of us advanced immediately after, when our horse fired, and wounded and killed some both horse and foot ; our horse advanced to their faces, and we fired on each other ; I being foremost, and finding the horse behind me broken, I then rode in amongst them, and went out at a side, without being wounded ; I was pursued by severals, with whom I fought a good space ; but at length I was striken down with three on horseback behind me ; and receiving three wounds on the head, and falling, submitted to them. They gave us all testimony of brave resolute men. What more of our men were killed, I did not see nor know ; I was brought toward Douglas. They used me civilly, and brought me drink out of a house by the way. At Douglas, Janet Cleland was kind to me, and brought a surgeon

he had declined the king's authority in council. The chancellor having asked the pannal

to me, who did but little to my wounds, only stanch'd the blood.

"Next morning I was brought to Lanark, and brought before Dalziel, and lord Ross, but I not satisfying them with answers, Dalziel did threaten to cast me; and carrying me to the tolbooth, caused me to be bound most barbarously, and cast me down, where I lay till Saturday morning, without any being admitted to look my wounds, or give me any ease whatsoever. And next morning they brought me and John Pollock, and other two of us, near two miles on foot, I being without shoes, where that party which had broken us at first, received us. They were commanded by Earlshall. We were horsed, civilly used by them on the way, and brought to Edinburgh about four in the afternoon, and carried about the north side of the town to the foot of the Canongate, where the town magistrates were, who received us; and setting me on a horse with my face backward, and the other three bound on a goad of iron, and Mr. Cameron's head carried on a halbert before me, and another head in a sack, which I knew not, on a lad's back; and so we were carried up the street to the parliament close, where I was taken down, and the rest loosed; all was done by the hangman. I was carried up to the council, and first put up into a room alone, where the chancellor came, and asked if I knew him? I answered yes. I was brought in before the council, where the chancellor read a ditto against me. First, anent the bishop's murder, to which I answered, I was obliged by no law, either of God or man, to answer to it; and neither to accuse myself, nor reveal others by vindicating myself, or any other way. The advocate asked, where I was the third day of May last year? To whom I answered I am not bound to keep a memorial where I am, or what I do every day. The chancellor asked, if I thought it murder? To which I answered, though I was not bound to answer such questions, yet I would not call it so, but rather say, it was no murder. The advocate said, Sir, you must be a great liar, to say you remember not where you was that day, it being so remarkable a day. I replied, Sir, you must be a far greater liar, to say I answered such a thing. Whereupon the chancellor replied, My lord Advocate, he said only, he was not bound to keep in memory every day's work.

"The chancellor asked, if I adhered to Mr. Cargill's papers, which they called the new covenant taken at the ferry? I answered, I would know what any would say against them. He asked, if I owned the king's authority? I told, though I was not bound to answer such questions, yet being permitted to speak, I would say somewhat to that. And first that there could be no lawful authority but what was of God; and that no authority, stat'd in a direct opposition to God, could be of

whither the archbishop of St. Andrews murder was a murder, he answered positive that he

God; and that I knew of no authority nor judicatory this day in these nations, but what were in a direct opposition to God, and so could neither be of God, nor lawful, and that their fruits were kithing it, in that they were setting buggers, murderers, sorcerers, and such others at liberty from justice, and employing them in their service, and made it their whole work to oppress, kill, and destroy the Lord's people. The chancellor and all rag'd, and desired me to instance one of such, so set at liberty and employed. I answered to that, though it were enough to instance any such when I saw a judicatory to execute justice, yet I would instance one; and I instanced a bugger, liberated at the sheriff court of Fife, and afterwards employed in their service. At which the chancellor rag'd and said I behoved to be a liar; but I offered to prove it. Bishop Paterson asked; if ever Pilate and that judicatory, who were direct enemies to Christ, were disowned by him as judges? I answered that I would answer no perjured prelate in the nation. He answered, that he could not be called perjured, because he never took that sacrilegious covenant. I answered, that God would own that covenant when none of them were to oppose it. They cried all, I was prophesying; I answered, I was not prophesying, but that I durst not doubt, but God who had such singular love to these lands, as to bring them into covenant in so peculiar a manner with him, would let it be seen that his faithfulness was engaged to carry it through in opposition to his enemies. Some asked, what I answered to that article of the confession of faith concerning the king? I answered, it was cleared in these two covenants. The advocate asked, what I said of that article of the covenant, wherein we are bound to maintain and defend the king? I desired him to tell out the rest of it, which was, in defence of religion, but not in the destruction of religion. The chancellor threatened me with boots, and other terrible things; and said, I should not have the benefit of a sudden death. To which I answered, it would be but an addition to their cruelties used against God's people before, and that I was there a prisoner of Christ, owning his truths against his open enemies, and referred it to their own acts of parliament and council, to let their cruelty and opposition to God and his people be seen.

"After this, they called for a surgeon, and removed me to another room; where he dress'd my wounds. In which time, the chancellor came, and kindly asked, if ever I said to a shepherd on the Mounthill, that if I thought they would not put me to an ignominious death, I would refer myself to the chancellor? I said, No. He said, a shepherd came to him and said so. I said, that he, or any other who said so to him, were liars. I was asked by some, concerning our strength. To which I told, how few we were, and how surpris'd by such

thought it was not. Depones that being interrogat, if he was present at the murder, he answered that he was not obliged to answer any such question, nor to accuse himself. Depones that being interrogat, when he was the third day of May 1679, he answered that he was not obliged to keep reckoning of dayes. Depones also that John Pollock prisoner did confesse before the lords of privie councill in the tortor, that he heard Hackstoun of Rathilet, say that he was with the murderers of the archbishop that day of the murder, but that he refused to joyne in the action, and this is the truth, as he shall answer to God.

Sic subscribitur, CH. MATTLAND.

Mr. John Vause, keeper of the Tolbooth, being solemnly sworne, purged of partial councill, depones upon the truth and veritie of David Hackstoun of Rathilet, his Declinator, signed by the justices upon the 28th of July instant. Depones that the pannall confest, he was in his sister's house in Mortoun, when he was searched for by the archbishop's servants and escaped.

Sic subscribitur, JOHN VAUSE.

John M'Kenzie macer of court, purged and sworne, depones upon the truth and veritie of the said Declinator in all poynts.

Sic subscribitur, J. M'KENZIE, MACER.

Mr. John Vause being farther examined, de-

a strong party, and that knowing with what cruel orders they came against us, we were forced to fight. After dressing of my wounds, I was brought back to them, and these things being written, were read over to me; to which I adhered; and being asked, if I would sign them, I said not. The chanceller said, he would do it for me. Some one of them asked, at the first time, concerning my being at some other business: to whom I answered, that though I was not obliged to answer such questions, yet I adhered to all that had been done in behalf of that cause against its enemies. After which, I was sent to the Tolbooth, and have met since with all manner of kindness, and want for nothing. My wounds are duly dressed, which, I fear, may prove deadly, they being all in the head, the rest of my body is safe.

"In all these trials (I bless the Lord) I was stayed, unmoved, no alteration of countenance in the least, nor impatience appeared. Some of them have come to me, and regretted that such a man as I should have been led away with Cameron. I answered, he was a faithful minister of Jesus Christ, and as for me, I desired to be one of those despicable ones whom Christ choosed. They said, it was a Quaker-like answer. I told it was the words of Christ and his apostles. Bishop Paterson's brother, unknown to me, had a long reasoning with me, but I think not to truth's disadvantage. He told me, that the whole council observed, that I gave them not their due titles; at which I smiled, and made no reply. He said, I was ill to the bishop. I told, that I asserted the

truth. He said, that he never took the covenant, and so could not be perjured. I answered, Prelacy itself was shured by the whole nation. He told me, that the whole council found, I was a man of great parts, and also of good birth. I replied, for my birth, I was related to the best in the kingdom, which I thought little of; and for my parts, they were small; yet I trusted so much to the goodness of that cause for which I was a prisoner, that if they would give God that justice as to let his cause be disputed, I doubted not to plead it against all that could speak against it. It was cast up to me both at the council and here, that there were not two hundred in the nation to own our cause. I answered at both times, that the cause of Christ had been often owned by fewer. I was pressed to take advice; I answered, I would advise with God and my own conscience, and would not depend on men, and refused to debate any more, since it was to no purpose, being troublesome to me, and not advantageous to the cause. At the council, some said, I was possessed with a devil; some one thing, some another. The chanceller said, I was a vicious man; I answered, while I was so, I had been acceptable to him; but now, when otherwise, it was not so. He asked me, if I would yet own that cause with my blood, if at liberty? I answered, both our fathers had owned it with the hazard of their blood before me. Then I was called by all, a murderer. I answered, God should decide it betwixt us, to whom I refer it, who were most murderers in his sight, they or I."

Sic subscribitur, JOHN VAUSE.

His Majesty's Advocate, for farther probation produced the Depositions of James Anderson, in Tewchets, and others taken befor his majesties privie councill, and befor the sheriff deput of Fyff, therenant; whiereof the tenors followe:

"Edinburgh the last of May 1679, in presence of the committee, for publick affairs, James Anderson in Tewchets in Largo aged 50 years, or theraby, being sworne and interrogat what he knowes of the murder of the late archbishop of St. Andrews, depones, that upon the third of May instant, the day of the murder, The deponent being that day at Balcoturmils, and having returned home betwixt two and three in the afternoon, Thomas Cowe, the deponent's servant told the deponent, that nyn armed men hade possesst his barrie, and sett out centries, and would not suffer any of the people to goe from the toun, untill they removed, which was about seven o'clock at night, and at parting each of them shook hands with the deponent, whom he knowes to be these followinge, viz. David Hackstoun of Rathilet, who is a tall slender man, black haired and black visaged, who hade ane brownaish gray horse

and a velvet cape, hade for armes ane carrabin, hulster pistols and a broad sword. John Balfour of Kinloch, who is a laigh broad man, round ruddie faced, dusk brown hair, and hade ane brown stoned horse, armed with hulster pistols, and a shabbe*. George Balfour in Gilstoun, who is a broad brownish sett man, black curleing hair, lean faced, who hade a whyt hose, and was armed with two lairg syd pistols and a sword. James Russill in Kettle who is a young man of the stature of John Balfour, brownish haired, who rode upon ane brown horse, and was armed with hulster pistols, and ane sword. Robert Dingwell, a tennent's son in Caddam, who is ane iron colored black broad young man, does not remember the collar of his horse, but that he hade syd pistols and a sword. Andrew Guilan Wobster in Balmirinoch, who is a little broad black man, black curleing bussie haired, who rod upon a whitt horse, who hade three syd pistols on his right syd and ane sword. The two Henrysons, sons to John Henryson in Kilbrackmont, who are young slender men, both young fair men, the youngest fairest and talest, and the eldest slenderest, does not remember the collar of ther horses, the eldest was armed with ane carabin, syd pistols and ane sword, and the youngest with syd pistols and a sword. George Fleyming son to George Fleyming in Balbuthie, who is a young man, fair haired, and a slender tall young man, who rode on a brown horse, and hade syd pistols and a sword. Depons that these nyn persons rode away together in a knot Westward, and shortlie went out of his sight, but whither they went be cannot tell, and this is the truth as he shall answer to God. And declares he cannot wreit.

Sic subscribitur, LNLITHGOW.
JO. EDINBURGEN.
DRUMMOND.

EDINBURGH, 4 June 1679.

Thomas Cow, servant to James Anderson, in Tewchets, maryed, age 40 years, being sworne and interogat what he knowes of the murder of the late Archbishop, depons that upon the third of May last betwixt two and thre o'clock in the efternoon, nyn men, in armes, came to the deponent's master's barne, and possesst themselves thereof. Of which number he only knewe John Balfour, in Kinloch, who hade a bay brown horse, with hulster pistols on him, and hade a shable at his syd, and George Balfour, in Gilstoun, but did not see his horse and armes; depons that shortly efter ther coming, his master came home from the Miln, and the deponent went to the Miln, and befor he came back, they were all gone. Depons that the tyme the deponent sawe them at the barne, they sett out some of ther number, to be centrie, who chalenged people of the

* "A crooked sword, or hanger. It is now generally used to denote an old rusty sword." Jamieson's Etymological Dictionary of the Scottish language.

toun, as they offered to go from it. Depons he did not at that tyme knowe of the murder, nor untill the next day in the forenoon, and this is the truth as shall answer to God. Declaires he cannot wreit.

Sic Subscribitur, JAMES FOULS.
DRUMMOND.

COUPAR, the seventh of May, 1679.

EXAMINATIONS of the persons under written.

Be Baylie William Carmichael of Thurstoun, sheriff deput of Fyff, in preença of Captain Carnegy of Finbeavin, Captain Dobie, his Lieutenant, and John Inglis, one of the serjeants of the said company.

Andrew Sutherland, servant to Rebecca Swantoun, in Balmirinoch, maryed man of the age of 40 years, or thereby, being sworne and examined, depons as he shall answer to God, as followes, That the Wobster that lives ther, they call him Andrew Gullan, and he was at home on Sundays night, and yesterhoy in the fornoon he did see him, and that John M'Farline, in the miln, deans Millar ther told him, that Rathilet was at the Wobster of Balmirinochs, on Friday last, the second instant, but he knowes not wher the Wobster is now, and that it was said he went away with the Rathilet, that Fridays night. Depons he cannot wreit.

Sic Subscribitur, WM. CARMICHAELL.

Cicill Smith, servitrix to John Balfour, of Kinloch, of the age of twentie yeaws, or thereby, being sworne and examined, depons as she shall answer to God, that she being at Rathilet yesterday, she heard that her master John Balfour, and Rathilet was at Rathilet on Friday morning, but she did not see them, and she was at Rathilet on Satterdays night, and non of them was ther then, and that ane cest lyned red, producet by one of the sojors, presently she declares it belongs to Rathilet. Depons she cannot wreit.

Sic Subscribitur, WM. CARMICHAELL.

Jannet Wilson, servitrix to the said Laird of Rathilet, about 25 years of age or thereby, depons upon oath, as she shall answer to God, that her master was at home on Friday last, and John Balfour of Kinloch was with him, and they went away in the efternoon, and ther was some other common persons with them, her master did ryd away on ane gray horse, and John Balfour had ane bay horse, and another man, her master, hade ane cloak lyned with red cloath, and that she heard that other man's name was George Balfour, but knowes not wher he lives. Depons she cannot wreit.

Sic Subscribitur, WM. CARMICHAELL.

Jannet Balverage, servitrix to the laird of Rathilet, about 30 years of age, or thereby, depons upon oath, as she shall answer to God, That her master was at home at Rathilet, on Frydays night, and John Balfour and another man with them, and that they hade all armes to

with pistols and swords, and did ryd away on Frydayes night together, Rathilet hade ane velvet cape on his head, and ane clock lyned red, and John Balfour hade ane cape, and the other young man ane bonnet, and the coat produced be the cojers in Rathilets coat. Depons she cannot wreit.

Sic Subscritur, WM. CARMICHAELL.

James Kinseir, servitor to Rathilet, 24 years of age or thereby, depons, his master was at home on Fryday last, and did ryd away at night on a gray horse, and John Balfour his brother in lawe, and George Balfour in Gilstown, and another person who was said to be Andrew Guilan, Wobster in Balmirinoch, his master had armes and pistols, for the rest he knowes not if they hade armes, being at a distance, they did ryd eastward, toward Kilmany. Depons he did not see his master since, nor knowes not wher he is. Depons, he cannot wreit; depons John Balfour was ryding on ane bay horse, and the Wobster on ane whitt horse, which they said belonged to George Balfour, and that John Balfour hade ane cape on his head, all which he depons to be of veritie as he shall answer to God.

Sic Subscritur, WM. CARMICHAELL.

William Bowman, servitor to John Lourie, tenant in Rathilet, of the age of 20 years or thereby, Depons upon oath as he shall answer to God, that he did see Rathilet on Frydayes night last ryd away on ane gray horse with John Balfour of Kinloch, and other two men with them ryding on horses, the one of them was called ane Wobster, a little man with ane bonnet, and John Balfour hade ane cape on his head, they hade swords, at least some of them, he being at ane distance, and their backs to him, befor he did see them ryding away towards the smiddie, about two pair of butts from him. Depons he cannot wreit, and that John Balfour was on ane bay horse.

Sic Subscritur, WM. CARMICHAELL.

William Tullois, servitor to Rathilet, about eighteen years or thereby, depons upon oath as he shall answer to God, that his master was at home on Fryday last, and John Balfour and George Balfour in Gilstown, and Andrew Guilan Wobster in Balmirinoch, and they did ryd away in the evening eastward, and they had all swords, and his master and John Balfour hade hulsters on their horses, and his master's horse was gray, and John Balfour hade ane cape on his head.

Sic Subscritur, WM. CARMICHAELL.

COUPPAR, the 8th of May. *James Robinson* of Dunnork, married man of the age of 42 years or thereby, depons upon oath as he shall answer to God, that upon Satterday last the 3d of May instant, he came from his own house, about ten hours in the forenoon, and came to John Millar's ho se-tenent in the Magask, and went in ther and tuk ane pype of tobacco, and one of John Millar's servants came in and told that his master would be taken, because

ther came a man ryding throwe the close with pistols and sword, and then they told the deponent that the bishop's coach was now gone by, and efterwards sitting still in the house he heard two shotts, and then went furth of the house and heard another shott, the reek* wherof covered the coach, and that he heard great screecking of ane woman, which made him apprehend if my lord St. Andrews was in the coach he would be killed, and that he did see about nyn men on horses that was accessorie to the act; but he knowes non of them, and efterwards they went southward from the coach a litle, and returned againe to the coach, and then went straight westward as they came, the deponer being at ane distance from them about half a myle or thereby.

Sic Subscritur, JAMES ROBERTSONE.
WM. CARMICHAELL.

William Balfour, servitor to John Millar, tenent in Magask, married man, 32 years of age, or thereby, being sworne and examined, depons upon oath, as he shall answer to God, that on Satterday last, the third of May instant, betwix ten and twelve hours in the day, he was in the barn yard of Magask, and ther came several persons ther ryding on horses, near twelve men, or thereby, and one of them came throwe the close of Magask, and he thought they hade been the king's guard, and he went in and told his master would be taken, and they did ryd throwe the land hastily toward the East dyk of Magask, and did followe the bishop's coach, whom he did see they did shutt efter the coach, and turned the coach, and killed my lord St. Andrewa. Also the deponer depons he knewe James Russill in Kingakettle, was one of them, and did ryd throwe the close of Magask, on ane browne horse, and George Balfour of Gilstown was ther, he did see him also, it was ane brown and ane gray horse that did turne the coach, and George Balfour was ryding on ane gray horse, and the persons did let ther cloaks flie from them at Magask dykes, and efterward, when they did the murder, they came and took up their cloaks againe, but the deponer being terrified, convoyed himself out of the way to the house. Depons he cannot wreit.

Sic Subscritur, W. CARMICHAELL.

The pannall *David Hackstoun* of Rathilet, being interrogat by his majesties advocat in order to his own vindication, wher he was, the tyme the arch-bishop was murdered, and wher he first heard of the murder, and if he was in his sister's house in Mortoun, the night he was searched for, refuses to answer, but adheres to his former Declinator.

Efter leading and adduceing of the whilk Probation, the lords ordained the Assyse, to inclose and returne ther verdict, who accordingly removed altogether furth of the court

* Smoke. Jamieson spells the word in three ways, *Reik, Reek, Rek.*

to the assyse house, wher having reasoned, and voted upon the poynts and articles of the lybell and probation, they re-entered againe in court, and returned ther Verdict in presence of the saids lords, whereof the tenor followes. "At Edinburgh the 30 of July 1680. The persons constitut and sworne assysers, be the lords of his majesties justiciarie to pass upon the tyrall of David Hackston of Rathillet, for severall horrid and treasonable crimes particularly contained in his indytmēt, they be the pluralitie of voices choised sir Patrick Threpland Chancellor and the said Mr. William Nisoun Clerk to the assyse, and thereafter having considered the lybell and contents thereof, with the depositions of the wholl witnesses upon the respective articles of the lybell, and being fallie and ryplic advised therant, doe unanionally, and in one voice, be the mouth of sir Patrick Threpland, Chancellor, find the pannel, David Hackston, of Rathillet, guilty of being in the rebellion, against his majesties authoritie, and at the conflict at Ayres Mousse, betwixt his majesties forces, and the rebelle defies ther, and for owning the treasonable papers mentioned in the dittay, and thereby of the treasonable contriving the destruction of his majesties lyff, authoritie, and government, and also of his treasonable declining his majesties authoritie, and the authoritie of his majesties privie council, and justice court, and also of his being art and part of that horrid, barbarous, and sacrilegious murder committed on the person of the late arch-bishop of St. Andrews, primate of all Scotland, upon the 3d of May, 1679 years.

Sic Subscritus,
P. THREPLAND, Chancellor."

After oppising and reading of the whilk Verdict of assyse, the Lords Justice General, Justice Clerk, and Commissioners of Justiciary therfor be the mouth of Adam Auld, Dempster of court, decreed and adjudged the body of the said David Hackston, of Rathillet, to be drawn upon one hurdle backward, to the croce of Edinburgh, and ther upon one high scaffold, erected a litle above the croce, to have his right hand struck off, and after some tyme, to have his left hand struck off, and then to be hanged up and cut down alive, and his bowels taken out, and his heart so be shown to the people, by the hand of the hangman, and his heart and bowells to be burnt in presence of the people, in one fyre prepared for that purpose, upon the scaffold, and afterwards, to have his head cut off, and his body devidit in four quarters, and his head to be affixt on the Nether Bowe, and one of his quarters with both his hands to be affixt at St. Andrews, another quarter at Glasgow, the third at Leith, the fourth at Burnt-island, and that non presume to be mourning for him, nor he to have one coffin, and that non be on the scaffold with him, but two baylies, four officers, the executioner, and his servants, and this sentence to be put to execution against him,

this thirtieth day of July, instant,* betwixt three and fyve o'clock in the afternoon, and or.

* "David Haxton of Rathillet was condemned, July 30th, and executed the same day in a most severe manner." 1 Fountain-hall, 112.

"There has been (says Mr. Hume, vol. 2, p. 344 of his Commentaries), a variation of practice, in the article of naming a time for execution of the Doom. It is only in the course of the present century, (the eighteenth century is meant) that any special order on this head has come to be a necessary article of the sentence: for, according to the older style, the time was left quite at large, to the will of the inferior magistrate; and it appears that not uncommonly this direction had been carried the length of executing the sentence on the very day that it was given." [According to a note 24 Jan. 1624, in the MS. Abridgement of the books of Adjournal, the ordinary course was to proceed to execution on the day after the sentence. I find this entry in the Diary of Robert Birrell, Burgess of Edinburgh, who seems to have been an exact observer of incidents of this nature: 'The 8th of Februar (1597) John Windiezetes, John Moscaip, Alexander Lowrie, John Halliday, and captain James Lowrie, all hangitt at the Crosse, for counterfeiting fals wrentis: quilk was grate pitie to me.' It appears from the book of Adjournal, that their sentence had been pronounced that same day.] "This happened in the case of lady Glamis, July 17th 1557, of Hackston of Rathillet, in 1680, of Bailie of Jarviswood, in 1684, and Richard Rumbold, in 1685." [Sir Thomas Hope, in his Major Practises, makes mention of an act of council in 1604, against the sudden execution of sentence; but this ordinance, if in truth any such was ever passed, does not seem to have been complied with in practice: and indeed it only enjoins to delay till next day, or longer, if the judge see cause. See Royston's notes, ad. p. 289.] "Nay, by the express appointment of the law, a murderer taken in the fact, or red hand, as it is called, was to be tried and executed by the sheriff within three suns; and by the statute 1695, c. 4, this precipitation was only so far corrected, as the time of execution was now left to the discretion of the judge, not exceeding nine days after sentence. There are, however, obvious reasons in the situation of Scotland, a country so remote from the seat of mercy, not to mention other very powerful considerations, why a more definite rule ought to be prescribed on this head, and the unhappy convict be allowed a longer interval between his doom and execution. Yet no provision was made in this behalf, before the 11th of Geo. 1, when, among other salutary regulations, thrown into the statute of that year, for disarming the Highlands, it was ordered that no sentence of corporal pains should be executed within less than thirty days after its date, if pronounced to the southward of the Forth, nor

dains his name, fame, memory and honours to be extinct, and his armes to be riven, and delate furth of the books of armes, so that his pos-

within less than forty days, if pronounced to the northward of that river. As far as concerned the inferior corporal punishments, such as scourging or pillory, this long delay of execution was found troublesome, and a discouragement to the trial of petty offenders. And it was therefore abridged by statute 3d Geo. 2, c. 32. which allows the inflicting of any punishment short of death or demeritation, after the expiration of eight days, or of twelve days, from the date of the judgment, according as it is pronounced to the southward, or to the northward of the Forth; saving always the privilege of applying to the judges of the Court of Justiciary, who, or any of them, may stay the execution of any such sentence of an inferior judge, for the space of thirty days, if there be cause for such an interposition."

As to the cases of murderers taken *red hand*, Mr. Hume, in another place, notices, "that the enlargement of the period for doing justice on the offender, from one sun to three, seems to have been owing to the erroneous narrative of the statute 1491, c. 28. which speaks of "the three suns contained in the said laws;" whereas, in all of these, the allowance was limited to one day only. Further, it was provided, generally, by statute 1695, c. 4, with respect to "all capital crimes wherein inferior criminal courts were hitherto restricted, to try and execute within three suns, that this time shall hereafter be restricted to the trial, and sentence only, but not to the time of execution, which is hereby left to the discretion of the judge, not exceeding nine days after sentence." It appears from lord Royston's notes, that the occasion of passing this law was, that a person had committed murder when in liquor, and was tried, condemned, and executed in the same unseemly condition. But even after that improvement, there still remained this serious objection (beside others of some weight) to so precipitate a form of process, that there was no sufficient time for applying to the king for mercy, nor even to the supreme court, for review of the proceedings. Now that exception, also, was obviated by the statute 11th Geo. 2d, c. 26. "Under these restrictions, therefore, (for ought that, says Mr. Hume, I can see, and to judge by the face of our books) "this vestige of barbarity is still a part of our law. But it is difficult to imagine, how any trial can possibly be absolved, with the observance of these forms, which are now esteemed material to justice, within so short a period, as three days after the slaughter. Probably, statute would before this time have interfered to cut off the appearance even of this rude privilege, if in truth it had not been so effectually abrogated by the manners and sentiments of later times, which have hindered any attempt, from being made, towards the use of so passionate a course of trial."

teritic may never be able to bruik or joyce, any lands, heretages, offices, titles, or dignities, within this realme in tyme coming, and to have

Fountainhall, under date August 15th, 1684, says, "The Privy Council are resolved, that any who are condemned for Bothwell Bridge Rebellion, or disowning the king's authority or any other treason, shall be allowed but three hours, and shall be execute that same day the sentence is pronounced. The French have some such custom."

"Nov. 24, 1684. The Council being informed, that this day three coffins were carried down the street, for the persons who were this day ordered to be executed for treasonable practices, and owning the late treasonable Declaration, the council recommended to sir William Paterson, to enquire into the maker and painter of them. So very low did their zeal against the sufferers creep." 2 Wodrow, 350.

Fountainhall mentions the same thing: "Nov. 13, 1684. Three fellows called Wat, Semple, and ——— who were suspected and apprehended, as owners of the late Apologetical Declaration of War against the King, and threatening to murder all their persecutors, (which was affixed on the 6th of November last, on Linthgow market cross and church-door, and sundry other places,) were brought in and examined, and they owned the contents of that scandalous paper, and did obstinately hide the torture of the thumbkins without abrasing, till they were taken out of them, and then they fell down."

Nov. 24, 1684. At Criminal Court; the three fellows mentioned supra, viz. Watt, Semple, and ——— are arraigned on this ground, that there being now a declared war by that rebellious party in arms, and who had already executed their bloody declaration of war, by killing two of the king's soldiers, yet the panels refused to disown the said paper as treasonable, and so were guilty of neutrality; which was not to tolerate 'in statu belli': For they were either on the king's side, or for these Rebels; if on the king's side, then they ought and ought in duty to declare their detestation and abhorrence of it; if they approved it, then they incurred the pain of treason; and to stand indifferent trimmers 'in hoc statu belli' was impossible, seeing those that were not for the king, were in such a case against him. This not disowning, (though a new case;) yet the justices, with advice of the privy council, found to be treason; and this was not condemning men for naked opinions: For, 1mo, They had been tortured, and yet refused to disclaim it. 2do. They were found with these declarations of war in their pockets. 3tio, They were certified of hanging, if they would not give a positive categorick answer; but if they would seek a time to be instructed, they should have it. Some thought a proclamation should have preceded, advertising them of the certification of hanging if they did not disown. Thus when Semple saw he could not avoid

forfault, amitted, and tint all end sundrie his lands, heretages, tacks, steadings, rounes,

possessions, goods and gear, whatsoever pertaining to him, to our sovereigne lord, to

hanging by his cautious tergiversing, he then openly owned and avowed the said paper as containing nothing but what they were bound to. The other two shifted, that if it was agreeable to the word of God, then they were for it; but being urged to give an instance where God's word allowed murder, they were silent; though they might have wrested Moses his killing the Egyptian, Phineas running Zimri and Cozbi through the body, Ehud's stabbing king Eglon, &c. but these were heroic impulses, expressly allowed by God, and they were magistrates, at least the two first. The assize found them guilty; and they were condemned about three o'clock, and were immediately carried down to the Gallowlee between Leith and Edinburgh, and hanged there before five at night. It is strange to find this obstinacy have countenancers; for good black coffins followed them down Leith Wynd, and women privily in the night stole their bodies from under the gibbet, and carried them to the gate of the Grayfriar's Church-yard, with a design to have buried them there; but the privy council ordained their corps to be drawn back again to the Gallowlee, and the wright who made their coffins, to be inquired after and apprehended, that he might discover who had employed him; but the magistrates of Edinburgh commonly furnish chests to the poor malefactors.—On this occasion the 33d act of parliament 1685 was made."

The practice of "warring with the dead" seems to have been extensively adopted in Scotland in these times. Wodrow, vol. 2, p. 48, after relating the discomfiture in Glasgow, of the conventiclers, proceeds, "When they are fairly marched off, the king's forces came out of their barricadoe. Great was the inhumanity of the soldiers to the dead bodies left in the streets. I find some papers asserting that Claverhouse and some of the officers gave orders that none should bury them, but that the butchers dogs should be suffered to eat them. I can scarce prevail with myself to think there were any such orders given; but it is certain that the seven dead bodies lay upon the street from eleven of the clock till night-came on, and the common soldiers would not permit them to be carried into houses, yea, actually hindered by force people who were going about this act of humanity: yea, which further discovers their naughty barbarity, when in the evening they were taken into houses, and dressed up for their burial, the soldiers came in and turned the bodies out of their dead clothes, and went off with the linens.

"And when a kind of connivance was given to bury them, none durst appear to do this last office but women; yea, when these were carrying them up the street to their burial-place, such was the unparalleled rudeness of the soldiers, that they attacked the women, cut the mort cloths with their swords, and forced

away the bier-trees from them. Upon this the women turned off some of their own plaids, folded them by their lengths, and put them under the coffins, and went on with them, till the merciless soldiers, after they had scattered those who were not carrying, came and took the plaids from them, and would not suffer them to carry the coffins to their graves, so they were set in the Alma-house near the High Church, and I think continued there till Mr. Welsh and some of their friends in a few days came and buried them."

And in another place speaking of the outrageous cruelties of the soldiery in the year 1685, he says, that on May 4th, "Peter Gillies and John Bryce were carried down to Mauchlin, and, with some others, were examined by lieutenant-general Drummond, and an Assize was called of fifteen of the soldiers, and an Indictment was given them, May 5th. It may be, some of my readers may desire to know the form used in those summar judiciary courts; and therefore, it being short, is inserted.

{ Peter Gillies, in Muirend-side,
{ John Bryce, in West Calder.

' You and ilk one of you are indicted, that, ' contrary the laws both divine and humane, ' the laws and practices of this realm, and ' several acts of parliament, ordaining an ' humble submission, by all persons, to kingly ' power and authority, and an acknowledg- ' ment of their just power and greatness, and ' of their full consent to the laws and acts in ' their jurisdictions, and giving sufficient de- ' monstrations of their loyalty, and adherence to ' their prince, as their head and sovereign, in ' all things and cases, when required; and the ' opposers thereof, and refusers to give sufficient testimony of their loyalty and consent, ' as aforesaid, being justly to be reputed ene- ' mies, and not friends, rebels and not subjects, ' and, by the same laws and ordinations, are to ' be cut off from their loyal, obedient, true, ' conforming subjects.

' Yet true it is and of verity, that you, in a ' manifest contempt of those laws, though ' living under a gracious prince and sovereign, ' having cast off all fear of God, duty and alle- ' giance to the king, have not only, contrary to ' the word of God; and all law and equity, ' most traiterously and impiously shaken off all ' love and obedience to kingly power by a ' long time homologating with the principles ' of those rebellious traitors, and blasphemers of ' God and the king, joyning with them in their ' wicked courses and practices, wanting nothing ' but an opportunity to murder and assassinate ' his majesty's subjects of the contrary opi- ' nion; but also openly and avowedly disown- ' ing the king his just authority and govern- ' ment, adhered to the covenant, owning and ' approving rising in arms against the king.

remain perpetually with his hyness, in pro-
prie, in tyme coming, which was pronounced
for doom.

“The sentence,” says Wodrow, “was
executed with great solemnity, and severity,
though he was a gentleman of good descent,
excellent parts, and remarkable piety, and his
body terribly mangled, and he dying of his
wounds. After his hands were cut off, which
he endured with great firmness and patience,
he was drawn up to the top of the gallows with

‘and those commissionate by him, and refuse
‘to pray for the king, whereof, and of the other
‘crimes specified, you being found guilty by
‘an assize, you and ilk one of you ought to be
‘punished with forfeiture of life, lands and
‘goods, to the terror of others who commit the
‘like hereafter.

‘You are summoned to compare before
‘lieutenant general Drummond, commissioner
‘of Justiciary, within the Tolbooth or court

a pully, and; when croaked a little, let down
alive within the hangman’s reach, who opened
his breast with a knife, and pulled out his heart,
which moved upon the scaffold. Then the
executioner stuck his knife in it, carried it
about the stage, and shewed it to the specta-
tors, crying, ‘Here is the heart of a traitor.’
And then the rest of the sentence was executed
as above. This barbarous procedure did very
much discover the malicious temper of his pe-
secutors, and imbibbed the spirits of a great
many.” See the Account of the Execution of
Harrison, vol. 5, p. 1237.

‘place of Mauchlin, this fifth of May, to an-
‘swer to your indictment.’

“We may be sure such an assize would
bring them in guilty, and they are sentenced
to be hunged at the town end of Mauchlin,
May 5th, which was done accordingly. No
coffins were allowed them, nor dead clothes;
but the soldiers and two countrymen made an
hole in the earth near by, and cast them all
together in it.” 2 Wodrow, 504.

317. *Trial of DONALD CARGILL, WALTER SMITH, JAMES BOIG,
WILLIAM THOMPSON, and WILLIAM COOTHILL, for Treason:
33 CHARLES II. A. D. 1681. [Now first printed from the Re-
cords of Justiciary in Edinburgh.]*

CURIA JUSTICIARIE, S. D. N. Regis tenta in
Prætorio Burgi de Edinburgh, vigesimo
sexto die mensis Julii 1681, per Nobilem
et Potentem Comitum Gulielmum Comitem
Queensberry, Justiciarium Generalem
et honorabiles viros, Ritchardum Mait-
land de Duddop, Justiciarie Clericum, Ro-
bertum Dominum de Nairn, Dominos Jaco-
bum Foulis de Colintoun, Davidem Balfour
de Forret, Davidem Falconer de Newton, et
Rogerum Hoge de Harcauss. Comissiona-
rios Justiciarjæ dicti S. D. N. Regis.

Curia legitime affirmata.

Intran

Mr. *Donald Cargill*,* preacher.
Mr. *Walter Smith*, preacher.

Mr. *James Boigle*, [hereafter in this Record,
denominated Boig, which appears to have been
his proper name.] preacher.

William Thomson, servant in Fresk.

William Coothill, seaman in Borrostannes,
and prisoner.

YE are indyted and accused, That wher
notwithstanding from the law of God, the law
of nations, and the municipal law of this king-
dome, and the allegiance of the subjects there-
of, ther lye great obligations upon them, and
you, to maintain and defend the royall and so-
vereigne power, and authoritie of the king’s
majestie; and be the common lawe, the law of
nations, and act of parliament of this kingdome,
and constant practique thereof, the ryeising of
his majesties subjects, or any number of them,

* “A strange spirit of fury had broke loose
on some of the Presbyterians, called Cargillites
from one Cargill that had been one of the mi-
nisters of Glasgow in the former times, and
was then very little considered, but now was
much followed, to the great reproach of the na-
tion. These held that the king had lost the
right of the crown by his breaking the Cove-
nant, which he had sworn at his coronation:
so they said, he was their king no more: and
by a formal declaration they renounced all
allegiance to him, which a party of them affixed
to the cross of Dunfreis, a town near the west
border. The guards fell upon a party of them,
whom they found in arms, where Cameron,

one of their furious teachers (from whom they
were also called Cameronians) was killed:
but Hackston, that was one of the archbishop’s
murderers, and Cargill were taken. [Cruok-
shank observes, that bishop Burnet was misin-
formed in saying that Mr. Cargill was taken
here.] Hackston, when brought before the
council would not own their authority, nor
make any answer to their questions. He was
so low by reason of his wounds, that it was
thought he would die in the question if tor-
tured: so he was in a very summary way
condemned to have both his hands cut off, and
then to be hangd. All this he suffered with
a constancy that amazed all people: he seemed

the joyning and assembling together in armes, without, and contrair to his majesties royal command, warrant, and authoritie, and the abaiting, assisting, recepting, intercomoning,

to be all the while as in an enthusiastical rapture, and insensible of what was done to him. When his hands were cut off, he asked, like one unconcerned, if his feet must be cut off likewise: and he had so strong a heart, that notwithstanding all the loss of blood by his wounds, and the cutting off his hands, yet when he was hanged up, and his heart cut out, it continued to palpitate some time after it was on the hangman's knife, as some eye-witnesses assured me. Cargill, and many others of that mad sect, both men and women, suffered with an obstinacy that was so particular, that though the duke sent the offer of pardon to them on the scaffold, if they would only say God bless the king, it was refused with great neglect: one of them, a woman, said very calmly, she was sure God would not bless him, and that therefore she would not take God's name in vain: another said more sullenly, that she would not worship that idol, nor acknowledge any other king but Christ: and so both were hanged. About fifteen or sixteen died under this delusion, which seemed to be a sort of madness: for they never attempted any thing against any person; only they seemed glad to suffer for their opinions. The Duke stopt that prosecution, and appointed them to be put in a house of correction, and to be kept at hard labour." 1 Burnet, 511.

Of this mitigatory interposition by the Duke, Mr. Laing intimates a doubt: "No example," says he, "of the fact exists: on the contrary, executions for private opinion continued to multiply during his whole administration and reign. It is asserted, too, by the same author, that the Duke indulged, without emotion, in contemplating the torture of State Prisoners as a curious experiment, while other counsellors recoiled from the scene; and on one occasion, it is certain, that he assisted, from choice, when Spreull (see the Case in this Volume, p. 725), was twice exposed to the question almost without intermission." Hist. vol. 4, p. 111. See also a subsequent Note to this Case.

Wodrow, Book 3, chap. 5, sec. 4, says:

"Upon the last year [1680] I gave some account of the condemnation and execution of severals of Mr. Cameron and Mr. Cargill's followers, for disowning of the king, and hearing them at Field-conventicles; and upon this section I shall put together the accounts of near twenty more, with Mr. Cargill himself, who suffered this year, just in the order of time they fell out.

"And when entering upon this melancholy subject, I cannot but regret the cunning and unprecedented severity of the persecutors, with a great many of these people who came before them. It is certain, the managers had words to say in their own defence as to the treat-

and keeping correspondence with such rebels, and supplying of them with levies of men, horse, money, armes, and furnishing them with meat, drink, powder, ball, are most hor-

ment of these now under their hand, than in many processes before and after this, when persons were taken in actual resistance, upon the back of a kind of declaration of war against the king; then the prelates and persecutors triumphed in the necessity and justice of cutting them off, and yet it was but a very few who were thus taken, two or three at Air-moss, who were attacked, and obliged to defend themselves; but the greatest part who suffered now were such who were discovered by their bribed informers, and alledged to have been at field-meetings; and when brought before them at Edinburgh, a confession was extorted by boots and thumbkins from some of them, and the rest, when brought before the justiciary, council, or committees of it, were ensnared by captious questions, upon subjects common people could not be supposed to understand; and upon their answers they were condemned and executed.

"True it is, they did disown the king's authority, wherein I have already declined to vindicate them: but the reader who may be a stranger to those times, would know, that by owning the authority, the poor people understood a virtual approbation of all that was done by the king since his restoration, the rescinding of the excellent laws and constitution we once enjoyed in Scotland, and the severities against, and the persecution of the people of God following thereupon. And this was in the poor country women and men now put to death, a matter of opinion and conscience misinformed indeed by the unwarrantable expressions of some who were soured by the rigidity of the times, and, it may be, likewise by some unguarded expressions they might have heard at some sermons in the fields since Bothwell; but then it is certain, this was such a misinformation and ignorance of facts, as they could scarce ever be brought from under; and indeed, except in an instance or two, no care was taken to inform them, but they were hurried from the council to the justiciary, from them to the prison, and in a few hours into eternity.

"Mean while the government could be in no manner of hazard from a handful of those people, and if any thing of this nature could breed disturbance, it was the barbarous extremities they ran to with such of them as fell into their hands: but it was easy to have secured the peace against ten times their number, by gentler methods, than butchering so many scores of otherwise serious and religious persons; this with many other unaccountable measures, now taken, did very much lessen the king, sully his reign, and made the administration burdensome and grievous to multitudes of his best subjects.

"Sometimes indeed the council in their good mood, would offer the country people their

rid, heinous, and abominable crimes of rebellion, treason, and lese majestie, and are punishable with forfeiture of liff, lands, heretages, and escheat of ther movables, and by the first

life, upon acknowledgments and declarations, which at first view seem very low and reasonable; but if narrowly considered, these were imprestable by the people to whom they were made, in their present circumstances, and under the uptaking of matters which they had: and I must observe, that it was only to the warmer and more ignorant sort such offers were made, probably under the prospect they would not be accepted; since the sense the people took the managers proposal in, did import a receding from bearing witness against the evil of the times; yea, most of them did think the accepting of the managers proposals included an approbation of what they had been, and were at present doing. In short, the cruelty the sufferers remarked in one process after another, and the whole conduct of this time, and the subdolent fetches and cunning used to carry them off their feet, made them jealous of every thing proposed; and their warm zeal for, and love to the truth, the small prospect they had of any end to their daily snares and troubles, together with a generous kind of *tedium vite*, in such a wicked age as this, did prevail with them to stand out. And all these some way heightened the wickedness of the managers, in putting them to death, of which I come now to give some account.

“The instance of the trial and execution of two poor women, with which this year begins, is a flaming proof of the iniquity of this period. Upon the 17th of January, I find Isobel Alison, a young unmarried woman, who lived in Perth, and Marian Harvey, a servant maid in Borrowstounness, where sometimes Mr. Cargil haunted, staged for their lives before the justiciary. This is an evidence of what was just now said. What hazard could the government be under from two such persons, against whom nothing could be adduced but their opinions, which they had taken up from the severities of the clergy at Perth, as the first owned, and the violence of the soldiers? Their private sentiments, I am perswaded; could have a very small influence, and would scarce ever have been noticed, had not the severity of the managers brought them upon the stage, evidently to their own reproach and shame.

“Their interrogatories and speeches are printed in the *Cloud of Witnesses*, and I shall give a hint of their trial before the criminal court, from the records, if once I had noticed a few things concerning them and their treatment before the council.

“Isobel Alison lived very privately in the town of Perth, and was of a sober and religious conversation: she had now and then heard Mr. Cargil preach in the fields, and some few others before Bothwel, but not very often, field-conventicles not being common in that country. Upon her nonconformity at Perth, and speak-

ing against the severity used upon some religious people there, she was seized, and nothing else could be laid to her charge, till she was brought before some of the magistrates, and in her simplicity voluntarily confess converse with some who had been declared rebels: When the managers are informed of this a party of soldiers seize her, living peaceably in her chamber at Perth, and carry her into Edinburgh. When she is brought before the council, the interrogatories were invidious and ensnaring, and knowing they had no probation but from what was elicite from her, they essayed sometimes by commendations and promises, and sometimes by threats, to bring her to confess she had conversed with Rathblet, Balfour, and the two Hendersons, said to be concerned in the primate's death; and when some very trivial things were owned by her, they jested her, and acted the buffoon rather than privy counsellors, as may be seen in their interrogatories.

“Marian Harvey was taken up in the road, when going to some sermon or other, and was soon ensnared by the questions put to her. She was scarce twenty years when brought into Edinburgh, and sisted before the council. They had nothing to lay to her charge but what she owned, to wit, her being at field conventicles. When interrogate as to Saanquhar declaration, and the Queensferry paper, she knew nothing about them, but being read to her, to ensnare her, she said she owned them, because she thought them agreeable to the scriptures. Some of the counsellors told her, A rock, a cod, and bobbins, would set her better than these debates, and yet they cast them up to her, and murder her upon them: and by the way it may be noticed, that the bishops were the great proposers of questions to these poor people, which helped to exasperate them, especially when urged to give them their titles, they looking on them as at bottom of all their persecution.

“After they were examined before the council, they are brought before the criminal court. This was the constant practice at this time, the one day to bring such as fell into their hand before the council, and there engage them by captious questions into a confession of statutory crimes, and next day to pannal them before the justiciary, where, if they were silent, they were asked if they would quit the testimony they had given yesterday. Both of them were indicted for hearing at field-conventicles, harbouring Messrs. Cargil, Cameron, Douglas, and Welsh, for owning Rugland and Saanquhar declarations, Queensferry covenant, and treasonable opinions. For probation, their confession before the council is adduced. Isobel Alison, being interrogate on several heads before the assize, answered, she was

cessors, and privileges of his highness crown, with their lives, lands, and goods, and be the first act of the first session of his majestic's first parliament: it is declared that it shall be high

not obliged to answer, for she did not look upon them as judges, declined their authority, and the king's, by whom they sat there, because they carry the sword against the Lord. In their interrogatories they come and go, and act like persons thirsting after blood, who resolves he shall be guilty. She owned converse with one they alledged was at the primate's murder, she owned the Sanquhar declaration, and bond of combination spoke of last year, and Queensferry covenant, when read to her, because, she said, she saw nothing in them against the Bible, and refused to sign. Marian Harvey, before the justiciary, owns the fourth article of the Queensferry paper, disowns the king's authority, abides by the Sanquhar Declaration, says, it was lawful to kill the archbishop of St. Andrews, when the Lord raised up instruments for that effect, adding, he was as miserable and perjured a wretch as ever betrayed the church; blesses God she heard sermons in the fields, and approves of Mr. Cargill's excommunication. She refuses to sign what she had said, and protests they had nothing to lay to her charge, but her opinion, and owning Christ and his persecuted truths.

"When the assize was sworn, it was observed that some of them trembled and would not swear, this process against two women being every way extraordinary: however they got as many as served their purpose. The two confessions, as writ by the clerk, were read to the inquest, and, in a discourse to them, the advocate aggravated every particular, and endeavoured to prove them guilty of treason. Some of the assize urged there was no fact proven against them, and they had not signed their confessions. The advocate answered, what they had said was treason, and charged them to act according to law, otherwise he knew what to do. The assize find them both guilty of treason by their own confession. The pronouncing their doom is delayed till January 21, when they are both sentenced to be hanged in the Grass-market upon the 26th instant.

"I find the council allow Presbyterian ministers to converse with these two women; but this was only a feint to rub off the odium of this affair, the council did not so till after the sentence was past, they could have no prospect of any great benefit to the women who did not desire this conversation, the ministers were unsavoury to them because sent by the council, and reasoning could have but very little influence in their circumstances, and upon subjects above their capacity.

"These two young women were executed upon the 26th, according to their sentence. The Cloud of Witnesses narrates a passage, which, if it be veiled, gives an odd idea of bishop Paterson, and is not disagreeable to the opinion not a few had of him at this time, as a

treason for the subjects of this realm, or any number of them, more or less, upon any ground or pretext whatsoever, to raise, or continue in arms, to make peace or war, or any

man of a light and profane temper. Just when they were going out to the place of execution, probably in the laigh council house, whence malefactors used to go to the gibbet, the bishop came in and said to Marian Harvey, you would never hear a curate, now you shall hear one pray before you die, and ordered one who was attending to pray. The poor woman thus jested upon, could not retire, and the one said to the other, Come, let us sing the 23rd Psalm, which they did, and soon drowned the bishop's curate, employed either in jest, or to vex these poor people. I am informed they were executed with some three or four wicked women guilty of murdering their own children, and other villanies, which was very grievous to these two. One of the episcopal ministers of the town, who waited upon the others on the scaffold, railed bitterly upon these sufferers, and assured them they were in the road to damnation, while he, without any evidence of penitence, was sending the other wicked wretches straight to Heaven: however Isobel Alison and Marian Harvey were not commoved, but sang some suitable Psalms on the scaffold, and prayed; and died with much composure and joy.

"In March I meet with a new process against some more of the people who adhered to Mr. Cargill. I need only give a few hints from the records, the course now with all of them being much the same. Upon the 2nd of March, John Murray of Borrosteonness, is indicted of treason in common form. The advocate now gives himself no further trouble, than to adduce the confessions made by these persons when examined before the council, in presence of the justiciary and assize, where they are examined upon them, and sometimes the confessions are only read to the inquest, who bring them in guilty by their own confession, and so they are sentenced. In John Murray's case, he had confessed he was at the conventicle at Torwood with arms; and indeed Mr. Cargill's followers being daily hunted for, were obliged to carry arms with them wherever they went, for their own defence. When he is interrogate, if he owns the king's authority, he answers, he owns all that is from God, and to be owned, and adds, that while the king observed the covenant, his was from God, but since he has broke that, he knows not what to say. As to the archbishop's murder, he says, if they were sent of God to execute judgment on him, he will not judge them nor their actions. He judiciously owns his confession, but refuses to sign it. And having a printed copy of the Queensferry covenant and Sanquhar declaration, given him to consider on, after some days he owns them.

"The same day Christopher Millar, was in Gargonock, is indicted as above: his con-

treaties or leagues with foreign princes, or estates, or amongst themselves, without his majesty's special authority and approbation, first interposed thereto; and all his majesty's

session before the council is adduced, where he acknowledges he was in arms at Bothwell-bridge, and thinks he may lawfully rise in arms against the king for the Covenant; declared he cannot write. Before the removing of the assize, the advocate threatens them (as still he does now) with an assize of error. They bring both in guilty by their own confession; and the court sentences both to be hanged in the Grass-market upon the 11th instant.

“ Upon the 8th of March, William Gougar in Borrowstownness, and Robert Sangster a Stirlingshire man, are indicted, as above, before the justiciary. The probation is their confession. The first acknowledges he was at Bothwell-bridge, and refuses to take the bond; that he was at Tor-wood, and owns Mr. Cargil's excommunication, and says, he thinks it lawful to kill the king's servants, because they are enemies to Christ; owns the Sanquhar and Queensferry papers; and refuses to sign. Robert Sangster owns Bothwell rising, and Tor-wood excommunication, as lawful, disowns the king's authority, says, it is lawful to kill him and the judges, in as far as they are against God, and adds, he thinks they are God's enemies. He refuses to sign. The assize bring in both guilty, and they are sentenced to be hanged at the grass-market, the 11th instant.

“ John Murray, June 2, is recommended by the council to the king's clemency, as being rather misled than malicious. The other three were executed. William Gougar had a short paper in his bible, which he designed to have delivered as his speech to the spectators; whether it be that which is printed, and goes under his name, I know not; for I find it remarked at this time, that Gib and his followers, both put some well-meaning prisoners to heights they would not otherwise have gone to, and corrupted and made additions to papers which went under their name. This paper, it seems, fell into the hands of some of the soldiers at the ladder-foot, and enraged them, and made them treat him very harshly. They tied his hands very strait before he went up the ladder, and when gone up, and beginning to speak, the drums were ruffed, and he was turned off the ladder, without time so much as to pray: such was their barbarity upon the least provocation.

“ Another process is intended before the justiciary, July 11, against three country people in Fife, Adam Philip, Lawrence Hay a weaver, and Andrew Pittiloch land-labourer. There was no act of rebellion, nor field-conventicles alledged against them. These three had joynd in a society for prayer and conference in Fife, when they had not the gospel preached to them by any they could hear. Their society, in June last, had agreed to,

hedges are discharged upon any pretext whatsoever, to attempt any of these things, under the pain of treason, and be the seventh act of the first session of his majesty's first parliament;

and signed a paper, which they called A Testimony against the Evils of the Times: whether they published it, or how it came into the hands of the managers, I have no account, but I find them indicted for publishing an infamous paper, the 11th of June last, called by them, the sixth month, disowning the king and all the ministers of this church, excepting Mr. Donald Cargil. The paper was produced, and they acknowledged they had signed it. They are found guilty, and sentenced to be hanged at the Grass-market, upon the 13th instant, and their heads to be severed from their body, and affixed to the Tolbooth of Cowpar. The last two of them are named in the Cloud of Witnesses, and their speech or testimony set down. I know no further about them. The paper, by the citations from it in their process, is very wild, and seems to smell of Gib and his delusions.

“ I come now to give some account of the trial of Mr. Donald Cargil, and four others with him, who were executed the 27th of July, the day before the meeting of parliament, this year. It hath been noticed in the former part of this history, that it was not unusual to grace that solemnity with the execution of some of the persecuted party.

“ We have already heard much of Mr. Cargil, and I shall not offer here any account of this good man, and successful preacher of the gospel. It is but a hint or two at matters of fact concerning him that I can give, leaving the vindication of several singular and peculiar steps he took, towards the end of his ministry, to such who approve all that he did. There were not a few remarkable steps of providence in his call unto, and settlement in the parish of the barony of Glasgow, some time before the restoration, which being out of my road here, I pass with a regret, that none have been at pains to collect and publish a well attested account of remarkable providences towards ministers and Christians in the Church of Scotland, since our reformation from Popery. Many likewise were his wonderful preservations in his wanderings and sufferings, since the turning out of the body of Presbyterian ministers, and under the particular spite and malice exercised against him; of which, with those of others in this period, had I good attestations, I would reckon a collection of them would be a very agreeable and useful appendage to this work.

“ Mr. Cargil's sufferings are what I am now concerned in. We have already heard, he was, for his freedom in his sermons, after the king's restoration, and refusing to solemnize the anniversary day appointed by parliament, particularly the object of the persecutors' rage, and continued under many and inexpressible difficulties till after Bothwell. The

the late Solemn League and Covenant, or any other covenant, or publick oath, is discharged, to be taken by any of his majestie's subjects, upon ther highest perrill, and be the 2d act, 2d

measures he took after that, at Queensferry and Torwood, have been narrated, and it is evident the government was particularly imbittered against him by these steps. No sooner were any notices got of his being in a place, but presently all the soldiers round were in arms, and searched all the country about for him. Upon the 5th of May this year, he kept a fast in the fields, near Lowdon-hill: the soldiers at Glasgow getting notice of this, immediately seized all the horses in town, and about it, and mounted in quest of him; but he got off at this time: yea, such was their haste and fury, that one of them who happened to be behind the rest, and furiously riding down the street called the Stockwell, in the middle of the day, rode over a child, and killed her in the spot.

“ However, Mr. Cargill escaped them not much longer. The circumstances or place of his seizing I have not; but I find, May 15, next year, James Irvin of Bonshaw petitions the council, for the reward promised in their proclamation, for his taking Mr. Cargill, and is recommended to the treasury: and some time, July this year, Mr. Cargill was brought into Glasgow by a party of soldiers, in great triumph, and put in the guard-house there. Multitudes came in to gaze upon him, and among others, one John Nisbet, an hater of godliness and the truly religious, a besotted drunkard, and mocker at piety, and at present the arch-bishop's factor: This profligate wretch addressed himself to Mr. Cargill in a way of mocking, and said, Mr. Donald, will you give us one word more? alluding to an expression Mr. Cargill used in his pathological serious way of preaching. Mr. Cargill looked on him a little with regret and sorrow, and then addressed him thus, Mock not, lest your hands be made strong; the day is coming when you shall not have one word to say though you would. This came very shortly to pass; not many days after, the Lord was pleased to lay his hand upon that ill man: at Glasgow where he lived, he fell suddely ill, and for three days his tongue swelled; and though he seemed very earnest to speak, yet he could not command one word, and died in great torment, and seeming terror. Some yet alive know the truth of this passage.

“ From Glasgow, Mr. Cargill was carried in to Edinburgh, where, July 15, I find him examined before the council, and his Confession then, in answer to his Interrogatories, I set down from the records.

EDINBURGH, July 15, 1681.

“ Mr. Donald Cargill, being interrogate if he owns the king's authority, and the king as his lawful prince, answers, as the magistrates au-

thority is now established by the act of parliament anent supremacy, and explanatory act, denies the same. Being again interrogate, if he owns the king as his lawful prince, yea or no, he refuses to give any other answer than as aforesaid; confesses, that in October 1680, he preached in the fields in Torwood. Being interrogate, if he excommunicated the king there, answered, That being merely a question about an ecclesiastical matter, he cannot answer it before the council, being a civil judicatory; and that he was content privately to give an account of all the reasons of all his excommunications that ever he made or pronounced; being pressed to a direct answer, refuses to make any further answer. Being interrogate, when he saw any of those who killed the arch-bishop, or if he knew any thing of the intention of it before it was done, declares he knew nothing of the intention before it was done; confesses he knew Balfour, Henderson, and Russel, but thinks he did not see Balfour these two years, but did see the other two within these twelve months, or thereby, to the best of his knowledge. The copy of the sermon alledged to have been by him preached at Torwood, being produced, and he asked if that was the copy thereof, desires a time to consider thereof before he answer. Being interrogate, if he thinks the rising at Bothwel-bridge was a rebellion against the king and his authority, declares he owns defensive arms in case of necessity, and thinks these who rose at Bothwel were not rebels, and thinks they were oppressed, and rose in their own defence. Being interrogate, if he was with those who were in arms at Ains-moss, refuses to answer, and desires it may be made out against him. The same answer as to Bothwel-bridge. Being interrogate, if he was at the emitting the paper at Sanquhar, denies he was. Being interrogate, if he had any hand in drawing of that paper, refuses to give answer thereupon, but declares he did not see it till after it was proclaimed. Being interrogate anent that paper, if he owned the principles therein, refuses to answer, and desires a time to consider thereof, not being unwilling, upon time given him, to declare his judgment thereof: gives the same answer as to the paper called Cargill's Covenant, or the Fanatics Covenant, when read to him. Being interrogate, if, when he preached at Torwood, his lecture was upon Ezek. xxi. 25, 26, 27. confesses it was. Being interrogate where his text to his sermon was, declares he remembers not. Being interrogate, if he thinks the killing of the arch-bishop of St. Andrews was murder, declares he cannot give his sense thereof; but that the scripture says, That the Lord giving a call to a private man to kill, he might do it lawfully; and instances in Jael and Phineas. Being in-

majestie's royall person, or any bodielie harm, tending to death, or destruction, or to deprive, suspend, or depose him, from the style, honour, and kinglie name of the imperial crown

terrogate, if he thinks the king, by his falling from the covenant; hath lost his civil right as king, declares he thinks this an ecclesiastical matter, and cannot answer here, but that he is not obliged to obey the king's government, as it is now established by the act of supremacy. Being interrogate, where he was the night before and after he was at Queensferry, declares he does not now remember; but seeing it may concern others he thinks he is not obliged to answer. Being interrogate, when he was in Fife, confesses he was there Fryday was a twenty days or month, and preached in Devan-common. Being interrogate, if any of the Hendersons were there, confesses there was one John Henderson, a man about thirty years of age. Being interrogate, when he was in Stirlingshire or Craigmade, declares he was not there these eleven months, and denies he was in Angus these three or four years past.

D. CARGIL."

CH. MAITLAND, I. P. D.

"He was again called before the council, July 19, and his Interrogatories and Answers are as follow:

EDINBURGH, July 19.

"In council being interrogate, if he owned his sermon at Torwood, in which the king, &c. were excommunicated, he could not answer for it, but before an ecclesiastical court, being an ecclesiastical act. Being asked, if he owns the excommunication of his majesty under the name of Charles Stuart, and as a tyrant, refuses to answer. Being interrogate, if he owns the principles in the Queensferry paper, declares he has not yet had sufficient time to consider it. Being interrogate, if he owns the principles in the paper called the Sanquhar declaration, he will not answer, but declares he did not see it before it was published. The sixth article of the Queensferry paper being read, he refuses to answer about it. Being interrogate, who was the author of that paper, and who wrote it, refuses to answer."

"It is but very little account I can give of these persons. Their speeches, and some other of their papers are published in the Cloud of Witnesses. Mr. Cargil had a design to have left behind him a large paper, giving an account of his principles and practices, and had writ some part of it; but they were all hastened to eternity, sooner than any body almost was expecting; and the night after his sentence, Mr. Cargil had all his papers seized, and pen and ink denied him. However some way or other he got access to write, and sign the short paper I have inserted (See p. 891). I need make no reflections on it, the reader will perceive in it, he abstracts much from public matters, and presses regeneration and the ex-

of this realme, or any others, his majestie's dominions, or to suspend him from the exercise of his royall government, or to kevie ware, or take up armes against his majestie, or any com-

ercise of godliness; and when he comes to state his disowning the king, as he had done in this examination, so now he puts it on this bottom, the magistracy I have rejected, is that founded on the supremacy, and that because invested with Christ's power. When he was upon the scaffold, he discouraged much to the same purpose, with what is in the foresaid paper. He was frequently interrupted by beating of the drums. He declared his full assurance of faith, as to his own everlasting happiness, his fears of a stroke coming upon Scotland, his cheerfulness in suffering, and says, he is going up the ladder with less fear and perturbation, than ever he entered the pulpit to preach. He forgave all wrongs done to him, and diel in the Lord with a great deal of sweetness and composure. These hints were taken from his mouth, and printed shortly after his death; but the confusion of the soldiers was so great, that much was lost. In short, he was a person of very deep and sharp exercise in his youth, and had a very extraordinary outgate from it; the account of both is too large to be insert here. Afterwards he lived a most pious and religious life, and was a zealous and useful minister, and of an easy sweet natural temper. And I am of opinion, the singular steps he took towards the end of his course, were as much to be attributed unto his regard to the sentiments of others, for whom he had a value, as to his own inclinations.

"After Mr. Cargil, Mr. Walter Smith was next executed; he stated his disowning of the king's authority upon the same foot with Mr. Cargil. At his last he spoke without that heat, and these heights, which, in some cases, he had discovered in the former part of his life. Upon the scaffold he was frequently interrupted, and there he repeated much of the paper he left in writing. He disclaimed the unlawful exercise and tyranny of authority, and gave very solid and pleasant advices to the spectators, as to their practice, and making their calling and election sure; and as in his testimony, so now he presses them to beware of a spirit of bitterness, peremptoriness, and ignorant zeal; and refers, for his judgment in many things he would not now dip into, to a paper drawn up by him some time ago, entitled, Some steps of defection, &c. and cautions against division, in adhering to some points, anent which, he himself, it seems, once had protested.

"Mr. James Boig was next dispatched. I have nothing further about him, than what is contained in a letter of his to his brother, the day before his death, which, though it be already printed, yet having matters of fact in it I have not observed elsewhere, I have annexed it (See p. 898.) Both he and Mr. Smith died

missioner by him, or, shall intyse any strangers to invade any of his majestie's dominions, and shall by writing, printing, or other malicious and advised speaking, expresse or declare such their treasonable intentions, every such person or persons being, upon sufficient probation, legalitie convict thereof, shall be deemed, detained, and adjudged traitors, and shall suffer forfeiture of life, honour, lands, and goods, as in the cases of treason, and be the 129 act 8th parliament king James 6 it is statut and ordained, that the king's majestie, his aires and successors, he themselves and ther council, are, and in tyme to come, shall be judges competent to all persons, his highnes subjects, of whatsoever estate, degree, or condition they be off, spirituell or temporall, in all matters wherein they, or any of them shall be apprehendit, summoned, or charged to answer to such things as shall be enquired at them, be our soveraigne lord, and his council, and that none of them whilk shall happen to be apprehendit, summoned, or charged, to the effect forsaide, prestane or take upon hand to decline the judgment of his highnes, his aires, or successors, or ther council in the premises, under the paine of treason; Nevertheless it is of veritie, that ye the said Mr. Donald Cargill, Mr. Walter Smith, and Mr. James Boig, shaking off all

under much comfort, joy, and full assurance, and the reader will remark a considerable difference betwixt the papers they left behind them, and many others unwarily published in the book I last cited."

In another place, after calling the Torwood Excommunication (which, it seems, he did not chuse to insert in his work) 'unprecedented' and 'plainly disagreeable to the rules of this church and our known presbyterian principles,' and saying 'it was approved by none that I know of but his own followers who now set up themselves in distinction from the rest of the presbyterians in Scotland, and refused to partake in ordinances dispensed by any presbyterian minister;' he adds:

"This step of Mr. Cargill's hath been matter of much reproach and ludibry to the enemies of the church of Scotland, whereas they do but expose themselves in charging it upon other presbyterians, since every body knew Mr. Cargill was perfectly alone in this matter. However, I cannot but remark here, that the jeerings and scoffs upon this step, came very awkwardly from the mouths and pens of the asserters of the hierarchy and canons, and advocates for the practices of the church of England.

"Both our Scots canons 1636, and the English canons begin with Anathemas against all who do any thing against the government by archbishops and bishops, &c. by which, not only the parliaments of both kingdoms, but even their blessed martyr king Charles himself, *ex post facto*, comes in under their solemn excommunication. And in Ireland and else-

fear of God, conscience and sense of duty, allegiance, and loyalty to your soveraigne and native prince, upon the sacrifice of whose sacred person and maintenance of whole soveraigne authoritie and princle power, the quietnes, stabilitie and happiness of the people doe depend, have most perfidiouslie and treasonable presumed to commit, and are guilty of the crimes above mentioned, in such sort as ye and each of you, and the bloodie and sacrilegious murderers of the late archbishop of St. Andrews did goe unto the westerne stryres, and did treasonable joyne in armes with Robert Hamilton, brother to the laird of Preston, and his accomplices, dissolute and fugitious persons to the number of three-score and upwards; and upon the twenty-nynth day of May, 1679, a day appoynted for a solemn thanksgiving for his majesties restoration to the royal government of this kingdome, went to the burgh of Rutherglen, and ther proddie and treasonable after reading acts of your own coyning, shaking off your allegiance to his majestie, ye most treasonable and wickedlie burnt several acts of parliament asserting his majesties prerogatives, and establishing the government of the church, drowned out bon-fyres set on in commemoration of that day, and thereafter continuing and abyding in your

where, they did actually excommunicate many worthy ministers, and others eminent for religion, learning and usefulness; to say nothing of the slur this casts upon all the reformed churches. Neither shall I add any thing upon these peoples common prostitutions of this awful and tremendous sentence, in cases which relate to the smallest trading civil matters, while in the mean time the lesser excommunication, the rail our Lord hath set about the holy mystery of his supper, is perfectly neglected, and people every way swift, forced to participate, as a test for their admission to civil places. I know these scandalous prostitutions of holy things, are a burden to the better sort in England and Ireland; yet the reflection upon them, and their own share in continuing these abuses, ought, methinks, to silence the high fliers, and restrain them from their invectives upon presbyterians, as to this matter I am now upon.

"These observes are not made to vindicate Mr. Cargill's practice, but, if possible, in time coming to prevent railing against this church upon this score, who are indeed no way concerned in it: and it was pronounced upon persons of a quite different character and practice from such, whom the persons they admit have anathematized. After all it was observed, that most of the persons excommunicated at this time, had somewhat remarkable in their exit, though that may be far better lodged at the door of their own loose lives and practices, than of this sentence. This step did further exasperate the government against the persecuted party, yea, though very groundlessly, against all presbyterians."

treasonable crimes, ye and your accomplices, to the number of three thousand, did waylay a small and fewe partie of men under the command of the laird of Claverhouse, and did most cruellie murder and kill severall of his majesties souldiers under his command, and being proud and insolent of your treasonable cruelties, murders, and villanies, and being assembled and convocat to the number foresaid upon the day of June the foresaid year, ye and your accomplices did most treasonable attacke and assault a small partie of his majesties forces within the town of Glasgow, by whom ye and your accomplices wer repulsed and defate, and yet being encouraged and imboldened with the number and confluence of your rebellious associates who did swell and growe to the number of ten or twelve thousand, you did robb, pillage, and search for horse, armes, powder, ball, and other instruments of ware, throwout the shyres of Lanerk, Aire, Renfrew, Stirling, Perth, and other shyres within this kingdom, robbed and plundered his majesties dutiefull and good subjects, and treasonable quartered upon them, and did supplie, shelter, and protect Mr. John Welsh, Mr. Samuel Arnot and other forfault and declared rebells and traitors for the rebellion 1666, with the bloodie and sacrilegious murderers of the late archbishop of St. Andrews, and ye and your accomplices having marched to Hamiltoun, you did take the boldnes upon you to issue proclamations and print declarations bearing the treasonable grounds of your rebellion, and did medell and give your rebellious associates the name of ane army, forminge and framinge them in troups companys and regiments, naminge colonells of regiments, captaines of companys, commanders of troups and other officers under the command of the said Robert Hamiltoun, and the impious and bloodie murderers of the late archbishop of St. Andrews, and did incamp yourselves at Hamiltoun muir for severall days together, did beat paries be drums, and did take the boldnes and presumption to send your commissioners to the royall camp, treasonable requyreing the subversion and overturning of the government of the church, prouddie and insolentlie boasting of your treasonable armes, in which ye and your accomplices did most treasonable continue untill the twentie second day of the said month, that ye wer dissipat routed and vanquished by his majesties forces, and yet still persisting and abiding in your treasonable rebellion and wickednes ye and the deceast Mr. Ritchard Cameron,* and others your impious, bloodie,

* Of this zealous maintainer of the covenant, "The following relation of some remarkable things anent his call to the ministry, which was rehearsed by himself a little before his death," is inserted in the Appendix to the "Cloud of Witnesses." "After his having gone through the ordinary course of university learning, he was a school-master and a preacher to a curate at Falkland for some time,

and murdering accomplices, did drawe up, contrive, devise, forme, and disperse two most

and at some occasions used to attend the sermons of the indulged ministers, as he had opportunity. At length it pleased the Lord to incline him to go out to the field-meetings; which when the curates understood, they set upon him, partly by flatteries, partly by menacing threats, and at length, by more direct persecution, to cause him forbear attending these meetings. But such was the powerful and wonderful working of the Lord by his spirit upon him, that he entirely deserted these prelatie curates; having got a lively discovery of the sin and hazard of that abominable prelacy. And no sooner was he enlightened anent the evil of prelacy, but beginning more narrowly to search into the state of things, that he might know what was his proper and necessary duty, the Lord was pleased to discover to him the sinfulness of the indulgence, as flowing from that ecclesiastical supremacy, usurped by the king; and being zealously affected for the honour of Christ, wronged by that Erastian acknowledgment of the magistrate's usurped power over the church, he longed for an opportunity to give a testimony against it: and, accordingly, being in the family of sir William Scot of Harden, who attended the indulged meetings, he took opportunity (notwithstanding many strong temptations from Satan to the contrary) to witness in his station against the indulgence: particularly, one Sabbath, after he was called to attend the lady to the church, he returned from the entry, refusing to go that day, and spent the day in his chamber, where he met with much of the Lord's presence (as he testified) and very evident discoveries of the nature of these temptations and suggestions of Satan, which had like to have prevailed with him before. And upon the Monday, giving a reason to the said sir William Scot and his lady, why he went not to church with them, he took occasion to be plain and express, in testifying against the sinfulness of the indulgence, in its complex nature, and original rise and spring from whence it flowed; and thereupon leaving that service, being no further acceptable to them, because of his faithfulness, he came to the south, and having met with the Rev. Mr. John Welch, he staid in his company a considerable time: who finding him a man qualified for the ministry, pressed upon him to receive a licence to preach, which he refused for some time, chiefly upon this reason, that he having such clear discoveries of the sinfulness of the indulgence, could not but testify against it explicitly, so soon as he should have the opportunity to preach in public; and considering that none of the outed ministers, who had been of standing and experience in the ministry, had yet expressly declared the sinfulness thereof in public, he was afraid that his being singular in it, considering his youth, and his being but new entered upon the work of the ministry, might perhaps make his doc-

reasonable papers, the one called the Fanatics

taine the less useful and weighty to the people. But the force of this objection being removed, by Mr. Welch's serious solicitations, he was prevailed with to accept a licence from some of the outed ministers, who had not complied with the indulgence, and were as yet preaching the gospel in the fields. And having preached occasionally with Mr. Welch and others, in several places of the western shires, and finding the people warmed and affected with his doctrine, by the good hand of God blessing the Word; he adventured sometimes, as the Lord assisted him, to be express and clear in declaring the sinfulness of the indulgence, and of joining with the acceptors thereof; whereupon the ministers who had licenced him to preach, conceiving it prudent not to be so explicit a step of compliance, began to prosecute him with censure for his freedom in preaching against it; and called three several meetings upon that account, one at Duncoske in Nithsdale, another at Dendough in Galloway, and a third at Edinburgh."

"After his return from Holland, where he received ordination to the exercise of the ministry, he went to some of these outed ministers, inviting and pressing them much to come out and preach in the fields, as they had done before the overthrow at Rathwell; but the persecution being then very hot against all such as had not accepted the indulgence and indemnity, they refused to adventure upon that hazard. Wherefore, notwithstanding such sad discouragements from the professed friends, and violent persecution by the declared enemies of the reformation, he adventured upon all hazard to preach publicly in the fields, in order to discharge the dispensation of the gospel, which the Lord had intrusted him with. And he continued so doing till he sealed that cause and testimony with his blood. Being, after some valiant resistance in his own defence, killed by a party of soldiers under the command of Earlshall, and his head and hands cut off by one Robert Murray, were brought and laid before the council, who ordered them to be placed upon the Netherbow-port of Edinburgh."

Crookshank, Hist. vol. 2, p. 68, says:

"When Mr. Cameron was killed, his head and hands were cut off by Robert Murray, and carried in to the council, who ordered them to be set up on the Netherbow-port in Edinburgh. It is said that Earlshall gave a guinea for this piece of service. John Fowler's head was struck off, through mistake, instead of Michael Cameron's. When Earlshall came to Edinburgh, he ordered the heads to be taken out of the bag in which they were carried, put them upon a halbert, and carried them to the council. Robert Murray said, "There is the head and hands that lived praying and preaching, and died praying and fighting." Mr. Cameron's sather being in the Tolbooth of Edinburgh, they carried them to him, to add to his sorrow, and

newe Covenant, (which was taken from you,

inquired if he knew them. He took his son's head and hands, and kissed them, and said, 'I know them, they are my son's, my dear son's. It is the Lord, good is the will of the Lord, who cannot wrong me nor mine, but has made goodness and mercy to follow us 'all our days.' Mr. Cameron's head was fixed on the port, and his hands by his head, with his fingers upward."

The attachment which was felt for Richard Cameron, by those who maintained his opinions, and the high respect which they entertained for his character, caused them to be distinguished by the appellation of "Cameronians."

As to this, Mr. Laing, (4 Hist. p. 107), says,

"A party now appeared among the Presbyterians, prepared to renounce their allegiance to the crown. The origin of this new sect must be ascribed to the rigours of government; its extravagance, to the sufferings which the intercommuned had endured. When persecuted and driven from their abodes by government, they were pursued by the military like beasts of prey; and their fanaticism was daily exasperated and confirmed by their sufferings and their despair. While they roamed or lurked throughout the country, heated and mutually inflaming each other, with religious phrenzy, their preachers began to consider their king as a tyrant, and to separate from the great body of the Presbyterians, who, according as they enjoyed his protection, or acknowledged his authority, were involved in the iniquity or defection of the times. Cargill and Cameron, who had escaped from Rathwell, returned from the continent to their vagrant flock, which acquired from the latter the name of Cameronians; a designation still appropriated to a religious sect, and to a regiment of the line. A party appeared in arms at Riquebar, where Cameron read and affixed a declaration to the market-cross; that although descended from the race of their ancient king, Charles Stuart, by his perjuries in the breach of his covenanted vows, by his tyrannical government, and by his usurpation over their civil and religious liberties, had dissolved their allegiance, and forfeited all right and title to the crown. They were surprised at Airdsmess in the district of Kyle. Cameron and his brother, fighting back to back, obtained by their gallantry an honourable death. Hundreds of Rathillet, and fifteen horsemen, were taken prisoners; but the foot, a despicable band of forty peasants, retired into the morass from the pursuit of the guards. Cargill alone continued to preach in the fields. At a conventicle held in the Terwood, he pronounced a solemn excommunication against their persecutors, the dukes of Lauderdale, Rotho, Monmouth, York, and the king himself; a sentence ludicrous at present, but productive then of a deep and indelible impression on the whole sect. While we pity or deride their extrava-

the said Mr. Donald Cargill, at Queensferry

gence, it is difficult to condemn them entirely for disowning a government under which they had enjoyed no reciprocal protection, but by which they were uniformly persecuted and proscribed."

See also, "A short Memorial of the Sufferings and Grievances, past and present, of the Presbyterians in Scotland, particularly of those of them called by nick-name Cameronians. Printed in the year 1690."

† Wodrow, (vol. 2, p. 136) says it was taken not from Cargill; but from Hall of Haugh-head: of whom he had given in the two preceding pages a short account as follows:

"Henry Hall of Haugh-head in the parish of Melkford in Teviotdale, upon whom the unsubscribed paper was found, which made all this noise, was a friend and relation of the earl of Roxburgh. He had been very religiously educated, and early began to shew his zeal for what he took to be the strictest side, and, in the time of the lamentable differences upon the public resolutions, he was a violent protester, and used to leave his own parish minister and ordinarily heard Mr. John Livingstone at Ayrton, who, as hath been noticed, was of a very healing spirit, and far from encouraging such practices.

"After the Restoration he was a strict non-conformist to prelacy, which brought him under many hardships, so that he was obliged to leave his estate, and to retire from the storm into the North of England, about the year 1665. In the year 1666, he was taken when coming towards Pentland, and with some others imprisoned in Cessford castle, whence he got out by the favour of the earl of Roxburgh. He retired again to Northumberland, and was very much beloved there for his care, and the pains he took to get many rude and ignorant people instructed, and his procuring ministers now and then to preach the Gospel to them.

"In the year 1678, when colonel Struthers was violently pursuing all Scotsmen in those counties, Haugh-head was in that scuffle near Crookcorn, a village upon the English border, where that gallant and religious gentleman, Thomas Ker of Heyhope; was killed. This obliged him to leave England, and come down to Scotland, where he was with Mr. Hamilton at Drumlogie, and the west country army at Bothwell. After which, being very diligently searched for, he went over to Holland, but did not stay there long, and ventured home again this year.

"In May, and the beginning of June this year he was mostly in company with Mr. Donald Cargill, lurking as privately as they could, about Borrowstounness and other places, upon both sides of the Firth of Forth. The curates of Borrowstounness and Carriiden, very soon smelted out Mr. Cargill and his companion, and presently sent information to Middleton, Governor of Blackness, who was a Papist.

upon the third day of June, 1680) and the other

"By the way here, I may repeat the remark I have once and again made, that a great part of the persecution and informations against suffering Presbyterians, came from the episcopal clergy, who, upon all occasions, laid themselves out to get notice of the wanderers, and to hound out the soldiers upon them; and indeed these two are justly chargeable with the blood of this good man. I find in the council-registers a good proof as to one of them. 'June 8, 1680. Mr. John Park Minister of Carriiden, for his good service in delating and discovering Mr. Donald Cargill, and other va-grant preachers, for which he is threatened in his life, is recommended to the Lords of the Treasury, to give him some allowance for this good service.' No doubt he had his reward, and when these people were rewarded for what they were so willing to engage in, their diligence would be the greater; meanwhile their native violence needed scarce any spur. He was deposed 1689, for gross immorality.

"The governor of Blackness immediately took the scent given him, and having gotten some notice where Mr. Cargill and Haugh-head were, dealt subtly enough. Upon June 9 he ordered out a party of soldiers, to march at some distance, by twos and threes, carelessly, as if they had been upon no design; at length, by some of them, he found Mr. Cargill and Mr. Hall had taken their horses, and was told the road where they were riding. The Governor and a servant upon horseback, presently traced them out, and kept at a little distance from them till they came to Queensferry, where, after the servant had noticed the house where they alighted, his master sent him off in all haste to call up his men to him, and put up his horse in another house.

"Within a very little, the governor came into the house where they were, as a stranger, and pretended a great deal of respect for Mr. Cargill, and begged leave to take a glass of wine with them. When they were in friendly conversation together, and the soldiers not like to come up, the Governor wearied, and threw off the mask, and told them they were his prisoners; and calling the house to assist him, he offered to lay hands upon them: There was none in the house would assist him, but one Thomas George a waiter.

"Haugh-head was a bold brisk man, and struggled hard with the Governor, until Mr. Cargill got off; and then when he was going off himself, having got clear of the Governor, Thomas George struck him upon the head with a carbine, and gave him his mortal wound; however, he got out, and by this time the women of the town got together at the gate, and conveyed him out of the town. He walked a little way upon his foot, but being very sore bruised with the stroke, he soon fainted, and was carried into the next country house; and though chirurgeons were brought,

called the Declaration of the true Presbyterian Antiprelatick and Anti Erastian* persecuted Party in Scotland, which are now printed and published, and herewith given in to you as a part of your dittay; by which wicked, treasonable, and seditious papers, ye and your treacherous, bloodie, and murdering accomplices, have plotted, contrived, and intendit the death of his majesties sacred person and the ruine of his government, and authoritie, and the deprivation, deposing, and suspending of him, from the style, honour, and kinglie name of the imperial crown of this realme, and sicklyke, ye the said Mr. Donald Cargill have drunk in popish and jesuiticall principles of exantering and killing of kings, and to make them the better take with your zealous and ignorant disciples, ye did most treasonablie excommunicat † your native sovereign, and some

I am told he never recovered so far as to speak any.

“General Dalziel of Binns, living near by, was soon advertised, and came very quickly with a party of the guards, and seized him: Such was his inhumanity, that though every body saw the gentleman just a dying, yet he would needs carry him in straight to Edinburgh, and he actually died among their hands in the way thither. His corps was laid in the Canonigate Tolbooth, for three days without burial; and though Haugh-head's friends in and about the town, were very importunate for liberty to do their last office to him, yet that could by no means be granted. Such was the fury of those times, that it reached the bodies of the people of God, after they were killed by them; of which we shall meet with more instances. Some little time after, his corps were buried clandestinely in the night.”

* Eraste, or Erastus, was a physician of Switzerland, who strenuously maintained, that the Church was subordinate to the Civil power, and dependent upon it, and that there was no regular ecclesiastical authority to excommunicate, exclude, censure, absolve, decree, or the like. I am much surprisid not to find in Bayle an article to Erastus, but Moreri makes brief mention of him. Fountainhall under date Nov. 17th, 1681, relating that the Privy Council had declared vacant the places of four ministers of Edinburgh, who had refused the test, observes, “This was an instance and practice of the king's supremacy in ecclesiastics over churchmen, whereas properly they should be only deprived by their own peers or the bishop.” 1 Dec. 162.

† Of this most extraordinary transaction, I have extracted from Crookshank's History and the “Cloud of Witnesses,” the following particulars:

“Mr. Cargill was now the only person who ventured to preach in the fields, notwithstanding the sanguinary laws against that practice, and who prosecuted the testimony for religion and liberty in that manner.

of his officers at Torwood, the day of October, 1680 years, or one or other of the dayes of the said month, and ye have by that contagion poysoned and infected many poor and

“Among other parts of his contending against the enemies of truth and godlines, that which exasperated the enemies most, was the Torwood Excommunication; wherein he moved with zeal against the indignities done to the Son of God, by overturning his work, and destroying his people, delivered up to Satan some of the most scandalous and principal promoters and abettors of this conspiracy against Christ, as formally as he could in his circumstances, who having earnestly sought the concurrence of his brethren, could not obtain it; and therefore, was left to do the work himself, or leave it undone, which he could by no means think of, considering that all other sorts of weapons had been used against them, save that of Ecclesiastical Censure, and the neglect of it might bring upon this Church that severe reproof given to Pergamos, Rev. ii. 14, 15, for having in her communion the Nicolaitans, and them that held the doctrine of Balaam. [But I have a few things against thee, because thou hast there them that hold the doctrine of Balaam, who taught Balak to cast a stumbling block before the children of Israel, to eat things sacrificed unto idols, and to commit fornication. So hast thou also them that hold the doctrine of the Nicolaitanes, which thing I hate,] and that sore animadversion made upon the church of Thyatira, for suffering that woman Jezebel, &c. [See Revelations, chapter 2d, verse 20th.] ‘And lest the Lord might come and fight against his Church, with the sword of his mouth, on account that such were not expressly cast out of her communion.’ Wherefore, in September 1680, after he had lectured upon Ezekiel, xxi. 25, 26, 27. ‘And thou, profane wicked prince of Israel, whose day is come when iniquity shall have an end, Thus saith the Lord God; Remove the diadem, and take off the crown: this shall not be the same, exalt him that is low, and abase him that is high. I will overturn, overturn, overturn it: and it shall be no more, until he come whose right it is; and I will give it him.—And preached from 1 Corinthians, v. 13. ‘But them that are without God judgeth. Therefore put away from among yourselves that wicked person.’ And having made a short and pertinent discourse on the nature, subject, cause, and ends of excommunication, and declared his motives leading him to it, not to be any private spirit of passion, but conscience of duty and zeal to God, he pronounced the Sentence as follows:

“We have spoken of Excommunication, of the causes, subject, and ends thereof, we shall now proceed to the action, being constrained by the conscience of our duty and zeal for God, to excommunicate some of these who have been the committers of so great crimes, and authors of the great mischiefs of Britain and

ignorant people, and has given occasion to popish emissaries, to co-operate with you in this detestable and anto-christian work, ye have brought your disciples to the scaffold, ownning

Ireland, but especially these of Scotland; and, in doing of this, we shall keep the names by which they are ordinarily called, that they may be the better known.

“I, being a minister of Jesus Christ, and having authority and power from him, do, in his name, and by his spirit, Excommunicate Charles II. king, &c.—and that upon the account of these wickednesses. 1st. For his high mocking of God, in that after he had acknowledged his own sins, his father’s sins, his mother’s idolatry, and had solemnly engaged against them, in a declaration at Dunfermline the 16th of August, 1650, he hath, notwithstanding of all this, gone on more avowedly in these sins than all that went before him. 2dly.

For his great perjury in that, after he had twice at least, solemnly subscribed that covenant, he did so presumptuously renounce, disown, and command it to be burnt by the hand of the hangman. 3dly. Because he hath rescinded all laws for establishing that religion, and enacted laws for establishing its contrary, and is still working for the introducing of popery into these lands. 4thly. For commanding of armies to destroy the Lord’s people, who were standing in their own just defence, and for their privileges and rights, against tyrannies, oppressions, and injuries of men; and for the blood he hath shed in fields, on scaffolds and in the seas, of the people of God, upon account of religion and righteousness, (they being most willing in all other things to render him obedience, if he had reigned and ruled them according to his covenant and oath) more than all the kings that have been before him in Scotland. 5thly. That he hath been still an enemy to, a persecutor of the true Protestants, a favourer and helper of the Papists, both at home and abroad, and hath hindered to the utmost of his power the due execution of just laws against them. 6thly. For his relaxing of the kingdom by his frequent grant of remissions and pardons for murderers (which is in the power of no king to do, being expressly contrary to the law of God), which was the ready way to embolden men in committing of murders, to the defiling of the land with blood.

Lastly, To pass by all other things, his great and dreadful uncleanness of adultery and incest. [Sheils in his ‘Hind let loose’, p. 178, ed. of 1797, inveighing against Charles, says, ‘for all the numerous brood of his adulterous and incestuous brats begotten of other men’s wives, and of his numerous multitude of whores at home, and abroad, yea of his own sister too, he died a childless pultron, and had the unlamented burial of an ass, without a successor, save him that murdered him.’ Mr. Fox in delineating the character of Charles says, ‘His affection for the duchess of Orleans seems to have been sincere and cordial. And though Bar-

these jesuiticall and treasonable principles, whereby ye are guilty of their blood, ye have advanced that to which ye pretendt enemy, and destroyed (as fare as in you lay) that to

set more covertly, and Ludlow more openly insinuate that his fondness for his sister was of a criminal nature; I never could find that there was any ground for such a suspicion.’ Historical Work, p. 71, large 4to ed. of 1808.] His drunkenness, his dissembling with God and man, and performing his promises where his engagements were sinful, &c.

“Next, by the same authority, and in the same name, I excommunicate, &c. James Duke of York, &c. and that for his idoltries (for I shall not speak of any other sins but what have been perpetrated by him in Scotland) and for setting up idolatry in Scotland, to defile the Lord’s land, and his inciting and encouraging others to do so, &c.

“Next, in the same name, &c. I excommunicate, &c. James Duke of Monmouth, &c. for coming into Scotland, upon his father’s unjust command, and leading armies against the Lord’s people, who were constrained to rise, being killed in and for the right worshipping of the true God, and for his refusing, that morning at Bothwell-bridge, a cessation of arms, for hearing and redressing their injuries, wrongs, and oppressions, &c.

“Next, I do, by the same authority, &c. excommunicate, &c. John Duke of Lauderdale, &c. for his dreadful blasphemy, especially that word to the Prelate of St. Andrews, Sit thou at my right hand, until I make thine enemies thy footstool; his atheistical drolling on the scriptures of God, scoffing at religion and religious persons; his apostacy from the covenant and reformation, and his persecuting thereof, after he had been a professor, pleader and presser thereof; for his perjury in the business of Mr. James Mitchel,* for his adulteries and uncleanness; for his counselling and assisting the king in all his tyrannies, overturning and plotting against the true religion, for his gaming on the Lord’s day, and for his usual and ordinary cursing.

“In the same manner he pronounced sentence against the duke of Rothes, sir George Mackenzie, the king’s Advocate, and Thomas Dalziel of Binns.

“After he had pronounced sentence as above, he went on as follows: “I think none that acknowledge the word of God, the power deputed to the church, and the reason and nature of that power, can judge this sentence to be unjust. The pretence of its being informal, without warnings, admonitions, &c. is fully answered, in that those men have placed themselves above the admonitions of ministers, have repelled all due warnings, and wickedly put to cruel deaths the servants and ministers of

* As to this, see the Cases of Mitchel, vol. 6, p. 1907, and of Maitland, vol. 6, p. 1361, of this Collection.

which ye pretend friend, ye have twisted and strained the Gospel of peace, which teaches obedience to magistrates for conscience sake,

Christ, who have, with freedom and boldness, ventured to give their writings and admonitions, and shut up all access from us that remain to do the like; and as for proof of the fact I have here charged upon them, it needeth none, the deeds being notorious and known, and the most of them such as themselves do avow, and to their shame, boast of. And, as the causes are just, and such as for which the ministers of Christ have in all ages proceeded to the like sentence, so, it being now done by a minister of the gospel, and in such a manner as the present circumstances of the church of Christ, with respect to the present cruel persecutions, will admit, the sentence likewise is undoubtedly just also: And there are no powers on earth, either of kings, princes, magistrates, or ministers of the gospel, can, with out the repentance of the persons openly and legally appearing, reverse these sentences upon any such account. And as God, who is the author of that power, is the more engaged to the ratifying of these sentences; so all that acknowledge the word of God, and believe themselves subject to his government, ought also to acknowledge them.

“If any shall object, as we hear they do, that these proceedings, though not unjust, are foolish and rigorous; we answer with that word of scripture, which we have much more reason to use than those of whom it is recorded, Gen. xxxiv. 31. ‘Should he deal with our sister, as with an harlot?’ Should they deal with our God as with an idol? Should they deal with his people, as with murderers and malefactors? And shall we not draw out God’s sword against God’s enemies?”

Crookshank then proceeds: “It is not my province either to condemn or vindicate this action, which not only exposed the sufferers to the greater fury of their persecutors, but also to the censures of their friends, nay, and exposed the whole body of the Presbyterians to the ridicule and scorn of their enemies; though nothing is more certain, than that they were neither consulted in it, nor approved of it. However, the following queries are submitted to the reader. Had not the persons against whom the sentence was pronounced been guilty of all that was laid to their charge? Was not Mr. Cargill an approved minister of the gospel? Can it be said that kings and princes are not subject to the censures of the church? It is plain the church of England approves of the excommunication of royal persons if they deserve it, as may be seen from their homilies, which are recommended by the 35th article. Thus, in that ‘homily of the right use of the church,’ part 2, it is said. [Edition printed at London 1687, p. 172.] ‘And, according to this example of our Saviour Christ, in the primitive church, which was most holy and godly, and in the which due discipline, with severity,

unto rebellion and disobedience, to the great scandoll and disadvantage of the Protestant reformed religion, the professors and preachers

was used against the wicked, open offenders were not suffered once to enter into the house of the Lord, nor admitted to common prayer, and the use of the holy sacraments, with other true Christians, until they had done open penance before the whole church. And this was practised not only upon mean persons, but also upon the rich, noble and mighty persons, yea, upon Theodosius that puissant and mighty Emperor, whom, for committing a grievous and wilful murder, St. Ambrose, bishop of Milan, reproved sharply, and did also excommunicate the said Emperor, and brought him to open penance. And they that were so justly exempted and banished (as it were) from the house of the Lord, were taken (as they be indeed) for men divided and separated from Christ’s church, and in most dangerous estate. ‘Yea, as St. Paul saith, even given unto Satan, the devil, for a time: And their company was shunned and avoided by all godly men and women, until such time as they, by repentance and public penance, were reconciled.’ Here then is the excommunication of a puissant and mighty Emperor, and his being brought to open penance, approved of by the church of England.

“From this the reader must judge for himself, how ill it becomes the high-flyers to make the Torwood excommunication a matter of reproach to all Presbyterians, even upon the supposition that they had approved of it, and whether that action was so unprecedented as some would represent it. And for the formality and seasonableness of it at that time, I must refer him to what Mr. Cargill says himself, and to his own reflection.

“Next Lord’s day, Mr. Cargill preached at the Fallowhill, in the parish of Livingston, and, in the *preface*, said, ‘I know I am and will be condemned by many for what I have done, in excommunicating those wicked men; but condemn me who will, I know I am approved of God, and am persuaded that what I have done on earth is ratified in heaven; for, if ever I knew the mind of God, and was clear in my call to any piece of my generation-work, it was in that; and I shall give you two signs, whereby you may know I am in no delusion. 1st. If some of these men do not find that sentence binding upon them ere they go off the stage, and be not obliged to confess it from their terror, and to the adfrightment of others. 2d. If these men die the ordinary death of men, then God hath not spoken by me.’ The first of these was verified in the date of Rother; and the second in the remarkable exit of most of those who were excommunicated.”

Mr. Laing, after observing of this excommunication, that though ludicrous at present, it was in the time of its denunciation, of a deep and indelible impression on the whole sect, proceeds, “While we pity or doubt their extravagance,

of the same, having so much declaired against, and be ther preaching and wrcitting having exprest ther detestation of such opinions and

it is difficult to condemn them entirely for dis-owning a government under which they had enjoyed no reciprocal protection, but by which they were uniformly persecuted and proscribed." Vol. 4, p. 108. 2d Ed.

Indeed, there can be but little reason to doubt, that of the vast numbers who would not acknowledge the king's authority, many were induced to that resolution, and many were confirmed in it by Cargill's sentence. Very numerous were the prosecutions for that offence: And it is curious to observe how of different individuals who were judicially questioned as to the authority of the king, some with different degrees of boldness and peremptoriness denied it, some answered evasively, some prevaricated, and some submitted to acknowledge it. In this Collection, the proceedings under a few of such prosecutions are reported at large from the Scots' Records, and a few others are mentioned in notes. I will here insert from Fountainhall two short reports of such cases:

"October 1, 1681. Colonel Gage, commander of a regiment for the king of Spain in Flanders, called the duke of York's regiment; having desired from the duke some of those who were prisoners on account of their religion and fanaticism, to be sent away with him, as soldiers to fit up his number: The duke called a council for that effect, and six of them, viz. Forman, Garnock, Lapsley, Stewart, Farris and Russel, the most of them young fellows, were brought with a purpose to sentence them to be delivered to him; but they did so misbehave in declining the king, the duke of York, and council, and speaking such notorious treason, that it altered the council's mind; and instead of sending them away, they ordained them all to be pannelled at the criminal court for treason."

"October 7. At Criminal Court, the six persons mentioned supra were pannelled for treason, on their declarations they had made before the privy council on the first current. The king's advocate being in Angus, sent over a deputation to me to pursue, as his substitute, in that cause; but God so ordered it that I was freed, and sir William Purvis eased me of the office. In fortification of what they said before the duke, and the council, they led the clerks and macers of council as witnesses, who deposed, that upon the matter, they uttered those or the like words: "They declined the king, and denied him to be their lawful sovereign; and called him a tyrant, and covenant-breaker." And Forman had a knife with this poste and inscription graven on it: This is to cut the throats of tyrants; and said, "if the king be a tyrant, why not also to cut his throat, and if they were righteous judges they would have the same on their swords, like Buchanan's motto, borrowed

practices committed by persons, and owned by wrciturs of the Roman profession, ye also teach your disciples to dye for that which ye

from the great Emperor Trajan, 'pro me, sin mereor, in me.'—Garnock having, at a committee of council, railed at general Dalziel, calling him a Muscovia beast, who used to roast men, the general in a passion struck him with the pommel of his shable on his face, till the blood sprang. Garnock gave in a testimony and protestation, all written and signed with his own hand, calling them all bloody murderers and Papists; and charging all the parliamenters (as he called them) quickly to reverse and disannul their wicked laws they had made, and that Polish test they had been taking, and to put away that sinful man (meaning the duke of York) or else the judgments of God were ready to break upon the land.—Lapsley was wiser than the other five; for he owned the king in so far as he owned the covenant which he swore at his coronation at Scoos, and would neither go back nor forward, nor say any more; so they not being able to reach his life, the diet was deserted against him, and he was sent back to the thieves hole, to be fettered again; but while they were on the pannels the bolts were taken off them, so non dicebant causam ex vinculis.' Before inclosing the assize, they gave in another paper, subscribed with all their hands, charging their blood on the judges, and summoning them to answer at God's tribunal, and reflecting on their unjust and barbarous dealing with Mitchell, Messieurs John Kid, and King, and alledging Mr. John Elties, for pursuing them, died with horrors, and for killing James Lermonth only for being present at a field conventicle, where a man was killed, &c.—Their five were found guilty by the jury, and condemned to be hanged in the Gallow-lee betwixt Leith and Edinburgh, on the 10th of October; their heads to be struck off, and set up upon pikes upon the pleasure-port of Edinburgh; and Forman's hand (who had the foresaid knife,) to be cut off alive: all which was accordingly done; and they died obstinately without acknowledging any fault, or retracting their errors; or allowing ministers to pray for them; but reviling and condemning their judges, and all that differed from them. Their bodies were stollen up by some of their party from under the gibbet, and reburied in the West-kirk-yard.

"October 11, 1681. The duke of York called a council extraordinary, to send away four more of these unhappy people of so deluded principles with colopel Gage, to Flanders. When they were brought in, they began in that same very strain and dialect with their neighbours, who were but hanged the day before: but the duke caused hastily remove them, that they might not also hang themselves with their own tongues."

Mr. Laing, vol. 4. note IV. calls this the only instance, which he has found of an equivocal

abhit and shune to owne, and ye being taken and examined in presence of his royall highness, his majesty's high commissioner, * and lords of Privie Council upon the fyfthent of July, instant, anent your reasonable practices and principles above mentioned, ye the saids Mr. Donald Cargill, Mr. Walter Smith, and Mr. James Boig, have most treasonable denied and disowned the king's majesties authoritie, as nowe established, declaring that ye are not obledged to obey it, and ye the said Mr. Walter Smith does expresslie disown the king's authoritie and power in making of judges and calling of parliaments, asserting, that if ye should owne the same, ye should owne the taking away of your own lyff, declairing it therby to be your opinion, that the owneing the king's authoritie is as great a cryme as self murder. And ye the said Mr. James Boig did refuse to signe your declaration emmitted befor the counccill, and that because it would supplie ane acknowledgement of the king's authoritie

humanity in the duke's administration, which therefore it would be unjust towards his character to suppress.

"December 11, 1682. At Criminal Court, three Bothwell-bridge rebels, called Cochran, Findlay, and Robertson, are pannelled for being there, at least for disowning the king's authority, and calling him a tyrant, and refusing to call Bothwell-bridge a rebellion; they were sentenced to be hanged on the 15th December. Robertson said boldly to the king's advocate, that he was maintaining no more than what he had sworn to in the test; for by it, they had all sworn to Knox's old confession of faith, and so by it were bound to suppress tyranny as well as he."

As to this see what Fountainhall (1 Dec. 149) says in his account of the proceedings in the parliament of 1681.

"In the act of this parliament, anent the asserting the succession of the crown, these words (which are twice repeated) are very material, and deserve deep consideration; "That it shall be treason to alter, invert, or suspend the next heir from the administration of the government, according to the laws of the kingdom." Ergo, the alledgeance ceases, if the next heir administrate contrary to the standing laws for the Protestant religion, or seek to introduce Popery: This consequence is the same with what is deduced from the 15th and 25th articles of our old confession of faith in 1567, limiting our obedience to the magistrate while he doth the things appertaining to his office, duty, and charge."

* Speaking of the duke's coming to Scotland, Shiels (Hind let loose 161), says "Anti-christ began to blaze his bravery in the solemn and shameful reception of his harbinger, that pimp of the Romish whore, the duke of York; who had now pulled off the mask under which he had long covered his Antichristian bigotry," &c. &c.

(which ye resolutie and obstinatie disowne), and that to such a hight as ye will not doe the least act that ye judge might inferre the meaneest acknowledgement of that sacred authoritie, which ye most treasonable and dispitfullie disowne and contemn. Lykeas ye the said Mr. Donald Cargill, Mr. Walter Smith, and Mr. James Boig have most treasonable in face of his royall highness, his majesties high commissioner, and lords of counccill, owned, justified, and ratibait the late rebellion at Bothwell-bridge, in June 1679, treasonable declaring that they wer not rebels, but that they wer in pursuit of the truth, and that it was lawfull, and that they rose in their own defence, and ye the said Mr. Donald has confest that ye preached at the forsaid conventicle holden at Torwood, in October 1680, but most treasonable declines, and refuses to answer whether ye did excommunicat the king ther or not, upon pretence that it is ane question anent ane ecclesiastic matter, and the counccill is a civill judicatorie, treasonable thereby declining the judgment and jurisdiction of the king's majestie and his counccill, and ye the said Mr. Walter Smith has most treasonable declared that ye think the reasons of the king's excommunication just, particularly his reason, viz. because the king is still working for the commanding of armes to destroy the Lord's people, who wer standing in their owne defence for their priviledges and rights against tirannie, oppression, and injuries of men, and for the blood he has shed in fields, and on scaffolds, and in the seas of the people of God, upon the account of religion, which ground of excommunication is both most false and treasonable, and ye most treasonable decline the judgment and jurisdiction of our soveraigne lord, and his counccill, in saying that that matter ought not to be judged by the counccill, but by ane ecclesiastical judicatorie, and ye the said Mr. Donald Cargill and Mr. Walter Smith, have oft and diverse tymes conversed, harboured, and intercommed with the bloodie and sacralegious murderers of the late archbishop of St. Andrews, particularie with John Balfour of Kinloch, Henrysons, sons to Henryson in Kilbrachmont, and James Russil in Kettle, in sundrie places, particularie in Holland, and at a field conventicle holden at the common of Devan, upon the day of June last, wher ye the said Mr. Donald Cargill took upon you to preach your treasonable and seditious doctrine, and ye the said Mr. James Boig has treasonable owned and adhered to the treasonable paper above mentioned, called the Sanquhar Declaration, in the hail head and articles thereof, having read it over, and having seain and read it formerlie as ye confesse, and ye the said Mr. Walter does also owne and adhere to the samen with a certain glosse and interpretation of your owne, but most treasonable concludes that he certainlie knewe the king is ane usurper, and ye wish he wer not a tyrann, thereby concluding that he is a tyrann in your opinion, and that ye are sorie he is one, and tho' all of

you shift to answer anent the murder committed upon the late archbishop of St. Andrew's, yet ye the said Mr. Donald does assert and oppinie avowe the damnable and jesuiticall doctrine of privat assassination and murder, and says that a privat man having a call, may lawfullie kill, and instances the case of Phineas* and Jacl,† upon which consideration ye say ye cannot give your sense of the archbishop's murder, thereby insinuating that the murderers hade a call and did murder lawfullie. Of the whilk treasonable crymes above-mentioned, ye and each of you are actors, art and part, which being found be ane assize, ye ought to be punished with forfeiture of lyff lands and goods, to the terror of others to commit the like herefter. And ye the saids Wm. Thompson and Wm. Coothill, are indytel and accused, that wher notwithstanding be the laws and acts of parliament above-mentioned, yet ye shaking off all fear of God, respect and regard to his majestie's authoritie and lawes, have presumed to ryse and joyne with the forsaids rebels in armes, at Bothwell-bridge, in June 1679, and to continue with them committing all acts of hostility, rebellion, and high treason, till they wer defate, and sicklyke, you did upon the day of † assist to the taking of two prisoners furth of Airth,

* See Numb. chap. xxv.

† See Judges, chap. iv.

† *Sic is Orig.*—Many passages in the Reports of this and other Scotch cases inserted in this Collection, exhibit proofs of remarkable carelessness and incorrectness in the Records of Justiciary from which they were transcribed. Mr. Hume, in his valuable and instructive Commentaries, has mentioned many instances of imperfection in these Records. The following I have noted among others:

It appears that certain commissions of judges are inserted in the books of adjournal, as if dated at the times of their entry, which are some days later than the true dates of the commissions. See of Description and Punishment of Crimes, vol. 1, pp. 2. 17. So he mentions instances of abridgment and mutilation. See of Description and Punishment of Crimes, vol. 1, pp. 249, 250, 251. Of Trial for Crimes, vol. 2, pp. 335. 399. 416. So omissions. See Description and Punishment of Crimes, vol. 1, pp. 233. 254. 255. So omissions of the whole libel. See Description and Punishment of Crimes, vol. 1, p. 351. Trial for Crimes, vol. 2, pp. 92. 102. 417, 418. And omissions of some of the libels, where there were more than one, see Trial for Crimes, vol. 2, p. 335. So Omissions of the whole Records. Description and Punishment of Crimes, vol. 1, p. 384. So Omission of Arguments and Interlocutors on disputed points. Description and Punishment of Crimes, vol. 1, p. 439. Trial for Crimes, vol. 2, pp. 149. 159, 160. 169. 181, 182, 183. 334. 424. So the insertion of only short notes of a libel. Trial for Crimes, vol. 2, p. 45. So want of uniformity in the Records as to the in-

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who wer imprisoned for ther accession to the said rebellion. Lyke as both of you have disowned and declined the king's sacred majestie and his authoritie, ye the said William Thomson saying that ye would not buy your lyff at so deare a rate as by saying God save the king; and ye have declared it as lawfull to kill the officers of his majestie's army, as it is lawfull for his majestie's judges to execut justice upon rebellious traitors like yourself, whom ye call the people of God; and ye the said William Coothill has most treasonable declared that ye think the king deserves to dye because he has brocken the covenant, and presses other persons to doe it by his forces, and has most iustlie asserted that he has caused take the blood of many upon that account. Lykens ye have most blasphemouslie declared, that those who murdered the archbishop of St. Andrews hade the glorie of God befor ther eyes, in that act, the whilk crymes ye have not only confessed in presence of his majestie's privie council, but also in presence of his royall highnes his majestie's high commissioner, and lords of privie council, upon the 12th of July instant, and of the whilk crymes above-specified, ye and ilk one of you are actors art and part, which being found be ane assize, ye ought to be punished with the paines of death, forfeiture and confiscation of lands and movables, to the terror of others to commit the like herefter.

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

His Majesties Advocate produced the Indytment and Precept, therupon dealie execut and indorsat, together with ane Act of council, wherof the tenor follows; "Edinburgh the 19th day of July 1681, his royall highnes his majesties high commissioner, and lords of privie council doe hereby give order to his majesties advocate to persewe a proces of forfeiture befor the Lords Commissioners of Justiciary, against Mr. Donald Cargill, Mr. Walter Smith, Mr. James Boig, William Thomson, and William Coothill, prisoners, for which these shall be his warrant. Extract by me, PA. MENZIES."

The Lords finds the Dittays relevant, and remitts the same to the knowledge of the Assize.

ASSIZE.

Hugh Blair, vintner.
John Aitkin, goldsmith.
James Graham, vintner.
Robert Miln, mason.
John Colendar, smith.
Alexander Leack, plumber.
Mr. Alexander Robertson, brewer.

sertion of particular matters. Trial for Crimes, vol. 2, pp. 156. 166. 171. 180. 186. 214. Moreover, it appears that during some periods, the Records are not extant. See Description and Punishment of Crimes, vol. 1, p. 441. Trial for Crimes, vol. 2, pp. 46. 100. 102. 143. 345.

Capt. Andrew, forrester.
 William Bruce, stabler.
 James M'Cubie, merchant.
 William Dunbar, of Paithnuk.
 Captain Andrew Cassie.
 Alexander Cruickshanks, merchant.
 George Weir, brewer.
 Andrew Johnstoun, stabler.

The Assize lawfullie sworne, no objection in the contrair.

His Majesties Advocat* for Probation, adduced the pannall's Examinations and Declarations, wherof the tenor follows:

EDINBURGH, the fyfteenth of July, 1681. In presence of his royall highnes, his majesties high commissiouner, and Lords of his majesties Privie Council.

The EXAMINATION of Mr. Donald Cargill, Prisoner.

Mr. Donald Cargill being examined and interogat if he ownes the king's authoritie, and the king as his lawful prince answers as the magistrates authoritie is nowe established by the act of parliament, anent supremacy and explanatorie act, he denyes the same. Being interogat if he owns the king as his lawful prince, I or no, refuses to give any other answer then as aforesaid. Being interogat if he kept a conventiole at Torewood in October 1680, confesses he preached in the Torewood in the fields, being interogat if he excommunicat the king ther, answers, that question being a question meirle anent ane ecclesiastical matter, declares that he cannot answer it befor the councill being a civill judicator, and that he was content privatie to give an account of all the reasons of all his excommunications that he ever made or pronounced; being pressed to a direct answer, I or no, refuses to make any farder answer. Being interogat when he sawe any of those who killed the archbishop, or knewe any thing of the intention of doing it befor it was done, declares he knewe nothing of the intention befor it was done being then at Glasgowe, and confesses he knew Balfour, Henryson, and Russill, but thinks he did

* "In parliament there was an accusation furnished against the king's advocate. 1mo, For reflecting highly on the parliament, by saying he saw sceticious Bothwel bridge faces sitting as members of parliament, whereas he alledged, he spoke only upon a supposition, if the burrows had liberty to chuse whom they please to represent them, factious and disloyal persons might prevail to get themselves elected.—But I hope, ere they entered, they behoved to take the oaths of alledgeance, supremacy, &c. 2do, He was accused for saying at the trial of Mr. Donald Cargill, on the 2d of July last, that the permitting the common people to read the scriptures did more ill than good: Which was a blasphemous popish error." 1 Fountainhall's Decisions, 150.

not see Balfour of Kinloch, these two years, but did see the other two within these twelve months or thereby to the best of his knowledge. The coppie of the sermon alledged, preached be him at Torwood, being produced, and he asked if that was the coppie thereof, desyres a tyme to consider thereof befor answer, being interogat if he thinks the rysting at Bothwellbridge was a rebellion against the king and his authoritie, declares he ownes defensive armes in case of necessity and thinks those that rose at Bothwel bridge wer not rebels, and that he thinks they wer opprat and rose in ther own defence. Being interogat if he was with those was in armes, at Airdsmosse, refuses to answer, and desyres it may be made out against him. Being interogat if he was with these wer in armes at Bothwel bridge, he makes the same answer. Being interogat if he was at the emitting of the Declaration at Sanquhar, denyes he was. Being interogat if he hade any accession to the drawing of that declaration or penned the same, refuses to give answer thereupon, but declares he did not see it till efter it was proclaimed. Being interogat anent that paper called the Declaration at Sanquhar, and if he ownes the principles therein contained; refuses to make answer and desyres a tyme to consider thereof, not that he is unwilling upon tyme given him to declare his judgment therupon. That paper called the Fanatick's Newe Covenant or Cargill's Covenant, being also read to him, and being interogat if he ownes the principles therein contained, makes answer as aforesaid. Being interogat if at his preaching at Torwoodhead his lecture was upon the 21 Zek. 25, 26, and 27, v.; confesses it was so, being interogat wher his text was to his sermon, declares he remembers not. Being interogat if he thinks the killing the archbishop of St. Andrews, was a murder, declares that he cannot give his sense therof, but declares that the scripture sayes the Lord giving a call to a privat man to kill he might doe it lawfullie, and instances the case of Phineas and Jael. Being interogat whither he thinks the king by his falling from the covenant has lost his civill right as king, he declares he thinks it a matter ecclesiastical, and cannot answer but that he is not obliged to obey the king's government as it is nowe established, by the act of supremacie. Being interogat wher he was the night befor, and efter he was at Queinsferrie, declares he does not nowe remember, but being it may concerne others, he thinks he is not obliged to answer. Being interogat when he was in Fyff, confesses he was ther upon Sunday was a twentie dayes or a month and preached in Devan common in the fields. Being interogat if any of the Henrysons, sons to Henryson, tennent in Kilbrachmont, was present at that meeting; confesses ther was one John Henryson ther, but whose son he is, he knowes not, he thinks he was a man about threttie years. Being interogat when he was in Stirrin shire, or Craigmade, declares he was not there these twelve

months, deny he was in Angus these three or four years past.

Sic Subscriptur, D. CARGILL.
CH. MAITLAND, I. P. D.

EDINBURGH, the 19th July 1681. In presence of his royall highnes his majesties high commissioner, and lords of privie council.

Mr. Donald Cargill, being called and examined, if he owned his sermon preached at Torwood, in which he excommunicates his majestie, and his royal highnes and others, and if he ownes the excommunication of the king, and doeing of it under the name of Charles Stewart, and as a tyranne, answers if ther was ane excommunication, he could not answer for it, but befor ane ecclesiastick court; it being ane ecclesiastick act. Being asked if in that excommunication, he named his majestie under the name of Charles Stewart, and as a tyrane abstract from the excommunication, refuses to answer. Being interogat, if he ownes the principles specifit, in the paper called Cargill's Covenant, and the words therein related, declares he has not yet hade sufficient time to consider therof, and cannot answer. Being interogat, if he ownes these principles mentioned in that paper called the Declaration at Sanguhar, and if he sawe it befor it was published, to the first will not answer; but declares he did not see that Declaration befor it was published. The sixt article of that paper called Cargill's Covenant being read to him, he refuses to make answer. Being interogat who was the author of that paper, and who wrott it, refuses to answer. Mr. Donald Cargill declares in presence of the justices and assyse, that the word explanatorie in his confession is to be understood thus, that the act explaining the king's supremacie, gives him a right to the authoritie of Jesus Christ, and that supremacie given by act of parliament is against right. Mr. Donald Cargill farther declares, that those that robe in arms at Bothwelbridge were not rebells, and that they wer raised by oppression.

Charles Maitland, of Haltoun, lord Treasurer Deput, having heard a Confession, emmitted by Mr. Donald Cargill, pannall, in presence of the privie council, wriitten by Hugh Steinson, and subscribed by the said Mr. Donald, and by the deponent as president of councill, depones that he did by warrand of his royall highnes, and lords of privie council, as then president of councill, examine the said Mr. Donald Cargill, upon the interrogators mentioned in the said confession, and depones, that the answers made unto the saids interrogators wer trulie and reallie emmitted, and made by the said Mr. Donald as they are sett down in the said paper above mentioned, signed by the pannall, and the deponent as president, and wriitten be Hugh Steinson, and this is the truth as he shall answer to God.

Sic Subscriptur, CHARLES MAITLAND.

Hugh Steinson, under clerk to the councill,

cited as a witness against Mr. Donald Cargill, upon the abovescriitten Confession, emmitted be him befor the councill, and the deponent having read over the said Confession, as Mr. Donald Cargill emmitted the same, he depons it is whollie his hand wreit, and that it was emmitted by him at the councill table, and the hail interrogators, and answers thereto are truth to the best of his knowledge, and that the margins and amendiements wer made by the said Mr. Donald's speciall order, upon reading over the confessions befor the councill, and this is the truth as he shall answer to God.

Sic Subscriptur, HUGH STEINSON.

His Majesties Advocate for farther probation, adduced the witnesses efter deponing, viz. James Hamilton, in Hamilton, called Nepon, aged furtie three years, married, purged and sworne, depons he saw Mr. Donald Cargill several tymes ryding in armes with the rebells in Hamilton and Hamilton Muir on a gray horse, betwixt the attackke at Dromcloge and the defate at Bothwelbridge, and that he hade sword and pistolls, and farther adds that to the best of his knowledge, the said Mr. Donald was at the croce of Hamilton, at a proclamation emmitted by the rebells, and this is the truth, as he shall answer to God.

Sic Subscriptur, JAS. HAMILTON.

Gavin Wood, son to John Wood, in Smid-diesyd, aged twenty years or thereby, unmarried, purged, and sworn, depons, he sawe Mr. Donald Cargill in company with the rebells, ryding on Hamilton Muir, on a gray horse, in armes, and heard him preach to the rebells in the park of Hamilton, at the back of Mr. James Naesmith's yard, with a sword about him, depons, this was a week befor the rebells defate at Bothwelbridge, and this is the truth as he shall answer to God.

Sic Subscriptur, GAVIN WOOD.

His Majesties Advocate adduced against Mr. James Boig, his Confession efter specifit :

EDINBURGH, the 15 July, 1681. In presence of his royall highnes, his majesties high commissioner, and lords of his majesties privy councill.

The EXAMINATION of Mr. James Boig, Prisoner.

Mr. James Boig, son to James Boig, merchant in Edinburgh, being examined, confesses, he was taken in the company of Cargill, declares, he ownes the principles of those that are persecut for the truths of God, and those people, that were beat at Bothwelbridge, were the people of God, and were fighting for God. Being interogat if he owned the ryseing in armes at Bothwelbridge was lawful, he declares it was for the defence of the truth, and that it was lawful, and that these are his principles. Being interogat if he thinks the killing of the archbishop of St. Andrews was a murder, declares, he thinks he is not to answer for the actions of other men :

declaires he ownes the declaration at Sanquhar, and has seen it in print, and has read it over, and the same being read to him, he ownes it in council, in all the heads and articles thereof. Being desyred to signe it, he declares, he could not doe it, because it were an acknowledgment of the king's authoritie, which he disownes, and his doing of it would imply a contradiction.

Sic Subscribitur, C. MAITLAND. I. P. D.

Mr. James Boig having heard a Confession, committed he him, upon the fyfteint of July instant, in presence of the lords of privie council, read to him, he confest, judiciaillie in presence of the commissioners of Justiciary and assyse, that he hade made the said Confession, and declaires that he yet ownes all the severall principles, expressions, and words, mentioned therein. Whereupon his Majesties Advocate took instruments, and repeited his Confession, made in presence of the commissioners of justiciary and assyse, as a probation of the indytmnt raised against him.

His Majesties Advocate adduced against Mr. Walter Smith, the Probation under-written.

EDINBURGH, the fyfteint of July, 1681. In presence of his royall highnes, his majesties high commissioner, and lords of his majestie's privie council.

The EXAMINATION of Mr. Walter Smith, Prisoner.

Mr. Walter Smith, son to Walter Smith, in the parish of St. Nineans, in Stirlingshyre, being interogat howe long he has been a frequenter of Mr. Donald Cargill, his company, and has heard him in the fields, declaires he has heard him seven years agoe, and severall tymes within these twelve moneths, and heard him at Devan Muir, lallie in Fyff. Being interogat if he was at the conventicle at Torwoodhead, in October, 1680, confesses he was ther, confesses, he heard the king and his royall highnes excommunicat ther. Being interogat if he was at Sanquhar, wher that declaration was emmitted, at the croce thereof, refuses to answer. Being interogat if he thinks it lawfull to ryse in armes against the king or his authoritie, upon any pretext, declaires, he thinks it not lawfull to ryse against lawfull authoritie. Being interogat if he ownes the king's authoritie, and that his authoritie is lawfull, declaires he cannot acknowledge the present authoritie, the king is nowe invested with, and the exercise thereof, being now invested with a supremacie over the church. Being interogat if he was at Bothwelbridge, refuses to answer. Being interogate when he saw James Russell, one of those was at the killing of the arch-bishop of St. Andrews, declaires, he saw him at the Conventicle, lallie at Devan Muir. Confesses, that about a twelve moneth since, he saws Balfour of Kinloch, in Holland, declares he knowes Henrysson, who is said to have bein at the killing of the arch-bishop of St. Andrews,

but did not see him lallie. Being interogat if he thinks the king's falling from the covenant, louses him from his obedience, and the king loses thereby his authority, he answers, he thinks he is obliged to obey, and perform all the duties in that covenant, conforme to the word of God, and the king is only to be obeyed in the termes of the covenant. Being interogat, if he thinks the excommunication of the king lawfull or not, he refuses to answer. Being interogat howe he liked the reasons of the king's excommunication, declaires, he thinks the reason was just. The coppie of Cargill's sermon being produced, and read to him, which he preached at Torewood, in that part thereof, which bears these words as being one of the reasons of the king's excommunication, viz. "Because the king is still working for the commanding of armes, to destroy the Lord's people who were standing in their own defence, for their priviledges, and rights against tyrannie, oppression, and injuries of men and for the blood he has shed in fields, and on scaffolds, and on the seas, of the people of God, upon the account of religion," he ownes the same as a just ground, and reason, of excommunication, and thinks the excommunication and the reasons thereof, ought not to be judged by this, but an ecclesiastical judicatorie. Being interogat if he thinks the killing of the arch-bishop of St. Andrews was a murder, declines to answer, and declaires he is not obliged to judge of the actions of other men. Being interogat if he ownes the king's authoritie, and the council, declaires as the king's government is nowe established, he does not owne his authoritie in regard of the supremacie he is invested within ecclesiastic things. Being interogat if he thinks the king is invested with the power of making judges, or calling of parliaments, declares he cannot owne that authority as it is nowe established, or if he should, he should owne the taking away of his owne lyff.

Sic Subscribitur, C. MAITLAND. I. P. D.

EDINBURGH, the 19 July 1681. In presence of his royall highnes and lords of council:

The said Mr. Walter Smith, being againe called and interogat, if he ownes the paper called Cargill's Covenant, and the principles therein contained, will not answer. Being interogat if he ownes the Declaration at Sanquhar, and the principles therein contained, and the same being publictie read to him, he ownes the said Declaration in all the particulars therof, except that he does not look upon those persons to be the formall representatives of the Presbyterian church, as they call themselves, and as to that expression wher it says, that the king should have bein denudit many years agoe, for the reasons therein specifit; he does not like the word denude, but says, that what the king hade done should justifie the people's revolting against him, and except as to that part, as to the declairing of ware, says, he does not know if they war called or in a capacitie to declaire

ware; and thinks that thereby they intendit only to justifie the killing of any the king's forces in their owne defence, that should have assaulted them, least otherwayes it might have bein esteemed murder. As to these words, wher it calls the king ane usurper, and tyrrane, he declares he knowes certainlie the king is an usurper, and wishes he wer not a tyrant. Mr. Walter Smith confesses he owne the printed paper, called the Declaration at Sanquhar, and desyres the word denude, mentioned in his Confession before the councill, may stand, and declares the king is ane usurper.

Charles Maitland, of Haltoun, depons, That the paper containing Mr. Walter Smith's declaration before the councill upon the fyfteenth, and nyntieth of July instant, is truth, his lordship as then president of the councill, having questioned him, upon the interrogators therein mentioned, and the said Mr. Walter made answer to the same as is mentioned and contained in the same paper, and this is the truth, as he shall answer to God.

Sic Subscibitur, CH. MAITLAND.

Hugh Steinson, under clerk to the councill, depons conformis to my lord thesaurer deput, as to Mr. Smith's declarations before the councill the dayes therein mentioned, that the samen is truth, and was written by the deponent at the councill table, and this is the truth, as he shall answer to God. HUGH STEVENSON.

His Majesty's Advocate, for Probation against William Thomson, and William Coothill, adduced their owne Confessions underwritten:

EDINBURGH, the 12 July 1681. In presence of the Committee for Publick Affairs.

W. Thomson, servant in Frook, in Stirrinsyre, confesses he was at Bothwelbridge, but has not taken the bond, nor will not take it. Confesses he assisted to the taking of two prisoners furth of Airth imprisoned by Airth, being interogat if the ryseing in armes at Bothwelbridge was a rebellion, or if he owne the king's authoritie, or if he thinks the killing of the Archbishop was a murther, refuses to answer these questions, and refuses to signe this his declaration. Being asked if he thinks it lawful to kill the officers of the army, he speired at * the committie, if it was lawfull for them to kill the people of God, and lay the one to the other. Being asked if to save his tyff he would say God save the king, † answers he will not buy his tyff at so dear a rate.

Sic Subscibitur, LINLITHGOW.
BALCARRES. R. MAITLAND.
ELPHINSTON. A. RAMSAY.

* 'Asked of.' See in Jamieson's Etymological Dictionary the articles 'to spere, speir, spyre.'

† Fountainhall vol. 1, p. 318, of his 'Decisions,' says, under date, December 9th 1684. "At Criminal Court, ten of these wild West-

William Coothill, seaman in Bertownounes, confesses he was taken by some of the earle of Mar's men, with two pistols and a durk, about him. Being interogat, if he thiaks it lawfull to kill the king, answers the king has broken the covenant, and presses other persons to doe it by his forces, and therfor he thinks he deserves to dye, and disownes his authoritie upon that account, and confesses he cane subscribe but will not subscribe this his declaration.

Sic Subscibitur, LINLITHGOW.
BALCARRES.
R. MAITLAND.

Being farther interogat if he thinks the persons that killed the archbishop of St. Andrews, did right or wrong in it, declares he thinks the persons that did it, had the glory of God before their eyes.

Sic Subscibitur, LINLITHGOW, I. P. Com.

The saids Wm. Thomson and William Coothill being called before his royall highnes, his majesties high commissioner, and lords of councill, do adhere to their former declarations, emitted before the committie, and farther the said William Coothill sayes, that not only the king deserves to dye for breaking the covenant, and pressing others to do it, but because he has caused take the blood of many upon that account, and both refuse to signe, albeit they confesse they can writt.

Sic Subscibitur, CH. MAITLAND, I. P. D.

William Thomson and William Coothill, prisoners, adhere to their former confessions emitted in presence of the committie of councill, and disownes the king's majestie and his authoritie.

After leading and adduceing of the whilk Probation, the Lords ordained the Assyse to inclose and returne ther Verdict, and the saids persons of assyse having removed altogether furth of court to the assyse house, wher having reasoned and voted upon the poynts and articles of the dittay and probation above written, adduced for verifieing therof, and being therewith well and rylie advised, they re-entered againe in court, and returned ther Verdict in presence of the saids lords, wherof the tenor follows:

The assyse all in one voice be the mouth of William Dunbar Chancellor, finds Mr. Donald Cargill and William Thomson guilty of being at the rebellion at Bothwel-bridge, and of their treasonable declining of the king's authoritie,

country fanatics, are pannelled for adhering to the late proclamation against his majesty, and for disowning his authority. Six of them were so wise as to reail; the other four were so mad as to deny to say, 'God save the king: three would have done it, but by the pestilent society of the fourth were obdured; so all the four were sentenced, and hanged that same day in the Gallowlee, between 4 and 5 o'clock, in the afternoon."

and also finds Mr. James Boig, Mr. Walter Smith, and William Coothill, guilty of the owning of the treasonable principles mentioned in the treasonable paper called the Declaration at Sanguhar, and of declining the king's majesties authoritie.

Sic Subscrib. WM. DUNBAR, Chancellor.

After oppining and reading of the whilk verdict of assyse, the lords justice clerk and commissioners of justiciary therfor be the mouth of Andrew Cuninghame, denapster* of court, decerned and adjudged the said Mr. Donald Cargill, Mr. James Boig, Mr. Walter Smith, William Thomson and William Coothill to be taken to the market croce of Edinburgh, to morrow † being the twentie seventh instant, betwixt two and four o'clock in the afternoon, and ther to be hanged on a gibbet, till they be dead, and thereafter ther heads to be severed from their bodies, and the said Mr. Donald Cargill, Mr. James Boig, and Mr. Walter Smith's heads to be affix on the Netherbowe, and the heads of the saids William Thomson and William Coothill to be affix on the west port, and ther names memory and honours to be extinct, and ther armes to be riven furth and delate out of the bookes of armes, suez that ther posteritie may never have place nor be able herefter to bruck or joyse any 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, steadings, roumes, possessions, goods and gear whatsomever, pertaining to them, to our sovereigne lord, to remaine perpetuallie with his highnes, in propertie. Which was pronounced for doom, and wherupon his majesties advocat asked, and took instruments.

THE LAST SPEECH AND TESTIMONY OF THE
REV. MR. DONALD CARGILL.

"This is the most joyful day that ever I saw in my pilgrimage on earth; my joy is now begun, which I see shall never be interrupted. I see both my interest, and his truth, and the sureness of the one, and the preciousness of the other. It is near thirty years since he made it sure; and since that time, (though there has fallen out much sin, yet) I was never out of an assurance of mine intarest, nor long out of sight of his presence. He has dandled me, and kept me lively, and never left me behind; though I was oft times turning back. O! he has shewed the wonderful preciousness of his grace, not only in the first receiving thereof, but in renewed and multiplied pardons! I have been a man of great sins, but he has been a God

* See the Case of lord Loudon and others, A. D. 1684, and Mr. Hume's Commentaries as there cited.

† See the Case of Hackstoun of Rathillet, p. 791, of this volume.

of great mercies. And now through his mercies, I have a conscience as sound and quiet, as if I had never sinned. It is long since I could have adventured on eternitie, through God's mercy and Christ's merits; but death remained somewhat terrible, and that now is taken away; and now death is no more to me, but to cast myself into my husband's arms, and to lie down with him. And, however it be with me at the last; though I should be straitened by God, or interrupted by men, yet all is sure, and shall be well. I have followed holiness, I have taught truth, and I have been most in the main things; not that I thought the things concerning our times little; but that I thought none could do any thing to purpose in God's great and public matters, till they were right in their conditions. And O that all had taken this method! for then there had been fewer apostacies. The religion of the land, and zeal for the land's engagements, are come to nothing, but a supine, loathsome and hateful formality; and there cannot be zeal, liveliness and rightness, where people meet with persecution, and want heart renovation. My soul trembles to think, how little of regeneration there is amongst the ministers and professors of Scotland. O the ministers of Scotland, how have they betrayed Christ's interest, and beguiled souls! "they have not entered in themselves, and them that were entering in they hindered." They have sold the things of Christ, and liberties of his church, for a short and cursed quiet to themselves, which is now near an end: and they are more one, and at peace with God's enemies, after they have done all their mischiefs, nor* they were at first, when they had put hand to them. And I much fear that though there were not one minister on all the earth, he will make no more use of them; but there will be a dreadful judgment upon themselves, and a long curse upon their posterity.

"As to our professors, my counsel to them is that they would see well to their own regeneration, for the most part of them has that yet to do; and yet let never one think, that he is in the right exercise of true religion, that has not a zeal to God's public glory. There is a small remnant in Scotland, that my soul has had its greatest comfort on earth from. I wish your increase in holiness, number, love, religion, and righteousness; and wait you, and cease to contend with these men that are gone from us, for there is nothing that shall convince them, but judgment. Satisfy your consciences, and go forward; for the nearer you are to God, and the further from all others, whether stated enemies, or lukewarm ministers and professors, it shall be the better. My preaching has occasioned persecution, but the want of it will (I fear) occasion worse. However, I have preached the truths of God to others; as it is written, "I believed and so I preached," and I

* See in Jamieson's Etymological Dictionary the words nor and se.

have not an ill conscience in preaching truth, whatever has followed; and this day I am to seal with my blood all the truths that ever I preached: and what is controverted of that which I have been professing, shall (ere long) be manifested by God's judgments in the consciences of men. I had a sweet calmness of spirit, and great submission as to my taking, the providence of God was so eminent in it; and I could not but think, that God judged it necessary for his glory to bring me to such an end, seeing he loosed me from such a work. My soul would be exceedingly troubled ament the remnant, were it not that I think the time will be short. Wherefore hold fast, for this is the way that is now persecuted.

"As to the cause of my suffering; the main is "not acknowledging the present authority," as it is established in the supremacy and explanatory act. This is the magistracy that I have rejected, that was invested with Christ's power. And seeing that power taken from Christ, which is his glory, made the essential of the crown, I thought this was as if I had seen one wearing my husband's garments, after he had killed him: And seeing it is made the essential of the crown, there is no distinction we can make, that can free the conscience of the acknowledger, from being a partaker of this sacrilegious robbing of God, and is but to cheat our consciences, to acknowledge the civil power, for it is not civil power only that is made of the essence of his crown; and seeing they are so express, we ought to be plain, for otherwise it is to deny our testimony, and consent to his robbery.

"[After he was come to the scaffold, standing with his back towards the ladder, he fixed his eyes upon the multitude, and desired their attention; and after singing a part of the cxlviii. Psalm, from the 16th verse to the close, he looked up to the windows on both sides of the scaffold with a smiling countenance, requesting the people to compose themselves, and hear a few words that he had to say, which] (said he) I shall direct to three sorts of folk, and shall endeavour to be brief. First, all you that are going on in persecuting the work and people of God, O beware for the Lord's sake! and refrain from such courses, as you would escape wrath eternally, which will be a torment far beyond what we are to endure by the hands of cruel and bloody murderers. [Upon this the drums were beaten, at which he smiling said,] now ye see we have not liberty to speak, or at least to speak what we would; but God knoweth our hearts. But, O ye that are called ministers, and professors in the church of Scotland, who are wearied in waiting upon the Lord, and are turned out of his way, and run into a course of gross defection and backsliding I truly, for my part, I tremble to think, what will become of you, for either you shall be punished with sore affliction, I mean, in your consciences, because of sin, or else you shall be tormented eternally without remedy, which shall be shortly, if mercy prevent it not, which

I pray God may be the mercy of all these to whom he has thoughts of peace. All ye that are the poor remnant, who fear sinning more than suffering, and are begging for his returning to Scotland to wear his own crown, and reign as king in Zion, in spite of all that will oppose him, whether devils or men: I say to you that are thus waiting, wait on, and ye shall not be disappointed; for either your eyes shall see it, or else ye shall die in the faith of it, that he shall return; and "if you suffer with him, you shall also reign with him;" which reign will be glorious and eternal. I come now to tell you for what I am brought here to die, and to give you an account of my faith, which I shall do as in the sight of the living God, before whom I am shortly to stand. First, I declare I am a Christian, a Protestant, a Presbyterian in my judgment, and whatever hath been said of me, I die testifying against Popery, Prelacy, Erastianism, and all manner of defection from the truth of God, and against all who make not the scriptures, which are the word of God, their rule, that so they may commend Christ and his way to strangers by a holy and gospel conversation. The cause for which I am sentenced to die here this day, is my disowning of authority in the unlawful exercise thereof, when they instead of ruling for God, are fighting against him, and encroaching upon his prerogatives, by that woeful supremacy which my soul abhors, and which I have testified against since I was apprehended; and now again, I disown all supremacy over the consciences of men, and liberties of Christ's church. [Whereupon the drums were again beaten, and he kept silence a little, and then said,] Of this subject I shall say no more. Only I think the Lord's quarrel against this land is, because there has not been so much heart religion and soul exercise among either ministers or professors, as there seemed to be, when the land owned Christ and his truths; I wish there were more true conversion, and then there would not be so much back-sliding, and for fear of suffering, living at ease, when there are so few to contend for Christ and his cause.

"Now, for my own case, I bless the Lord, that for all that hath been said of me, my conscience doth not condemn me; I do not say, I am free of sin, but I am at peace with God through a slain Mediator; and I believe that there is no salvation, but only in Christ: and I abhor that superstitious way of worshipping of angels, and saints, contrary unto the word of God; as also I abhor the leaning to self righteousness, and Popish penances. I bless the Lord, that these thirty years, and more, I have been at peace with God, and was never shaken loose of it; and now I am as sure of my interest in Christ, and peace with God, as all within this Bible, and the spirit of God can make me; and I am no more terrified at death, nor afraid of hell, because of sin, than, if I had never had sin; for all my sins are freely pardoned, and washed thoroughly away, through the precious blood

and intercession of Jesus Christ; and I am fully persuaded, that this is his way for which I suffer, and that he will return gloriously to Scotland, but it will be terrifying to many; therefore I entreat you, be not discouraged at the way of Christ, and the cause for which I am to lay down my life, and step into eternity, where my soul shall be as full of him, as it can desire to be. And now this is the sweetest and most glorious day that ever my eyes did see. Now I entreat you, study to know and believe the scriptures, which are the truths of God, these I have preached, and do firmly believe them. O! prepare for judgments, for they shall be sore and sudden. Enemies are now enraged against the way and people of God, but ere long they shall be enraged one against another, to their own confusion. [At this the drums were beaten a third time. And then being taken to the north side of the scaffold, he stood a little during the space that one of the rest was singing. And then being carried to the south-side of the scaffold, he prayed. Thence he was brought to the east-side of the scaffold, and then he said,] I entreat you prepare you presently for a stroke, for God will not sit with all the wrongs done to him, but will suddenly come and make inquisition for the blood that has been shed in Scotland. [Then he was commanded to go up the ladder, and as he set his foot on the ladder, he said,] The Lord knows I go up this ladder, with less fear and perturbation of mind, than ever I entered the pulpit to preach. [And when he was up, he set himself down, and said,] Now I am near to the getting of my crown, which shall be sure, for I bless the Lord, and desire all of you to bless him, that he hath brought me here, and makes me triumph over devils, and men, and sin; they shall wound me no more. I forgive all men the wrongs they have done to me, and pray the Lord may forgive all the wrongs that any of the elect has done against him. I pray, that sufferers may be kept from sin, and helped to know their duty. [Then, having prayed a little within himself, he lifted up the napkin, and said,] Farewell all relations and friends in Christ; farewell acquaintances, and all earthly enjoyments; farewell reading and preaching, praying and believing, wanderings, reproaches and sufferings. Welcome, Father, Son, and Holy Ghost, into thy hands I commit my spirit."

Then he prayed a little, and the executioner turned him over praying.

THE DYING TESTIMONY AND LAST WORDS OF MR. WALTER SMITH, STUDENT OF THEOLOGY, WHO SUFFERED AT THE CROSS OF EDINBURGH, JULY 27, 1681.

"Dear Friends and Acquaintances,

"As I desire while in the body, to sympathize somewhat with you, in lamenting your various cases, and the case of the church, whereof ye are the sons and daughters; so I must lay this request upon you, and leave it

with you, that ye take some of your time, and set it apart particularly, to solace your souls, in blessing and magnifying your God, and my God, for the lot he hath decreed and chosen out for poor unworthy me, from eternity in time, and to eternity, in the immediate enjoyment of Father, Son and Holy Ghost, one God, incomprehensible and unchangeable in his being, wisdom, power, holiness, justice, goodness and truth; and that, because he hath made me a man, and a Christian; and now I set to my seal to all his truths, revealed in his word, and particularly these. First, That he is one God, Father, Son, and Holy Ghost; but alas! who can think of him? who can hear of him, or write of him aright? O! he is God! he is God! 2dly, That he made man perfect; and though we have destroyed and incapacitate ourselves to do any thing that is right, while out of Christ, yet we are under the obligation of the whole law, which the perfect rule of righteousness. 3dly, That my Lord (yea, through free grace, I can say, my Lord Jesus Christ) came to the world, to save sinners. And though I cannot say that I have been the greatest of sinners, yet I can say, that he hath covered, pardoned, prevented, and hid from the world, sins in me that have been heinous by many aggravations. 4thly, That except a man be born again, he cannot enter into the kingdom of Heaven; my friends, this is the new birth, this is the regeneration that I am speaking of, to which the great part even of professors (I fear) will be found strangers. 5thly, I set to my seal to the truth of that precious promise, Josh. i. 5, &c. repeated Heb. xiii. 3. For he hath said, "I will never leave thee, nor forsake thee," together with all the other promises to that purpose; and I am sure, he hath carried me through divers conditions of life, many various and singular difficulties and damping discouragements: but omitting those things whereof the profane persecutors may as much boast as to the outward as any, he hath led me through the several steps of soul-exercise, and the pangs of the new birth, into himself. This, this, my friends, is the cogizance and distinguishing character of a saint indeed: and by this, and this only, "We pass from death to life."

"And as I adhere to the Confession of Faith and work of reformation as I shall afterwards speak to; so particularly, I set to my seal to these truths in the xvii. chapter thereof, and the assurance of grace and salvation. Alas! the ignorance of this generation is great: My dear friends, I leave this as my last advice to you, make use of that book which contains the Confession of Faith, Catechisms, Sum of Saving Knowledge, Practical Use of Saving Knowledge, Directory for Worship, the Causes of God's Wrath, &c. And let none think this work below them; for the spiritual enlightening of the mind, which requires the literal with it, is the first work of this spirit, after we first begin to come to ourselves, or rather to what we were in innocency, and ought to be by grace. But

as to this, I do confidently refer you to the Shepherd's Sound Believer, which in my poor apprehension is the soundest and surest ye can meet with. And 6thly, I set to my seal to the Covenant of Grace, particularly that clause of it, Isa. lix. 21. "As for me this is my covenant with them, saith the Lord, my spirit shall be upon thee," &c. And here I leave my testimony against all Atheists speculative (if there be any such) and practical, and all mockers of godliness, all formalists and hypocrites, quarrel and enthusiasts, who either pretend to the Spirit, neglecting the word, or lean upon the word neglecting the teaching of the Spirit; and what shall I more say; but by what of truth I have in experience seen, I am bold to believe what I have not seen; his testimony is a ground sufficient, and there can be no deceit under it.

"And now I am to die a martyr; and I am as fully persuaded of my interest in Christ, and that he hath countenanced me in that, for which I am to lay down my life, as I am of my being. And let the world and biased professors say their pleasures, I am here in no delusion; I have the free and full exercise of reason and judgment; I am free of passion and prejudice, and, (excepting that I am yet in the body) I am free of Satan's fire and fury; I have no bitterness nor malice at any living; so that what I am owning and dying for, I am solidly and firmly persuaded to be truth and duty, according to my mean capacity. And this is the main point this day in controversy, upon which I was peremptorily questioned, and desired positively to answer, yea, or nay, under the threatening of the boots, viz. Whether I owned the king's authority as presently established and exercised? which I did positively disown, and denied allegiance to him, as he is invested with that supremacy proper to Christ Jesus only. And who knoweth not that at first he was constitute and crowned a covenanted king; and the subjects sworn in allegiance to him, as such, by the Solemn League and Covenant? This was the authority wherewith he was clothed; and the exercise of it was to be for God, religion, and the good of the subjects; and is not all this, as to God, and his people, overturned and perverted? But sadly, The whole of this pleaded for authority at present, is established on the ruins of the land's engagements to God, and to one another: But I say no more as to this. Consider things seriously, and ponder them deeply; zeal for God is much gone: look to it, and labour to recover it: your peace shall be in it; as to duty; though Christ's righteousness (I see) is the only sure foundation.

"I leave my testimony against malignancy, ungodliness, and profanity, and whatsoever is contrary to sound doctrine, professed and owned by the reformed Anti-Erastian presbyterian party in Scotland, whereof I die a member and professor, being fully satisfied and content with my lot. And as to my apprehending, we were singularly delivered by Providence into the adversaries hands, and (for

what I could learn) were betrayed by some, not were any necessary to our taking, more than we were ourselves, and particularly let none blame the lady St. Johnskirk in this. I have no time to give you an account of the Lord's kindness and tenderness to us, in restraining the adversaries fury; for they began very brisk, by smiting us ty all night bound, and expressly refused to suffer us to worship God, or pray with one another; until we came to Linlithgow. But the Lord hasteneth to come, be-ward of going back; wait for him, be not anxious about what shall become of you, or a resistent; he is concerned, his intercession is sufficient, get him set up, and kept up in his own room in your souls, and other things will be the more easily kept in theirs. Be tender of all who have the root of the matter, but beware of compliance with any, whether ministers or professors, or adversaries. As to my judgment (insignificant as it is) I am necessitated to refer you to the draught of a paper, which I drew at the desire of some societies in Clydesdale, intitled; Some steps of defection, &c. Beware of a spirit of bitterness, peremptoriness, and ignorant zeal, which hath been the ruin of some; and will be the ruin of more, if mercy prevent not. I was withdrawn from by some, as having given offence to them by my protesting against their way in a particular, wherein I am sure as to the manner they were wrong; and though they had been right, it was not a ground to have made such a separation from me, much less from those who joined with me? And if any division be longer kept up upon that account, they will find it a great iniquity, if rightly considered. I can get no more writtē; nor see I great need for it, for the testimony of martyrs is not your rule. Farewell.

From the Tolbooth of Edinburgh, July 27, 1681:
Sic Subscriptor, WALTER SMITH."

Being come to the scaffold, he accosted the multitude to this purpose. "All ye beholders who are come here upon various designs, I entreat you, be not mistaken ament the cause of our suffering this day; for however ye may be misinformed, yet it is of verity, that we are brought here upon the matters of our God; because we testified against the supremacy; and would not consent to the setting of Christ's crown upon the head of him, who had by usurpation aspired thereto; contrary to his former engagements." Upon this they caused beat the drums, which obliged him a little to silence; but beckoning with his hand, he said, "I shall only say something to three particulars: and first, ament that which some are apt to believe, that we are against authority; but we detest that, and say, that we own all the lawfull exercise of authority; and we hope there are none, that are Christians, will allow us to own the unlawful exercise, or rather tyranny of authority." At this the drums were again beat; and so he sang a part of the cill. Psalm from the beginning, and prayed; which done he turned his face to the cross, and said, "I bless the Lord,

I am not surprised, neither terrified with this death, or the manner of it. I confess, the thoughts of death have been sometimes very terrible to me, when I have been reflecting upon my mis-spending of precious time, yea, sometimes the strength of temptation and my own weakness, have made me herein to raze the very foundation of my interest; but my God builds faster, than he permits the devil and my false heart to cast down. I have had some clouds even since I came to prison, but blessed be God, these are all removed; for my God hath said to my soul, "be of good cheer, thy sins are forgiven thee;" and the faith of this makes me not to fear grim death; though it be called the king of terrors, yet it is not so to me: for this, that you think a cruel and sudden death, is but an inlet to life, which shall be eternal. Let none be offended at Christ and his way, because of suffering; for I can persuade you, there is more of Christ's help, and supporting grace, and strength in a suffering lot, than all that I ever heard of by the hearing of the ear; but now I am made to find it in my own experience, and I can say, "he is altogether lovely."

"But a second thing that I promised to speak to is, that I detest and abhor all Popery, Prelacy, Erastianism, and all other steps of defection from the truths of God, and turning aside to the right and left hand. Also I testify against all errors, as Quakerism, Arminianism, &c. and all that is contrary to sound doctrine, who walk not according to the scriptures, and make not the word and spirit of God their rule to walk by. I have lived, and now am ready to die, a Christian, a Protestant, and a Presbyterian in my judgment; therefore let none hereafter say, that we walk not by the scriptures; for once Britain and Ireland, and especially Scotland, were deeply sworn to maintain, what now they disown; therefore beware of standing in the way of others, seeing ye will not go in yourselves. Silly, I exhort all you that are the poor remnant, to be serious in getting your interest cleared, you that are in the dark with your case, take not flashes for conversion; study a holy conversation; be at more pains to know the scriptures, and believe them, be serious in prayer, slight not time, take Christ in his own terms, and resolve to meet with trials, and that shortly; slight not known duties, commit not known sins, whatever suffering ye may meet with, for your cleaving to duty, Listen to God and you will not be disappointed, construct well of him under all dispensations; weary not of suffering; lie not at ease in a day of Jacob's trouble. I have one word more to speak, to all that are going on in persecuting the way, and friends of Christ, and that is the very words of our Lord Redeemer, "whatever ye do to one of these little ones, ye do it unto me." I pray the Lord, that he may open the eyes of all the elect, who are yet strangers to regeneration; and also convince such of them as are fallen from their first love. Now, my friends, I have

this to say in my own vindication, that (how ever I have been branded by some, and misconstrued by others, yet) I can say in the sight of the Lord, before whom I am now to appear, that I am free of any public scandal; I say, I am free of drunkenness, I am free of whoredom, thefts, or murder; therefore let none say, that we are murderers, or would kill any, but in self defence, and in defence of the gospel. I truly forgive all men the wrongs they have done to me, as I desire to be forgiven of the Lord; but as for the wrongs done to a holy God, I leave these to him, who is the avenger of blood, let him do to them as he may be glorified. Now I say no more, but pray that all who are in his way, may be kept from sinning under suffering, and that every one may prepare for a storm, which I do verily believe is not far off.

"Then stooping down; he saluted some friends, and said, farewell all relations and acquaintances, farewell all ye that are lovers of Christ and his righteous cause. And beckoning to the multitude, he said farewell also. And so he went up the ladder with the greatest discoveries of alacrity, and magnanimity, and seating himself upon it, he said, Now this death of mine I fear not; for my sins are freely pardoned, yea, and I shall sin no more, for I am made through my God, to look hell, wrath, and devils, and sin eternally out of countenance. Therefore, farewell all created enjoyments, pleasures and delights; farewell sinning and suffering; farewell praying and believing, and welcome heaven and singing. Welcome joy in the Holy Ghost. Welcome, Father, Son, and Holy Ghost; into thy hands I commit my spirit."

When the executioner was about to untie his cravat, he thrust him away, and untied it himself, and calling for his brother, threw it down, saying, This is the last token you will get from me: after the napkin was drawn over his face, he uncovered it again, and said, I have one word more to say, and that is, to all that have any love to God, and his righteous cause, that they will set time apart, and sing a song of praise to the Lord, for what he has done to my soul, and my soul says, to him be praise; then letting down the napkin, he prayed a little within himself, and the executioner doing his office, threw him over.

THE LAST TESTIMONY OF MR. JAMES BOG, STUDENT OF THEOLOGY, WHO SUFFERED AT THE CROSS OF EDINBURGH, JULY 27, 1681, WRITTEN IN A LETTER TO HIS BROTHER.

"Dear Brother;

"I have not now time to write that which I would, but to satisfy your desire, and the desire of others who are concerned in the cause and work of God, that is now at this time trampled upon, I have given out my indictment to a friend of yours; and now I shall give you an account of the enemies persecutors

thereof against us: My indictment did run upon three heads. 1st, That I had disowned the king's authority. 2dly, That I said, the rising in arms at Bothwell-bridge, was lawful, and upon the defence of truth. 3dly, That I owned the Sanghar declaration, in the whole heads and articles thereof. And having again owned this before the justiciary and assizers, I held my peace and spake no more; because I saw what was spoken by others was not regarded, either by our unjust judges, or mocking auditors; all that our speaking did, was the exposing of us to the mockery of all present. But the reasons that were given in this, for our defence in the first head, were, that we could not own the authority, as now presently established, unless we should also own the supremacy, which the king hath usurped over the church. By our doing of this, we should rob Christ of that which is his right: and give that unto a man which is due to no mortal: the reason is, because the supremacy is declared in their acts of parliament, to be essential to the crown; and that which is essential to any thing, is the same with the thing itself; so that in owning the authority, we are of necessity obliged to justify them in their usurpation also. But there is another argument which to me is valid, though I spoke it not before them: and it does not a little trouble me, that I should have passed it. The advocate in his discourse to the assizers, among other things, said, that we were overturning these acts and laws, which they (the assizers) had consented to, and were owning. Now I suppose their consent to the present acts and laws was never formally required of them, but that which is taken for their consent, is their simple silence, when these acts were made and published, and owning these parliaments as their representatives, so that I may clearly argue from this, that even in their own sense, my owning of the present authority now established as lawful, and the present magistrates as my magistrates, is a giving my consent to the present acts and laws, and so consequently to the robbing of Christ of that which is his right. As to the second, it being but one particular fact, deduced from that principle of self-defence and this principle being as positively asserted by all of us, I look upon the principle to be as expressly sealed with our blood, as that particular fact of rising in arms at Bothwell-bridge is. As to the third, it being a deed consequential from the first, I look upon them both to stand and fall together, and he that owneth the first, must of necessity own the last also. And as to that of declaring of war, I did always look upon it to be one and the same though differently expressed, with that contained in the paper found at the Ferry, and that the main design of it was, to vindicate us before the world, in our repelling unjust violence, and clearing us of these aspersions, that were cast upon us, viz. The holding as a principle the lawfulness of private assassinations, (which we disown,) and murdering all those who are not

of the same judgment with us. These are the truths, which we are to seal with our blood, to-morrow in the afternoons, at the cross of Edinburgh. As to other particular actions, we declined to answer positively to them, as that of the bishop's death, we told them we could not be judges of other mens actions: as to the excommunication because we declined them as not competent judges, to cognosse upon an ecclesiastic matter, they did not proceed upon it.

And now, dear brother, you may see our quarrel clearly stated, to be the same that Mr. James Guthry laid down his head for; beside whose, mine and my other two friends heads are to be set. There were many other things past in private betwixt me and Mr. William Paterson, sometime my regent, now council clerk, with some others, who strongly assaulted me with their snares, but now I hope I may say, that "my soul hath escaped like a bird out of the snare of the fowler." And as to your second desire of knowing how it went with my soul; many and strong have been the assaults of Satan since I came to prison, but glory to God, who hath not been wanting to me in giving me assistance, yea, many times unsought, and he is yet continuing. And I hope shall do to the end, to carry me above the fear of death, so that I am in as sweet a calm, as if I were going to be married to one dearly beloved. Alas, my cold heart is not able to answer his burning love! but what is wanting in me, is and shall be made up in a Saviour complete and well furnished in all things appointed of the Father for this end, to bring his straying children to their own home, whereof (I think I may adventure to say it) I am one, though feckless. Now I have no time to enlarge, else I would give you a more particular account of God's goodness and dealing with me; but let this suffice, that I am once fairly on the way, and within the view of Emmanuel's land, and in hopes to be received an inhabitant there within the space of 26 hours at most. Farewell all earthly comforts, farewell all worldly amities, farewell all carnal desires, welcome heaven and everlasting happiness, &c. I have no more spare time: Grace, mercy and peace be with you, Amen.

From Edinburgh Tolbooth, July 27, 1681.

Sic Subscritur, JAMES BOIG."

THE TESTIMONY OF WILLIAM THOMSON, WHO LIVED IN THE SHIRE OF FIFE, AND SUFFERED AT EDINBURGH, JULY 27th, 1681.

"Men and Brethren;

"I being a prisoner for Christ's sake, and for my adhering to truth, being taken at Alloa, coming out of Fife from hearing of the gospel preached by Mr. Donald Cargil, the last sabbath of June, this present year; and not knowing when I may be taken and murdered by the stated enemies of our Lord, (for they neither walk after the equity of their own law, nor God's law,) I have for fear of inconveniences,

laid hold of this opportunity to set down, under my hand, or from my mouth, an account of my life and conversation, and my testimony to the truth of Christ, and against all the abominations of the times.

“ I was, before the year 1670, running away with the rest of this generation, to God-provoking courses; and about that time, when I saw the people of God going to draw together to adventure their lives in the Lord's quarrel, the Lord took a dealing with me at that time, so that I could neither get night's rest nor day's rest, till I resolved to go with them. And on the other hand, was afraid lest I should have been the Achan in the Lord's camp; but again I remembered the Lord's promise, that is held out in the word.—“ return unto me, and I will return unto you, saith the Lord of Hosts.” Mal. iii. 7. Now, I do with all my heart bless the Lord, for his wonderful workings with me since he began with me. I think when I look on his dealings since that time till now, I must say, that I am a brand plucked out of the fire. O that my heart and soul could praise him, for all that he hath done for me! And now I am content to die a dyvour to free grace, and in Christ's debt. I was charged with being guilty of rebellion against their prince, I was answered, I was not so, for I was there a prisoner of Jesus Christ, and for his sake; and told them, I adhered to his covenant, and all things in it. I am not convicted from the word of God of any crime, as to him whom they call king; nor any thing worthy of death, committed against any man, either in thought, word, or deed. So my blood, and all cry, with the rest of the innocent blood shed in the land, for vengeance from heaven, on the inhabitants of the earth, great or small, who are in the least accessory thereto, ay and while they repent. It is not my doing, but their own that hath procured it; and God is just to seek after them for the same; neither is it in any man's power to forgive that, as being a breach of God's holy law, without repentance, nor then neither, for the furthest they can come is, but to declare unto them from God's word, that that and their other sins shall never be charged upon them, if they have truly received Christ upon his own terms, and walked worthy of the Lord, unto all well-pleasing. But now the thing is clear, the ground whereon they intend to take away my life, is the disowning Charles Stuart for my king, because, he will have no homage upon the account of the covenant from me, or any other, and God only requires the performing of vows, and keeping and fulfilling the covenants, Psal. 1. So in this case, I cannot serve two masters, and I resolve to obey God rather than man.

“ Now, I here as a dying man, ready to step into eternity, having health and strength and being in my right mind, declare, I adhere to the Protestant religion, as that which is God's true religion, and the Christian religion. I adhere to the holy rule of the word of God, the scriptures of the Old and New

Testament, containing the will of God to man, and avert man; and that the scriptures are a full rule of faith and manners to us. I adhere to the work of reformation in Scotland, to the Covenant National and Solemn League, the Solemn Acknowledgment of sins, and Engagement to Duties, the Confession of Faith, in regard it agrees with the foresaid writings; the larger and shorter Catechisms, as most reasonable, sound, and according to the scriptures, and well worth the reading, considering and practising what in therein set forth. I say, I adhere to the Rutherglen Testimony, to the paper commonly called Mr. Donald Cargill's Covenant, of the date of June 1680. I adhere to the original copies of these papers, as they were corrected and revised by the authors. And likewise I adhere to every sound paper, tending to the good of religion; as the Directory for Worship and Catechising; and I adhere unto the doctrine, discipline, worship, and government of the church of Scotland. I bear my testimony unto all the lawful wrestlings of the people of God for truth, and in the defence and preservation of their civil, natural, and divine rights and privileges, contained and held forth in the foresaid papers, against all encroachers thereupon, and betrayers thereof; especially by the sword, as a mean most lawful and commended of God, to be made use of in that quarrel; which is to be carried to preachings, and other assemblies of the Lord's people, and as much the more, as the enemy discharges it, as the case now stands.

“ In the last place, I give my testimony and protestation against all wrongs and injuries done to God and his people throughout the whole world this day; and more particularly against all that hath been done in Scotland, since the beginning of the work of reformation unto this day, in prejudice of God's glory, his work and people; and especially these crying sins. 1st, The usurpation of the worship of God, profanation of his holy things, mocking, misbelieving, and belying of God, and swearing as if there were no God, yea, which is worse, saying he approves of all that they do. O this heaven-condemning generation! 2dly, Against the defrauding, mocking, murdering, and oppressing the people of God, in their bodies, consciences and estates, and punishing them as evil doers; yea, as the vilest monsters of cruelty, and that only for following their duty, and making them to stink, as it were, above the ground; and making their names to rot by calumnies and reproaches, and doing all they can to drive them to sin; and then blaming them as the main instruments of all the mischievous villainies and abuses in the land; so that it is come to that with it, “ the man that departs from iniquity, makes himself a fool.” And scarcely can those who design honesty get a night's quarters in any house in the land; so that the people of God are become “ a scorn to their foes, and a fear to their friends, and especially reproached of those who are their near-

est neighbours," as the psalmist complains. 3dly, I leave my testimony against all that make peace with the stated enemies of God, these Christ-despisers, these heaven-contemners, and non-such fighters against God; whether by words, oaths, or promises; they being persons worthy of no credit nor trust, who will not keep faith nor trust upon any account, but where it may contribute for fulfilling their lusts, and prosecuting their wicked designs and half-hatched enterprises. If they were brought to straits, possibly they might feign themselves but he is unwise that will give them so much trust as a dog; as Solomon says, "when he speaks fair believe him not, for there are seven abominations in his heart." 4thly, I leave my testimony against all that contribute of their means, for the down-bearing of God's works and people, and upholding his and their enemies, seeing it is so expressly against the covenant, and in that case they being called to suffer, and not to sin, to which practice is annexed a gracious promise; "he that loseth life, lands, goods or relations, for Christ's sake, and the gospel's, shall receive an hundred fold in this life, and in the world to come life everlasting." In the last place, I bear my testimony to the cross of Christ, as the only desirable up-making and rich lot of the people of God this day in Scotland. O it is the portion of poor things who desire to seek God, and design honesty in the land! I think they want a good bargain of it that want it; and I think they want nothing that have it, and get leave to carry it heartily, and his presence under it. I would advise you all to take it on; I dare say thus much for your encouragement, that it is easy and sweet. There is no better way to carry the cross right than to cast all our care upon Christ, and trust him for all things, and use our single endeavours in the matter, and speak what he bids us, and obey his voice in all things. Now, I declare I have all ungodliness. Now farewell all things, wherein I have been troubled with a wicked world, and evil heart of misbelief, a subtle, powerful, and malicious devil, and tempted with a company of men, who have shaken off the fear of God. Now, welcome Lord Jesus, into thy hand I commit my spirit.

Sic Subscribitur, WILLIAM THOMSON.

THE LAST TESTIMONY OF WILLIAM CUTLER, SEAMAN IN BORDOWSTOUNESS, WHO SUFFERED AT EDINBURGH, JULY 27, 1681.

I here, as one ready to step into eternity, and one of the subjects of a kingdom covenanted to God, and one of Christ's sufferers, enter my protestation, and give in my testimony against all that hath been done against Christ's reigning, and the thriving of his kingdom in Scotland, since the beginning of the work of reformation. And more particularly, against all the several steps of backsliding: as,

"1. The admitting Charles Stuart to the exercise of kingly power, and crowning him,

while they knew he carried heart-enmity against the people of God, and while in the mean time there was so much of his treachery made known to the parliament, by his commissionating James Graham earl of Montrose, to burn and slay the subjects of this kingdom, that would not side with, or would withstand him, in the prosecuting of his wickedness; which is recorded in the causes of wrath, and the remonstrances of the gentlemen, ministers, and commanders attending the forces in the west, in the year 1650.

"2. Against the unfaithfulness, connivance, and compliance of ministers, and others, at the wickedness perpetrated in the land during the time of Cromwell's usurpation; for, as I am informed, few testified against him, for trespassing all the ingresses of Jesus Christ under his feet, in giving a toleration to all sectaries which was to set up their thresholds beside Christ's, and their altars beside the Lord's, in a land covenanted to God, never to suffer the like, and lying under the same bonds.

"3. Against the public resolutions, for the bringing in malignants to the places of power and trust; which have been the rod in God's hand above the heads and upon the backs of God's people, ever since they lusted after them; and now, I suppose they are convinced, that God hath given them on the finger ends for it: but we have not seen them confessing before God and his people in public, that they have added this sin to all their other sins, in asking them a king, whereas the Lord was their king.

"4. I bear my testimony against that unparalleled practice of ministers, in quitting their charges; and that, which doth more aggravate their guilt, at his command, who had no power to act, nor right to be obeyed, neither in that, nor yet in civil things; for then he had unkinged himself; and their going away without almost ever a testimony who should have been the main men that should have told the people what to do.

"5. I hold it as one of the causes of God's wrath against the land, and one of the causes of God's breaking and scattering that poor handful of men at Pentland, that renewed the covenant at Lanark, and did not keep his interest out of it; for it only binds us to remainers, not to its destroyers.

"6. I bear testimony against the procedure of the ministers when they came to the fields again after Pentland, because they did not first begin with public and private fasts, and make up the hedge and gap for the Church of God in Scotland: and then only preaching to cases of conscience, and not catechising the people, nor informing them in the duty of the day; but did let them pay curates stipends, and other revenues of that nature. But I think they were engaged to God under the pain of losing soul and body, in the day of God's fearful judgment, to tell the people to chase them out of the land. Seeing prelacy was abjured and cast out like an abominable branch, as it

was, were they not worthy to die the death, that would, against so much light, defile God's land with that abjured abomination? but forsooth, to this day, they must be fed like birds in a cage upon the fattest in the land, and the spoils of Christ's crown.

"7. I bear my testimony against that course carried on by the ministers; their conniving at, countenancing of, and complying with these indulged, that have quit Christ and taken on with another master.

"8. I bear my testimony against their treachery at Bothwell-bridge, in stopping the drawing up of the causes of God's wrath, and keeping a fast-day, and changing their declaration; and in, hindering the purging of the army.

"9. I bear my testimony against their treachery at Edinburgh, when a proclamation came out to the view of the world, blaspheming God's true religion, and declaring that all that belonged to God was due to Charles Stuart, which is the plain sense of the act; and they sat in an assembly, and voted for a liberty coming from him to preach by; though the very same day that that was proclaimed, two of their more worthy and faithful brethren were murdered, O! how much pomp and jivialty was that day in rejoicing over the ruins of the work of God and his people, yea, over himself? There was first a scaffold made on the east side of the cross, and a green table set down on it; and two green forms; and then the cross was covered; and about twelve hours of the day, the pursuivants, and Lyon heralds, the Lyon king at arms, and eight trumpeters went up to the cross, and fourteen men on the foresaid scaffold, and seven of them with red gowns of velvet, and seven with black, and then that act was read, and at night the bells were ringing, and bonfires burning.

"10. I leave my testimony against them for running away and leaving God's flock after Bothwell-bridge, when they had drawn them to the fields. Does not the Scripture say, that they who are in the watchmen's place, should warn the people, when they see the sword come; and have not the ministers of Scotland had the first hand in all these courses of backslidings? Well, their sins are known to be no more sins of weakness, but sins of wickedness.

"11. I bear my testimony against them, because they did not join with their brethren in the work of the day in preaching to the people in the fields, with Mr. Richard Cameron and Mr. Donald Cargill. And will ye tell me, although there were never one to open their mouth in that thing, does not the work of the one confound to silence, and the work of the other justify and plead for them? But there is one thing, I have learned from the practice of all this people, and God's dealing with them. They have sought their own, and one another's credit, more than God's, and he hath discovered their wickedness in their ugliness.

"12. I bear my testimony against their ob-

stinacy, in refusing to return and amend their manners. They hold fast wickedness, and refuse to let it go, and that against the light of God's word, their own consciences, their vows and engagements to God, the cries of bloodshed, the cries of wrong done to God and his work, and against these their former preachings and practices; that they will not come out and rid the ground, so to speak, and seek out the causes of God's wrath; and set days of humiliation apart, and see that they be kept, and renew their engagements, and carry themselves like ministers of Jesus Christ afterward. Is this erroneous? Is not this according to Presbyterian principles? Does not the Confession of our Faith say, those who offend the church, and their brethren, shall make their repentance as public as their offences have been? Is not this the plain meaning of that article, yea, the very words almost of the Confession of Faith, chap. xv. art. last? Without which thing be done, (if any would take my counsel, who am looking to receive the sentence of death every hour), I would say, meddle not with them, for they have not only sinned against the Church of God, and their brethren, and their own souls, but against God: and have they not been light and treacherous; whereof many instances may be given. Have they not polluted the sanctuary? Have they not done violence to the law? Have they not been unfaithful? Are they not walking very openly amongst God's stated enemies, while the people of God dare not be seen? I fear, if they make not haste to come off these courses, that God's wrath shall overtake them, ere it be long. And lastly, I bear my testimony against them, for their untenderness to weak consciences, and making use of their gifts and parts to wrest the word of God, to put out that light, which God has given poor things; of which I, among others, have a proof; for one of them came into the prison, and told me, that he had been dealing with him, who had been pursuing us to death, (the king's advocate), that he would not take innocent blood upon him; and out of love and tenderness to our souls, he came to pay us a visit. and said, he was neither a curate nor an indulged man, but a minister of the gospel: so he said, that he would be well advised what we were doing, for the advocate had said, we were shortly to be before the criminal court. And I asked, what he advised us to do? And began to tell him the ground whereupon we were accused, which was this, that Charles Stuart, having broken and burnt God's covenant, and compelled all that he could by his forces to do the like, and slain many upon that account, upon this head, I declined his authority; and being hard questioned, confessed, that I thought it lawful to kill him, but I did not say by whose hands: and he said, all that would not free me from being his subject, and instanced Zedekiah's case to prove it: but I was not in case to speak to him, (being confused with a distracted man who was in with

us), only I told him, there was as great a difference betwixt that of Zedekiah, and this in hand, as east was from the west. And he called us James and Jambres who withstood the truth, when we would not hear him; and said, there was no such thing as any condition holden out in the form and order of the coronation, that did free us from allegiance to Charles Stuart upon that account. But what? Do they think, that every one can reason and debate with them, or else that they are not Christians, but gainstanders of the truth? Hath not God given to every man his measure of light and grace both? If they know not this, and walk not accordingly, they were never worthy to be ministers of the gospel. He said, that he would send me any of the ministers whom I pleased to call for: I said, that I heard tell Mr. Donald Cargil was taken, would he send him to me, and I would take it as a great kindness off his hand? But he said, that he had taken a way by himself. But what shall I say, my heart is like to sink, when I think on them, and the case of the land. O I think it is a desperate like case! Only I know God can, and I hope he will cure it.

"Next, I leave my testimony against all that side with or strengthen the hands of the adversaries of the Lord, in less or more, against clear conviction from the word of God, or sound reason; and particularly against this duke, that bold and truculent Papist, who hath defiled the Lord's land with his altars and images.

"Next, I leave my testimony against the gentry and commonality, for letting so much innocent blood be shed, some of which ranks, I think God hath a turn to put in their hands yet, if they would espouse his quarrel, and turn to him with all their hearts, and not suffer the work to go as it does; but indeed they must keep company with God's stated enemies, and learn the court fashion: I will tell you one thing, ye have lost the manners of the court of heaven, by learning the manners of the courts of men. O what think ye to do? Or how think ye to be countable to God? Will ye but speak your minds, who, ye think, hath the best end of the controversy? Will ye let the fear of men and the devil prevail with you more than the fear of God? Or what think ye this duke would do to you, when he sees his opportunity? Will ye trust bloody Papists? It may be, ye may be put to suffer on worse accounts yet, if ye will not own God and his people: but there are but very few of you now, who are ought but mockers. Will ye turn to the Lord with all your hearts. Is it any shame to you to take shame to yourselves, in glorifying God by confessing your sins, and turning from them? but will you tell me now, who, think ye, can be at one with you, while ye are standing out against God. Will ye read but the first chapter of Isaiah, and consider it, and the first two chapters of Jeremiah, the second of Joel, the prophecy of Haggai, Isa. xxiii. Ezek. viii. O consider, and if not, the Lord and you take it between you. Read and consider, Psal. l. 5.

"Now, what shall I say to you, who own and adhere to God's cause, against all his enemies? O that I could let you see the inside of my heart! Will ye learn Christianity? seek the Lord and get him on your side. I think, it is a good token of a sanctified heart, that longs more to be in God's company nor other folks, that sees the worst of evil lies in committing sin. Beware of heart risings and grudgings one against another; know, that there is a great difference between sins of weakness, and sins of wickedness; ye may not mark every failing, for if ye do, ye shall not have two to stay together in Scotland. O but there be much need of the gospel, and these ministers will not come out and contend for Christ! without which, though I were at liberty, God knows, I durst not meddle with them, and I would rather keep aback from them, nor other folk; for I think, there are many of them either unconcerned, or then dreadfully misled, for how can it be otherwise, not bearing with tender consciences, for they will rather strive to break folk than build them up, but how can any that has love to Christ look on them with good will: I do verily think, if ever they turn again, the world shall hear tell of it. It is beyond all controversy, that they have quit their first works, and their first love. O will ye learn to be sober and grave! Cleave to your covenants and engagements: I say, mind your engagements; look what becomes of covenant-breakers. I would say unto you, take no courses by the end till God give you clearness; but indeed, I know, that God will reprove many in this generation, because they put away light from them, Beware of these ministers of Charles Stuart, these indulged and these Prelatic, these mockers of God, and contemptners of the godly, these Christ-deserters, these undervaluers of heaven, these scandalous and insignificant time-servers, whom God hath blasted to the conviction of all the generation, that see any thing; these monsters of men, the disgrace of the ministry, the just contempt of the generation. God hath sometimes had a church without a ministry, but he never had a ministry without a church. Doth not the scriptures say, That for many days Israel shall be without a priest, without a teraphim, &c. Do we not see in the Revelation, the two witnesses slain, and lie three days and an half: But, O cry to God, That he would send forth labourers to his vineyard: for verily the harvest is great, but the labourers are few. If there be a casting at the gospel on the people's side, then I think they shall be in extreme hazard of losing their soul if God's mercy prevent it not; for then they refuse to be guided by God: but if when the hireling sees the wolf come, he run away, and leave the sheep, because he is an hireling, then I think the mercy of God is engaged for the sheep, because they have no shepherd. It is not the first time that Israel has been scattered as sheep having no shepherd; but it is as sure as the sun shines, none can keep himself nor guide himself: it is

not in him that walketh to direct his steps. And God hath shewn a joyful light to the upright; and he has said, Him that sitteth in darkness, and hath no light, let him trust in the Lord and stay himself upon his God. But could the spouse rest in Jerusalem, and her husband not to be found? it is beyond debate, that she made all the fields ado before she wanted him. Can the spouse see another wear her husband's cloaths, and be well satisfied? yea, one that has robbed, spoiled, and shut him to the doors with disgrace, contempt and blame, and as one unworthy to manage the affairs of his own house; and has defied him to take any thing back again, and has set up legs and arms, heads and hands, and quarters of the children, as trophies of victory over the good men of the house, and has triumphed with spite and contempt, and is only seeking it of the poor widow, the wife and the heirs to be quiet, and accept of him for a husband and father: so I say, shall the wife and children of such a husband and father be peaceable to see this? I trow, there are few earthly folk would do so: But O! who can shew the difference here, as to searching out it cannot be. The Lord keep you from dwelling at ease, under cover, with such an one. Beware of making any treaty of peace with such a robber and murderer as this; beware of feeding these soldiers, or giving them quarters, when they come to your houses. O but the king of Assyria know well enough, that the kings of Israel were merciful kings! If ye will not use the sword at God's bidding, God will put it (as he hath) into the hands of his and your enemies, to use it against you. Indeed I think, till Saul's sons be hanged up before the Lord, the plagues of famine shall not be stayed from Israel.

"Now, in the next place, I witness by this my testimony, my adherence to the scriptures of truth, the Holy Bible, the Old and New Testament, which has been made sweet to me. The fault is not in them that we understand them not, but in us, and this we have as our old father Adam's heirship. I witness my adherence to the Covenants, National and Solemn League; Confession of Faith; only there is in it something concerning the magistrate's calling a synod of ministers, by virtue of his magistratical power, which ought to be cautiously understood according to the General Assembly's explication. I adhere to the Catechisms larger and shorter, Psalms in metre, Directory for Worship, Form of Church Government; the doctrine of the church of Scotland, as it is held out in the word of God, and laid down in the formal papers. I adhere to all faithful testimonies for truth in Scotland; of one sort and another, and particularly these three, the papers found at the Queen's ferry of the date of the 8th of June, the Senquhar Declaration, the Rutherglen Testimony, and every other paper tending to the good of religion, particularly the Causes of Wrath, and I request all to read and consider them. I bear my testimony against them that

say, that I am a self murderer. because I spake that which God gave me to speak, before his adversaries; and I think that it is my great mercy, that he hath helped me to be free before them in matters of truth, relating to the disowning of them, and standing to our God's, and our own right. This paper I leave as my testimony, and formed and deliberate thoughts; and request all to bear with faults of weakness, especially when the sword of the adversary is above a man's head. Now farewell world, and all things in it. Welcome Lord Jesus Christ, into thy hands I recommend my spirit.

See *Subscriber*, William CURRIE."

Of this Trial, Fountainhall, in his Decisions, says only:

"July 26, 1681. Mr. Donald Cargill and four of his disciples were condemned for rebellion, and disowning the king, and hanged the next day." 1 Decisions, 148.

But the following passages in the same volume concern Cargill:

"June 4, 1669. A Council was called extraordinary upon this news of the riot committed by some women at Queen's-ferry, who revolted from some of the king's forces one of the ministers who preach at the field conventicles, called Mr. Donald Cargill, and Henry Hall, a fever in Tivisdale, who was wounded and taken, but died of his wounds; only their papers were seized on, and a new covenant, which was printed. The Council sent general Dalziel with a party to make all the strict inquiry he could, to apprehend Cargill the minister, and to take them prisoners who had defended him."

"Oct. 5. Mr. John Wansie, keeper of the Tolbooth, got a severe reproof from the council, for suffering one of the women to escape out of prison who had assisted Mr. Daniel Cargill's escape at the Queen's-ferry in June last, with certification he should not only be deprived, if he felt in the like, but also he and his cautioners most rigorously punished."

"Jan. 18th, 1682. By Act of Privy Council, the Solemn League and Covenant, with Cargill's Covenant, and several other papers, were this day solemnly burnt at the cross of Edinburgh, the magistrates being present in their scarlet robes. Some wondered at their policy in reviving the memory of so old and buried a legend as the Solemn League, which was burned in 1663, and set people a work to buy it and read it; and for Cargill's ridiculous Covenant, they had about a twelve-month before this, caused print it; though that was only in contempt of it."

Shiels, in his "Hand let Loose," is very copious concerning refusal to pray for the king. The following curious and characteristic extract, which conveys a satisfactory notion of his sentiments, arguments, and style, will perhaps be read not without interest:

"To vindicate the scriptures and refuse of such compelled and extorted detentions in pray-

ing for tyrants, I shall offer these considerations:

"1. The imposed form of it (which as it is found in the original from whence it is taken, is only paraphrastically expounded, God save the king; and catechetically applied to tyrants, being in the native sense of the words of this signification, Let the king live; which is a very improper wish for men of death; of whom God says they shall die, and the law says, they shall die for their murders and capital crimes) must be taken either as an adulatory compliment; or a congratulatory honour; or a precatory benediction. The first as it is extorted most illegally, so it can be tendered neither civilly, nor sincerely, nor christianly; but all ingenuous men would think it a base imposition, to be forced not only to subject themselves to their tyrannical oppressors, but to flatter them as if they were not such. Whatever they may force the mouth to speak dissemblingly, they can never compel the heart to think such wishes are due to them; and so they can never be cordial, nor consistent with candor, and to interpose the holy and dreadful name of God, in a dissembling compliment, to flatter base men, is a horrid mocking of God, and a heinous taking his name in vain, contrary to the third command. If it be a congratulation (as always it is used in scripture, and in cases formerly; being never imposed on men, by way of compulsion, before this set of tyrants started up, that know they can get no deference of honest men, but by extortion) it is the more abominable; not only for the hypocrisy that is in it, but the blasphemy, in giving thanks for the promoter of the devil's interest, and the destroyer of Christ's, and the liberties of mankind. What have we to congratulate him for, but for overturning our laws and liberties, and oppressing us in most grievous tyranny? Besides, to give the vilest of men, when exalted, any congratulatory honour, is contrary to the fifth command, as is shewed above. "And it were a forsaking of the law, thus to praise the wicked, since they that keep the law, will contend with them," Prov. xviii. 4. If it be a benediction, we cannot bestow it upon one whom our father curses, our mother curses, and all our brethren. It is no less preposterous to bless whom the Lord declaredly curses, than to curse whom he blesses. "The curse of the Lord is in the house of the wicked," Prov. iii. 33. We cannot then bless that house. Nor can we bless them that our mother curses, and cries for vengeance against, as she did against Nebuchadnezzar, Jer. li. 34, 35. Nor them against whom the blood of our dead brethren hath a mortal cry. "How long, O Lord, holy and true, dost thou not judge and avenge our blood?" Rev. vi. 10. And the vexed spirits of our brethren, yet howling under the same yoke, are putting up before the throne of grace, the same continued cry, with incessant importunity. "How long, how long shall the wicked triumph? How long shall they break

in pieces thy people? O God, to whom vengeance belongeth?" Psalm xciv. 1—4. Yes God hath said it, and we must not contradict it in our practice, against all tyrants that wrest judgment, and say unto the wicked, "Thou art righteous: him shall the people curse, nations shall abhor him," Prov. xxiv. 24. And this must stand registred, as the everlasting clause of all Zion's haters, to which all her lovers must say, Amen, that they shall be as the grass upon the house tops, and never have the benefit of the Church's benediction, Psal. cxxxix. 8. "Neither do they which go by say, the blessing of the Lord be upon you: we bless you in the name of the Lord." This one word may be a sufficient supersedeas from blessing any of the enemies of God, or of the Church, while acting in a declared opposition to God for the destruction of his people and interest.

"2. Either this, 'Save the king,' as they mouth it, and demand the repetition of it, is a prayer, or it is not. If not, it must be a dreadful profanation of the name of God, to be commanded to speak to him, and yet not to pray. If it be a prayer, we would expect another way of dealing with us, if they really desired the benefit of our prayers, than a threatening us with death, if we did it not. And if they did desire it, as Darius did, "that we might offer sacrifices of sweet savour unto the God of Heaven, and pray for the life of the king and of his sons," Ezra, vi. 10, we could not refuse to pray for him, so far as we might consist with that prayer of the same Darius, in that same decree; verse 12, "that God may destroy all kings and people, that shall put to their hand to alter and destroy the house of God." We can pray no prayer inconsistent with this; and to pray that God would save this king, and yet destroy all kings that put to their hand against his house, were to pray contradictions. But they know they deserve no prayers, and must force them, if they get them. And all the world knows, that compelled prayers are no devotion; and if they be no devotion, they must be sin; imposed prayers are not the prayers that God will hear and accept; and if we have not the faith of acceptance in them, they must be sin; for whatever is not of faith is sin, Rom. xiv, last verse. All prayers which God will hear, must proceed from the heart voluntarily and fervently, in spirit and in truth, with the whole heart; but imposed and compelled prayers cannot be such, especially when they are not only by them imposed, but prescribed as to the form of them, which sets and forms prescribed by men, and such men as usurp a supremacy over the Church, cannot be submitted to, according to the word of God, and principles of our reformation.

"3d. That infallible proposition of the Apostle, whatsoever is not of faith is sin, must be urged yet a little further: and that with a reference, both to the person required to be prayed for, and to the matter of the duty more ge-

werally. First, if we cannot pray for this man, neither as a Christian, nor as a king, then we cannot satisfy this imposed demand; for it will not satisfy for him as a heathen; but we cannot in faith pray for him, either as a Christian or as a king. Not as a Christian, for besides that he is an excommunicate apostate (by a sentence which we believe stands yet ratified in heaven, pronounced by a faithful servant of Christ) and a Papist, which, as such, can no more be prayed for, than the pope as pope; for whom, and all the limbs of Antichrist, the only prayer that Protestants can pray, is, that the Lord would consume him with the spirit of his mouth, and destroy with the brightness of his coming. 2 Thess. ii. 8. (we cannot reconcile the prayers of some, that pray against the pope and his supporters, and upholders of his tottering kingdom, and yet for this his Antichristian-vassal) his rage and resolution in prosecuting a war against Christ and his followers, is such, that if we may make comparisons, our faith will have little more ground to pray for James, than Christians of old could find for Julian the apostate. Nor as a king, for that we cannot do, because he is none with God's approbation, and may not do, for a very heathen could teach us to pray, that God would destroy all kings that put to their hand to alter and destroy the house of God. Ezra, vi. 12. And besides, in the second place, with respect to the matter of the duty in general, that cannot be in faith, which wants a warrant in the word, either by precept, promise, or practice; but to pray for wicked tyrants and enemies of God, wants a warrant in the word, either by precept, promise, or practice: there is no precept for it, either general or particular, neither express, nor any to which this is reducible; and who dare add without a precept in the worship of God, either for matter, manner or end, what he hath not commanded? For such presumption, Nadab and Abihu were destroyed. Levit. x. 1. 2, because they did that which the Lord had not commanded. What command can there be for praying for that, which is against the preceptive will of God, but it is against the preceptive will of God that there should be tyrants: therefore to pray that these may be preserved in the world, cannot fall under a command of God. There is no promise for it, which is the foment and foundation of prayer: we can pray for nothing that we have not a promise for, either general or particular; but we have none, nor can have any, for the preservation of a plague to us, as tyrants are.

"There is no practice for it in scripture, to pray for kings that put to their hand to destroy the house of God. Samuel did indeed mourn for Saul, but the Lord reproved him for it, "how long wilt thou mourn for Saul, seeing I have rejected him from being king over Israel?" 1 Sam. xvi. 1, belike this reproof was for his praying for Saul's preservation as king, for otherwise we may mourn for wicked wretches, for their sin and misery both. But hence, if

the Lord reprove his servant, for mourning for a king whom he disowns, then we may not pray for such a king whom the Lord disowns, as he disowns all tyrants, for they are set up and not by him; but the antecedent is true in that example of Samuel; therefore also the consequent, that we may not pray for them as kings, whom the Lord disowns.

"4. Moreover, to confirm this yet further; that prayer is not of faith, and so sin, which is contrary to the precepts of God, and his promises, and the practices of the saints; but praying for wicked kings, their preservation, is contrary to these precepts, promises, and practices, &c. Ergo—It is contrary to some divine precepts, both affirmative and negative. There is an affirmative precept, prescribing what prayer should be used under the domination of tyrants, that they should weep and say, Spare thy people, O Lord, give not this heritage to reproach, that the heathen should rule over them, wherefore should they say among the people, where is their God? Joel ii. 17. If it be a reproach to be under heathen rulers, and if we should pray that they may not rule, but that our God may shew himself where he is, and who he is, in delivering his people from their domination: then it is contrary to this, to pray for the preservation of tyrants, that do rule over them to their destruction and reproach; for it is contradictory to pray, that they may not rule, and that they may be preserved in ruling. There is a negative precept, prohibiting the salutation of heretics and enemies of the gospel, which will condemn this salutation of heretical kings: for in the original, God save the king, is no more than a solemn salutation, or appreciator wish that he may prosper, 2 Epist. John ver. 10. 11. "If there come any and bring not this doctrine, neither bid him God speed, for he that biddeth him God speed, is partaker of his evil deeds." God speed, in the Greek, is the same with God save in the Hebrew. If then we must not say, God save a heretic; neither must we say, God save an heretical king, or a popish tyrant, a sworn enemy to the gospel of Christ, and the coming of his kingdom. This is also inconsistent with that rule and directory of our prayer, commonly called the Lord's prayer, not only because it cannot be reduced to any of its petitions (which are comprehensive of all that we are warranted to pray for) but because it is contradictory to the second, which is, Thy kingdom come. The coming of Christ's kingdom in our land cannot consist with the preservation of the tyrant's reign, which is Satan's rule, Antichrist's and Satan's kingdom, and Christ's cannot be promoted both at once. It may be also demonstrated, that it is inconsistent with all the petitions of that perfect form of prayer. With the first, hallowed be thy name; for when they who rule over his people make them to howl, then his name continually is blasphemed. Isa. lii. 5. yea much profaned in the frequent repeating that imposition. With the second, thy kingdom come; for when he takes unto

him his great power and reigns, then is the time he will destroy them that destroy the earth, Rev. xi. 17. 18. It is against the third, thy will be done, . . . for it is against his preceptive will that there should be a throne of iniquity, it shall not have fellowship with him, as it would have, if according to his will. And therefore Habbakkuk pleads from the Lord's holiness and righteousness against tyrants, Habbak. i. 13. 14. It is against the fourth, give us this day our daily bread, to pray for them that rob us of it, whom the Lord hath set over us for a plague, to domineer over our bodies, and all the means of life. Neh. ix. 37. The saints there make a complaint of kings, and pray to remove them, not to save them: the church also prays against base rulers on this account, because under them they get their bread with the peril of their lives. Lam. v. 8. 9. It is against the fifth, forgive us our debts or sins; for if we pray for taking away the guilt of sin, we must also pray for removing the punishment; whereof this is one, to be under tyrants: and if it be sin which brings on judgment, then it is sin to pray for the keeping of it on, and continuing thereof; and though we should forgive their sin against us, yet we ought to complain against their sins against God, and the Church in defiling it, and shedding the blood of the Saints. Psal. lxxix. 1. 7. It is against the sixth, lead us not into temptation, and deliver us from evil; for their government is a continued tract of temptation, they being a snare on Mizpah, and a net spread upon Tabor. Hos. v. 1. And if we pray to be delivered from all evil, then we must pray to be delivered from tyranny, which is a great evil. It is against the conclusion also, for thine is the kingdom, . . . and glory: tyrants being stated in opposition to the glory of God. Again in the next place, it is against many promises of giving good rulers, and of breaking the yoke of tyrants, (as I cited several above,) neither of which can consist with the preservation of tyrants, if such a prayer should be answered according to the idol of the heart of the supplicants: for if God should save this man as long as we may pray for him as a king, then all the promises of a change and revolution are precluded. Lastly, it is contrary to the constant tenor of the saints' prayers against the enemies of God. Deborah prayed upon the destruction of a tyrant, so let all thine enemies perish, O Lord. Judg. v. ult. Jotham prayed against the bastard king. Let fire come out from Abimelech, and devour the men of Sechem, and . . . let fire come out from the men of Sechem, and devour Abimelech, Judg. ix. 20. David prays against Saul, whom he calls Cush the Benjamite in the title of Psal. vii. alluding to Kish his father, or because he was no better than an Ethiopian, a Cushite, Amos ix. 7, and could no more change his manners than an Ethiopian can change his skin. Jer. xiii. 23. See Pool's Synops. Critic. in locum. Where it is proven, that this was Saul; against him he prays, that the Lord would awake to judgment.

Psal. vii. 6. and that he would break the arm of the wicked and the evil man, Psal. x. 15. that he would not slay them, (to wit, suddenly or in a common way) lest the people forget, but scatter, and bring them down, and consume them in wrath, that they may not be, that it may be known God ruleth in Jacob to the ends of the earth. Psal. lix. 11. 13. This is a psalm against dogs. ver. 9. what dogs? Saul and his men watching David. See the title. As also it is against Saul that he prays, that the Lord would not grant his desires, nor further his devices, and as for the head of them that compassed him about (which was Saul). Let the mischief of their own lips cover them, Psal. cxl. 8. 9. There is also a prayer, that the saints may execute vengeance, and the judgment written upon tyrants, and bind them with chains, Psal. cxlix. 6. 8. 9. The church is brought in praying for vengeance against the Babylonian tyrant, Nebuchadnezzar the king of Babylon hath devoured me, . . . the violence done to me and my flesh be upon Babylon, shall the inhabitants of Zion say, Jer. li. 34, 35. Paul imprecates any man that does not love the Lord Jesus, let him be Anathema Maranatha, 1 Cor. xvi. 22, and sure no tyrant, persecutor, subverter of Christ's kingdom, can be a lover of Christ. The Martyrs, under the fifth seal slain for the word of God, and the testimony which they held, are brought in crying against the tyrants that murdered them, How long! O Lord, holy and true, dost thou not judge and avenge our blood, Revel. vii. 9, 10. Which though it be to be understood of a mortal cry of blood, as Abel's blood cried against Cain: yet ought to be a pattern of our prayers against such bloody enemies, imbruing their hands in the blood of our brethren, for which we ought to pray that the Lord would haste to make inquisition. Durham observes from this place, that God's people, in a holy way, may pray for vengeance upon persecutors.

45. Let us consider the person and matter, for whom and for what this prayer is extorted. Either it is for the personal salvation of James the Papist, or the royal preservation of James the tyrant. It will not satisfy to pray, that if it be possible, and if it were the Lord's will, he might be taken to heaven, that so we might be quit of him. Neither were it lawful, to pray that, except we prayed first, that he might repent of this his wickedness, if perhaps it might be forgiven him, as Peter directed Simon Magus to pray for himself. Acts viii. 22, for it is unlawful to pray for the salvation of a papist, except upon supposition of his repentance and relinquishing popery. We must pray nothing but according to the will of God; and it is not the will of God, that they that have and keep, and will not part with the mark of the beast, should be saved, for he is adjudged of God to drink of the wine of his wrath. Revel. xiv. 9, 10. So we cannot pray for him as a Christian, which he is not, nor as a papist, except that he may get repentance.

Nor can we pray for him as a king, which he is not; nor as a tyrant, except that he may repent of and relinquish his tyranny and usurpation: for tyrants as such cannot be saved, no more than papists as such; for Tophet is ordained of old, yea for the king it is prepared. . . . Isa. xxx, 33. We cannot then pray for his salvation, except we pray for his repentance, and relinquishing all his sins, and so we must pray for his relinquishing his kingship, and that he may cease to be king; for that is his sin, that he hath made himself king without God, and against the laws of the land.

“And now, while he continues such, we must complain in prayer, not for his misgovernment only, but for that he governs, and desire to be delivered from him. See Gee’s *Magistrate’s Original*, pag. 258. But now considering what a man, and what a king he hath been, guilty of murder, adultery, idolatry, under sentence of the law both of God and man; we can pray no otherwise for him, than for a murderer, adulterer, or an idolater. We cannot pray for him as clothed with authority, or that the Lord may bless his government, for that is his sin and our misery, that he is a governor: and his throne is a throne of iniquity, which we dare not pray may have fellowship with God. Can we pray that God would bless him on a throne of iniquity? Could we pray, that the Lord would bless a drunkard in his drunkenness, abusing his enjoyments? Or a thief in his stealing, though he used his purchase never so soberly? What if prevailing robbers by land, or pirates by sea, praying

upon all passengers, should require this as the sign of subjection to them, and only condition whereupon such, as they apprehend and overcome, should be suffered to live, that they should pray for preservation and prosperity to them? Would not this be wickedness thus to pray for thieves and robbers? And are not tyrants the greatest of thieves, that rob and destroy twenty for one of private robberies? And do they not require this as such a sign on such a condition.

“6. Lastly, then the plea will be reduced to this, that it is exacted as a badge of loyalty, and sign, Tesseræ, Shibboleth of owning the authority. Which I have at this length endeavoured to prove, cannot be conscientiously owned by us, in these circumstances. And even by this argument: that authority which we cannot pray for, we cannot own; but we cannot pray for this tyrannical authority: therefore, . . . the minor I trust is in some measure made manifest, by what is said above. And so I conclude this head, with that form of prayer, that I use for the king. “O Lord God, to whom vengeance belongeth, shew thyself; lift up thyself, thou judge of the earth, render a reward to the proud. Lord, how long shall the wicked? how long shall the wicked triumph? shall the throne of iniquity have fellowship with thee, that frameth mischief by a law? The mighty and terrible God destroy all kings and people, that put to their hand to alter and destroy the House of God. Overturn, overturn, overturn this throne of tyranny, and let it be no more, until he come whose right it is.”

318. *Proceedings against Sir HUGH CAMPBELL, Laird of Cesnock, for Treason: 36 CHARLES II. A. D. 1684. [Wodrow’s History of the Sufferings of the Church of Scotland.* Records of Privy Council, and Records of Justiciary of Scotland.]*

August 16, 1683.

THE Council appoint the King’s Advocate to raise a process of Treason against the earl of Lowdon, lord Melvil, sir John Cochran of Ochiltree, John Cochran his son, sir Hugh

* Mr. Laing, in his *History of Scotland*, deservedly places great reliance on Wodrow’s work, and upon different occasions gives proofs of its authenticity and bears testimony to the merits of the author. Lord Hailes does not speak with very great reverence of the sagacity of any of the Ecclesiastical Historians of Scotland. See his *Historical Memorials concerning the Provincial Councils of Scottish Clergy*, &c. At p. 29, of that tract, he says in a Note, “Keith was as incapable of deceiving as he was of judging. I can make no better excuse for this useful labourer in the *History of Scotland*. When I say more for Calderwood and Wodrow, let me be termed partial and prejudiced.” It must be admitted,

Campbel of Cesnock elder — Campbel of Cesnock younger, the laird of Rowallan elder and younger, — Montgomery of Langshaw, — Fairly of Brunfield, — Bailly of Jarviswood, — Crawford younger of Crawfordland, — Stuart of Coltness, and

that Wodrow’s work not unfrequently exhibits indications of credulity, and an inclination to the notion of particular providential judgments.

The following is Burnet’s account of the proceedings against the Campbells:

“When Castairs was put to the torture, and came to capitulate in order to the making a discovery, he got a promise from the council, that no use should be made of his deposition against any person whatsoever. He in his deposition said somewhat that brought sir Hugh Campbell and his son under the guilt of treason, who had been taken up in London two years before, and were kept in prison all this while

— Denholm of Westbield, who being cited before the late Justice-sir, upon several points of Treason, it was made appear to them that at the time of their citation they were out of the kingdom.

Nov. 3. The procedure of the Scots council at London in this matter, is read at Edinburgh, and insert in the registers. 'At Whitehall October 22, 1683; present the king's majesty, his royal highness the duke of York, the earls of Murray, Middleton, Sunderland, Mar, Airlay, Ancrum, Broadalbin, the treasurer-depute, justice clerk, advocate, and John Wedderburn of Gosford; his Majesty, with advice of his privy council, orders the laird of

The earl of Melfort got the promise of his estate, which was about 1,000*l.* a year, as soon as he should be convicted of high treason. So an act was brought in, which was to last only six weeks; and enacted, that if within that time any of the privy council would depose that any man was proved to be guilty of high treason, he should upon such a proof be attainted. Upon which, as soon as the act was past, four of the privy council stood up, and affirmed that the Cambells were proved by Castair's deposition to be guilty. Upon this both father and son were brought to the bar, to see what they had to say, why the sentence should not be executed. The old gentleman, then near eighty, seeing the ruin of his family was determined, and that he was condemned in so unusual a manner, took courage, and said, the oppression they had been under had driven them to despair, and made them think how they might secure their lives and fortunes: upon this he went to London, and had some meetings with Baillie, and others: that one was sent to Scotland to hinder all risings: that an oath of secrecy was indeed offered, but was never taken upon all this. So it was pretended, he had confessed the crime, and by a shew of mercy they were pardoned; but the earl of Melfort possessed himself of their estate. The old gentleman died soon after. And very probably his death was hastened by his long and rigorous imprisonment, and this unexampled conclusion of it; which was so universally condemned, that when the news of it was writ to foreign parts, it was not easy to make people believe it possible."

I believe that Margaret, the daughter and heiress of sir George Campbell of Cesnock, who appears to have been involved with his father in this charge of Treason, married Alexander Hume, who assumed her name of Campbell, and became, in 1704, a lord of session by the title of lord Cesnock. He was second son of sir Patrick Hume, first earl of Marchmont, whom he succeeded in that title. In 1714, he resigned his seat in the court of session to his brother sir Andrew Hume. Mention is made of him in lady Murray's Narrative, printed in the Appendix to Mr. Rose's Observations on *Fag's Historical Work,*

Cesnock and his son, Rowallan elder and younger, Crawfordland, Brunnsfield, Alexander Monro of Beacrofta, Jerviswood, Mr. Williams Carstairs, Hepburn son to Major Hepburn, — Spence servant to the late earl of Argyle, prisoners at London suspect of high treason, and some of them accused, to be sent prisoners to Edinburgh, to be tried according to law, being Scotsmen.

The English law could not answer the view they had against them, and our Scots law is far more arbitrary, at least the procedure used at this time would not have gone down in England. Accordingly, those named were sent down, several of them I meet with no more in the registers, and can say no further of them; but these who were chiefly levelled at, we shall meet with in their order. By a letter from the king, the advocate is ordered to prosecute the above named persons for treason.

Dec. 10, 1683. The council remit it to the bishop of Edinburgh, treasurer-depute, advocate, and colonel Graham of Claverhouse, to consider the several papers sent down from London, and to put together what they find concerning every prisoner, and to begin with what concerns Spence, and to endeavour to decypher the letters.

Feb. 21, 1684. The advocate reports to the council, that he hath found matter, as he conceived, to insist against sir Hugh Campbell of Cesnock for Treason: The council February 14th ordain him to insist; and appoint sir George Lockhart to concur in the said process with the King's Advocate. * The design of this was plain enough, to hinder that able lawyer, who had vexed them so much in the earl of Argyle's process, to be employed by Cesnock. Accordingly, upon Cesnock's petition, Feb. 21, "he is allowed to employ any advocate he pleases, and they are warrant to plead, still excepting sir George Lockhart, he being already ordered to assist the king's advocate. †"

* The order of the Privy Council ordaining the Lord Advocate to insist in the trial, is dated the 14th February 1684, and not the 12th as Wodrow has it. It is in these words.

"The lords of his majesties privy council having heard and considered a representation made by his majesties advocat, that he had got probation against sir Hugh Campbell, of Cesnock, elder, sufficient, as he conceived, to prove him guilty of treason, or airt and part thereof, doe give order and warrant to his majesties advocat, to raise and insist in a process of treason against him before the justices, and doe ordain and require sir George Lockart advocat, to concur with the king's advocat in the said process." Privy Council Records, p. 253.

† As to this, the entry in the Privy Council Records, is as follows. "February 21st 1684. Anent a petition presented by sir Hugh Campbell of Cesnock, prisoner, within the Tolbooth of Edinburgh, shewing that where the petitioner being informed, that there is a process of treason raised against him at the instance of his

However we shall find Cesnock is not prosecuted upon the plot, but upon his accession to Bothwel, and that the witnesses who had informed against him retracted when in judgment.

I come now from the Records, and some original Letters writ by a gentleman present at the Trial, to give a short and distinct account of the process against that worthy gentleman sir Hugh Campbel elder of Cesnock, a very ancient and honourable family; and because this Trial was plainly invidious, and every thing stretched to the utmost height, I shall give the larger view of it.

Sir Hugh was indicted March 17,* and with

majesties advocat, and he being sensible that his majesty nor his laws does not allow any person processed to be precluded of their just defences, but on the contrarie has ordained them to appear for any pannels, and it is most ordinar for the counsel so to doe, yet the petitioner having applied himself to sir George Lockhart, and several other lawiers to compare for him in the said process, they absolutely refuse unless they be commanded by your lordships to that effect, and therefore humbly supplicating the council to ordain the said sir George Lockhart, and any other advocats their lordships of council and the petitioner shall think fitt, to advise, consult with, and appear for him in the said process, that the petitioner be not deprived of those legal and just defences he has to offer, and in the mean time to allow the freedom to them or any others that can be serviceable to the petitioner, free access. The lords of his majesties privie council having considered the forsaide petition, doe give warrant and allowance to any advocat the petitioner shall desire to appear for him, for his defence in the processe of treason pursued against him before the justices, at the instance of his majesties advocat, excepting sir George Lockhart, he being formerly ordered to concur with the king's advocat, and allows the magistrats of Edinburgh and keepers of the Tolbooth to give the petitioner a fitt room be himselfe; and his friends and advocats to have access to him, for preparing his defences, they being always answerable for his saife custody." Privy Council Records, p. 257.

* The Trial was first appointed to proceed on the 17th March; on which day there is the following entry in the Books of Adjournal.

Intran March 17, 1684.

Sir Hugh Campbell, elder, of Cesnock, John Weir of Newton.

Indyted and accused for being art and part of the late rebellion, and other treasonable crymes mentioned in their dittayes.

Pursuer.—Sir George Mc'Kenzie of Rosehagh, his majesties advocat.

Procurators in Defence.—Sir Patrick Hume, sir John Lawder, Mr. William Fletcher, Mr.

him John Weir of Newton, who is continued till April, and the Advocate insists against Cesnock, according to an Act of Council, dated February 14th, by which sir George Lockhart is appointed to concur with the Advocate in this process. That day the process is delayed till March 24, when Cesnock's Indictment was read as follows:

CESNOCK'S INDICTMENT. 24th March 1684.

Sir Hugh Campbel of Cesnock indicted and accused, that where, notwithstanding by the laws and acts of parliament of this kingdom, and constant practick thereof, the rising of his Majesty's subjects, or any number of them in arms, without and contrary to his Majesty's command, warrant and authority, and the aiding, abetting, assisting, resetting, supplying, intercommuning, or keeping correspondence with open and manifest rebels, and the out-hounding or rathabiting of them, or doing them any favours, are crimes of high treason and punishable with forfeiture of life, lands and goods; and by the 3 Act, 1 Parl. king Jam. 1. it is statute 'That no man rebel against the king's person under the pain of forfeiture of life, lands and goods; and by the fifth act of his Majesty's first session of his first parliament, it is declared, That it shall be high treason to the subjects of this kingdom, or any number of them, more or less, upon any ground or pretext whatsoever, to use or continue in arms, to make peace, or war, or any treaties, or leagues with foreign princes or estates, or amongst themselves, without his majesty's special authority and approbation first interponed thereto.' And all his majesty's subjects are discharged, upon any pretext whatsoever, to attempt any of those things under the pain of treason. And by the 37 act 2 parl. Jam. 5, it is declared, 'That no man willfully maintain, or do favours to open and manifest rebels against the king's majesty, under the pain of forfeitures; and by the 144 act, parl. 12. Jam. 6. it is statute and ordained, 'That no man openly or notoriously rebel against the king's person or authority, or make war against the king's lieges; and that where any declared trai-

Colline Mc'Kenzie, Mr. Walter Pringle, Mr. John Kincaird, Mr. William Bailly, Mr. Robert Mayne, Mr. James Balfour.

"The said day, Mr. George Bannerman produced an act of privy council, for insisting against Cesnock, whereof the tenor follows." (Here is recited the order of the privy council above quoted, but dated the 16th instead of the 14th as it stands in the Record of the Privy Council.)

"The Lords, at his Majesties Advocats desire, continues the dyett against John Weir of Newton, till the 7th day of April next, and against sir Hugh Campbell, Munday next, and ordains witnesses and assayers to attend, ylk ane under the paine of fyve hundreth merks."

tors or rebels repair in any part of this realm none of his Majesty's lieges shall presume to reset, supply or intercommune with them, or give them meat, drink, house, harbour, or any relief or comfort, under the same pain for which they are forfeited, or put to the horn; and that immediately, upon knowledge of their repairing in the bounds, all his Majesty's obedient subjects do their exact diligence, at the utmost of their power, in searching, seeking, taking and apprehending of the said declared traitors, and presenting them to justice, or in following of them while they be taken, and expelled, and put out of the shire; and immediately to make intimation to the magistrats and persons of power and authority in the next shire, who shall be holden to do the like diligence without delay, and so from shire to shire, while they be apprehended and brought to justice, or expelled and put forth of the realm; and that they, with all possible speed, certify his majesty, or some of his secret council, or some of the chief persons of authority and credit dwelling within the same shire, that such persons are within the same, wandering ahort the country, or lurking in any part thereof, under the pain that the traitors or rebels ought to have sustained in bodies or goods themselves, in case they had been apprehended, presented and convict by justice; and by the 14 act, 6 parl. Jam. 2, it is declared, 'That all who shall reset such as are justified for crimes, if the crimes be notour, or the trespasser convict or declared guilty, are ordained to be punished as the principal trespasser; and by the 97 act 7 parl. Jam. 5, it is statute, 'That no man, wittingly or wilfully, reset, supply, maintain, defend, or do favours to any of his Majesty's rebels, and being at the horn, within their houses, bounds, lands, or bailiaries, under the pain of death and confiscation of their moveables.' And by the common law, laws and acts of parliament of this kingdom, hounding out and rathabition, or art and part, is punishable as the principal crime. Yet nevertheless it is of verity, that the said sir Hugh Campbell elder of Cesnock, shaking off all fear of God, respect and regard to his majesty's laws and authority, has presumed to commit, and is guilty of the said crimes, in so far as the bloody and sacrilegious murderers of the late archbishop of St. Andrews, and their accomplices, to the number of nine or ten thousand, having, in the months of May, or June, 1679, risen and appeared with arms within the western shires, in a desperate and avowed rebellion against his majesty and his authority, having burnt his laws and acts of parliament, proclaimed treasonable declarations and proclamations at public market-crosses, killed and murdered several of his soldiers at Drumclog, assaulted the city of Glasgow, robbed and rifled the goods and houses of his Majesty's loyal subjects, marched up and down the country in a warlike and military posture, kept councils of war, rendezvoused, exer-

cised, appointed commanders, and officers over them, and continued in open and avowed rebellion, committing all acts of hostility and high treason till the 22d day of June the said year, that they were defeat at Bothwel-bridge. The said sir Hugh Campbell having, upon one, or other of the days of the said month of June, 1679, met with Daniel Crawford in Galstoun, Thomas Ingrham in Borlands, John Ferguson in Catharingill, and several other of the said rebels, at or near the bridge-end of Galstoun, coming from the rebels then in arms, whom they left at Tolcross-park near Glasgow, the pannel asked them where they had been; and when they had told him that they came from the Westland army, he said that he had seen more going to them than coming from them. And having asked them if they were to return; they told him, they knew not. Whereupon he reasonably, contrary to his allegiance and duty, said, that he liked not run-aways, and that they should get help if they would bide by it, and bade them take courage, or some such like words to that purpose. Wherethrough the said sir Hugh Campbell is guilty of intercommuning with notour rebels, they having told him that they had come from the Westland army at Tolcross-park; and the said pannel's not apprehending of the said rebels, and giving intimation to the next magistrate. And also he was guilty and culpable of giving a treasonable counsel and advice, to go back and return to the rebellions army, and also encouraging and hounding them out thereto. And also of rathabiting, maintaining and fortifying the said rebels in their treasonable designs of rebellion, by telling, they should not want help if they would bide by it; and thereby he was guilty of the said rebellion, and accessory thereto, and art and part thereof: which being found by an assize, he ought to be punished with the loss and forfeiture of life, lands, and goods, conform to the said laws and acts of parliament, to the terror and example of others to commit the like hereafter.

2. Ye are also indicted and accused, that whereas, notwithstanding by the laws and acts of parliament of this kingdom, and constant practick thereof, particularly by the 37 act, 3 parl. James 1. it is statute, That no man wilfully maintain or do favours to open and manifest rebels against the king's majesty, under the pain of forfeiture. And by the 14 act, 6 parl. James 2, it is declared, That all who shall reset such as are justified for crimes, if the crimes be notour, or the trespasser convict or declared guilty are ordained to be punished as the principal trespasser. And by the 97 act, 7 parl. James 5, it is statute, that no man wittingly or willingly, reset, supply, maintain, defend, or do favours to any of his majesty's rebels, and being at home within their houses, bounds, land, or bailiaries, under the pain of death and confiscation of moveables. And by the 144 act, 12 parl. James 6, it is statute and ordained, that no man, openly or notourly, rebel against the king's person or authority, or

make war with the king's lieges; and that where any declared traitors or rebels repair in any part of this realm, none of his majesty's lieges shall presume to reset, or supply, or intercommune with them, or give them any meat, drink, house, harbour, or any relief or comfort, under the same pain, for whilk they are forfeited or put to the horn; and that immediately, upon knowledge of their repairing in the bounds, all his majesty's obedient subjects do their exact diligence, at the utmost of their power, in searching, seeking, taking and apprehending the said declared traitors, and presenting them to justice, or in following of them, while they be taken and expelled, and put out of the shire, and immediately to make intimation to the magistrates, and persons of power and authority, in the next shire, who shall be holden to do the like diligence without delay, and so from shire to shire, while they be apprehended and brought to justice, or expelled and put forth of the realm; and that they, with all possible speed, certify his majesty, or some of his secret council, or some of the chief persons of authority and credit, dwelling within the said shire, that such persons are within the same, wandering about the country, or lurking in any part thereof, under the pain that the traitors and rebels ought to have sustained, in their bodies and goods, themselves, in case they had been apprehended, presented, and convict by justice. And by the common law, laws, and acts of parliament of this kingdom, hounding out, or rathabition, or art and part is punishable as the principal crime. Nevertheless it is of verity, that the said Hugh Campbel, to evidence yet further his wicked and traitorous design of contriving the late rebellion in the year 1679; and that ye would, as far as was in your power, contribute thereto, by hounding, levying, sending out thereto, according as ye did promise to Thomas Ingham, Daniel Crawford, John Ferguson, and others mentioned in his former indictment, that he did send out to the said rebellion, his tenants and servants after specified, viz. Mr. James Brown his chaplain, George Lambie in Crofthead, James Hutchison in Underwood, Robert Parker in Wester Lenfine, Michael Roxburgh, mason in Galstoun, Hector Paton in Cesnock-yards, Hugh Neilson in Rickartoun, John Brown younger in Priestland, Alexander Wood in High-side, John Lambie in Ladybrow, Alexander Mitchel in Priestland, George Hutchison in Underwood, Matthew Reid in Grasholm, James Richmond in Lawfield, John Hunter in Shiling-hill, George Lambie merchant in Bankhouse, William Harris officer in Rickartoun, — Glasford in Bareith, Samuel Ross in Nethertoun, John Gamil in Bank, Patrick Gamil, James Lambie in Lawfen, Hugh Wilson in Burnfoot, Francis Ross in Knowhead, and several others; at the least they having gone out to the said rebellion, and having been thereat, he did reset them upon his own ground, without enquiring where they had been, or why they had been so long absent in so dangerous and critical a time, when it was

notour to all the kingdom, that there was an open rebellion carried on against his majesty, to the destruction of the peace, quiet and security of this his native country, as well as of the monarchy therein established; and he did even reset, in his very house, William Gilmore who went out of his ground to the said rebellion, and lived very near his own gate before the rebellion, and though he owned before his servants in his family, that he had been in the rebellion, so that the same could not but be notour to him, yet he entertained him two years as his porter, and thereafter gave him a certificate as a very honest man, and recommended him to the earl of Dundonald. And he entertained the said Mr. James Brown, a notorious and ringleading field-preacher, as his chaplain in his family, and the persons abovenamed being his tenants and servants, and having gone out of his ground to the rebellion, and immediately thereafter having returned thereto, and being ever since living therein, and he himself going up and down among them, so that, as ye were obliged to have enquired where they were, so he could not know, that they were out at the rebellion, especially seeing their being at the same was notour in the country, and two of them were his own domestick servants, and lived in his own house. Wherethrough the said sir Hugh Campbel has most treasonably contrived, contributed to, hounded, and sent out persons to the late rebellion, has harboured, reset, supplied, entertained, conversed with, and done favours to open, notour and manifest traitors and rebels, and was actor, art and part with the same, and of the other treasonable crimes above specified; which being found by an assize, you ought be punished with forfeiture of life, lands and goods, to the terror and example of others to commit the like hereafter.

3. The said sir Hugh Campbel is further indicted, and accused upon the laws and acts of parliament mentioned in his former indictments, for the treasonable harbouring, resetting, entertaining, corresponding with, and doing favours to notour, open and manifest traitors and rebels, encouraging them in their rebellious practices, and disuading them to submit to his majesty's authority; in so far as Alexander Paterson in Balgray his tenant, having, upon the first, second, third, or one or other of the days, or one or other of the months of the year 1682, advertised him of his having been in the rebellion, and of his willingness to submit to his majesty's authority, and craving his advice as to what he should do, he did disuade him and desired him to go home to his work until he sent for him, and so he continued his tenant, notwithstanding he knew of his being in the said rebellion. As also he did, on one or other days of the month of June, 1679, go to the burial of Captain — Campbel, who was drowned in the water of Galstoun, as he was going to the said rebellion; wherethrough he committed, and was guilty of the treasonable crimes abovespecified, and was

near, and part thereof; which being found by an assize, he ought to be punished with forfeiture of life, lands, and goods, to the terror of others to commit the like hereafter.

In the enumeration of the Counsel on both sides which is inserted in the Record after this Indictment, the name of Sir George Lockart appears for the crown, in addition to the enumeration on the 17th. The Record then proceeds as follows:

“ His Majesties Advocat produced the precept and indytement fullie execute, and repeated the warrant for pursuing the pannall recorded in *de precedente*.

“ His Majesties Advocat having desired the justices, according to his majesties letter to examine the witnesses previouslie before any trial, being in a case of treason.

“ Mr. Walter Pringle, for the pannell, alleged, that by the letter direct by his majesty there ought to be previous warrant from the council before any examination; which is not produced, and so no previous examination can be till that be produced.

“ His Majesties Advocat answered, that he obtained a warrant from the council for pursuing the pannell, which is produced and read, and is sufficient for the hail procedure in the process, both as to examination and tryall. The lords delayed to give answer till they should advise with his majesties privy council.

“ The Privy Council having presently convened thereabout, his majesties advocat reported to the court the act and warrant underwritten.

EDINBURGH, March 24, 1684.

“ The lords of his majesties privy council, having considered a representation made by his majesties advocat of the necessity of a previous examination of the witnesses adduced in the process at his instance against the laird of Cessnock, &c, conforme to his majesties letter to the justices of the 30th December 1683, give warrant to the justices to examine these witnesses previouslie.* Extract by me,

Subscribitur,

WILLIAM PATERSON, Cl. Sec. Con.”

* The King's Letter to the Lords of Justiciary of Scotland, relative to the previous examination of witnesses, is recorded in the Books of Adjournal on the 8th of January 1683. It is as follows:

“ C. R.

“ Right trustie and well beloved cousin and counsellour, right trustie and well beloved counsellours, and trustie and well beloved, we greet you well. It being always our chief care to prevent the increase of disorder and rebellion, in that our ancient kingdom, not only by maintaining forces to suppress the same, but likewise by employing learned and able judges, who may discourage any such insurrections by discovering and punishing such as are guilty thereof, and

[It is remarkable that there is no mention of this Order in the Privy-Council Record, where there is no entry at all, of this date.]

“ The pannall and his procrators being called to the barr, and enquired if they found any objection upon Daniel Cranford in Gal-

being informed of late that such as are to be adduced witnesses being to be given in list to pannalls, are oft tymes practised after their haiftes are known by the late regulations, so that it cannot be clear who will be proving witnesses, whereby the most guilty may escape, and thinking it most secure for our people to truit the previous examination either before or after citation to you the learned judges, who of all others are the most unsuspected and indifferent. We see therefore recommend to you that if our privy council shall find it necessary previouslie to examine any who are to be adduced witnesses you will examine them upon oath accordingly. So that our advocat may be secure how to manage such process, wherein you will do us acceptable service, for which this shall be your warrant. And so we bid you heartily farewell. Given at our court at Whythall, the 30th day of December 1683, and of our reignie the threttie four years. By his majesties command.

Sic Subscribitur,

MIDDLETON.”

“ A lawyer who understands criminal forms, and the reasons of them, would be in case to make ample observes upon this Letter. As was customary in this time, this practice here had been tried by the managers, before the king's authority was interposed; and this was the way now, first to do unreasonable things, and then to engage the king to require them to be done. It is very evident, this method was fallen on to expiscate matter of criminal process against gentlemen and others, to secure their evidence; and keep it secret likewise, till it was past time for the pannells to get defences. There is here much more than a precognition, and the matter is by oath fixed as far as it is possible to be; and it appears very hard this should be done, and parties not present to give what exceptions and light they could for their own defence. And when once the witnesses had made their declaration upon oath, they could not resile without the charge of perjury, when they came to hear evidence in causa, and before the assize. By this Letter indeed the Lords of the Justiciary, are to take the witnesses oaths, which how far it agrees with judges before they come to judge directly, I must leave to others; but this is only when the council lay this upon them; and the council themselves had power, or assumed it to do this; yea, many times it was left entirely to the advocate to do it, who was evidently a party in these cases.” Wodrow.

“ His Majesty's Advocate, with us, examines parties and witnesses, before the process be intented, which he doth upon pretext that he may thereby know how to libel exactly; and to

stoune, his being designed in the list of witnesses given to the pannall Daniell Carmichael in Galstoun, but who is rightlie named and designed in the body of the dittay given first to the pannall, and is since given him in list under his true name and designation. They declare they pass from any designation—[It is so written in the Record, but this should clearly be objection and not designation. This part of the Record seems very carelesly written.—The words 'advocate' and 'took' inserted below in brackets, appear requisite to complete the sense.]—competent to them upon that head, for casting the said Daniel Craufurd as a witness. Whereupon his majesties [advocate] asked and [took] instruments."

"The said day the Warrant of Privy Counsel authorising advocats to appear for the pannall, was produced and read before the said lords, whereof the tenor follows." (As already extracted from the Privy Council Record, dated 21 February, p. 922.)

Wodrow proceeds thus:

"After his Indictment is read at the bar, Cesnock himself opened his case in a long and patheticall Speech, wherein he insisted mostly upon those points. "That though several field conventicles had been kept in the country where he lived, yet he had permitted none to be upon his ground; that neither himself, children, or servants, had been present at any of them; that as he kept his own parish church regularly, so missing two of his servants there one Lord's day, he caused them to be kept out of his gates till the sabbath was over, and next morning called for them, paid them their wages, and dismissed them; that during the time of the libelled rebellion, he was so far from encouraging it, that he retired to Gilchrist, (perhaps writ for Gilcherscroft) a strong house, and abode there till it was over; that he had put off his ground all his tenants who were said to be at Bothwel, as soon as they were convict; that if he was found guilty in that matter, he was most willing to underly the law, but he knew he was innocent; that one of the witnesses adduced against him he never saw before, as far as he knew, but could prove he had declared in several places, that he would do Cesnock an ill turn, because he had informed

the end he may not vex parties, if he find no ground for the pursuit. But many learned lawyers have always thought this procedure dangerous, for his majesty's advocate is still a party interested, and so should not be allowed to deal with the witnesses; for thereby he may strain from them what otherwise they would not depone. And if in our last reformation of the justice court, it was found, that the king's advocate should not make the roll of assizers, because he is too much interested, much less should he, for the same reason, be allowed to examine the witnesses, since that is not allowed to the advocates for the defenders." Mackenzie's Criminals, part 2. tit. 20, sec. 2.

about a murder he (the witness) had committed. In short, as to other defences, he remitted himself, to his advocates."

The Advocates for the Pannel were sir John Lawder, sir Patrick Hume, Mr. Walter Pringle, Mr. William Fletcher, Mr. John Kincaid, Mr. Colin Mackenzie, Mr. Robert Main, Mr. William Baily, Mr. James Balfour. After reading the Indictment, the King's Advocate moved that the Justices might examine the witnesses previously before any trial, this being a case of treason, and alledged a letter from his majesty to this effect. Mr. Pringle answered, that a previous Warrant ought first to be given by the council, in terms of the King's Letter, which was not produced. The Advocate replied, his Warrant produced was as to the whole process, and no more was needful. The Lords delayed to determine till they advised with the Privy Council.

This little bit of form was soon got over; a council was immediately called, and the Advocate had a Warrant given him. "Edinburgh, March 24, the Lords of Council having considered a representation by his Majesty's Advocate, of the necessity of the previous examination of witnesses in Cesnock's process, do, conform to his Majesty's Letter to the justices, December 30, 1682, give warrant to them to examine these witnesses previously." When this was produced, the lawyers entered upon the cause. Cesnock's Advocates pleaded it a great length, and with much force of reason, and the King's Advocate said all so ill a cause could bear. In this extraordinary Case, of which no account has been yet published, the curious reader will incline to have the Debates as they stand in the Registers. Accordingly, I have added the Defences of Cesnock's Advocates.

CESNOCK'S ADVOCATES DEFENCES.

Sir Patrick Hume, for the pannel, alledges, always denying the indictments and hail articles and qualifications thereof. And as to the first indictment; whereas it is alledged that the defender did intercommune with the rebels in so far as he having met with Daniel Crauford, and the other persons mentioned in the libel at or near the bridge of Galstoun, as they were coming from the rebels then in arms, whom they left at Tolcross-park, and did speak and discourse with them. It is answered, 1mo. That it is not relevant, unless his Majesty's Advocate condescend upon the particular day that these persons past the bridge of Galstoun, which if he will do, the defender positively offers to prove that he was *absenti*, and that he was at home at his own house of Cesnock at that day.

2do. The libel is not relevant to infer intercommuning; seeing it bears, the defender only met with them by the way, and the simple meeting of persons in the high-way, which was only accidental, and the asking them from whence they came, and whether they were going, neither by our law, nor any law in the

world, can infer intercommuning discharged by the law, which can only be understood in the case of keeping correspondence by letters, or of designed meetings to treat of things, in order to the carrying on of the rebellion, and not of accidental rencounters in the high-way; and if it were otherwise understood than upon that ground, every person that had met any man coming from the rebels, and had asked at him from whence he came, or whither he was going, and had inquired for news concerning these rebels, as was very ordinary at that time, should have been guilty of intercommuning; which were absurd to imagine.

3tio. Albeit these men declared they came from the army of the rebels in the west, yet the defender was not obliged to know that they had been concurring in the rebellion, seeing they might have been there upon another account, for many went there who had no design to concur in the rebellion. For it is notoriously known that some went to bring back their horses and goods that were taken away by the rebels, others to bring back their children and servants from such rebellions courses. And therefore unless they have been denounced to the horn, at the head burgh of the shire where they dwell, it could be no crime to speak or discourse with them, or not to apprehend them, or not to make intimation to the next magistrate, as is clear from 126 act, par. 12. Jam. 6. By which it is expressly provided, 'That the inhabitants of the Shire are not put in *mala fide* to converse or intercommune with rebels, unless they be denounced to the Horn at the Market-cross of the Shire where they dwell;' and albeit they had been forfeited persons, and declared and denounced rebels, as they were not, yet the intercommuning and conversing with them being only by chance and accident, it cannot infer the punishment of treason, as is clear from his majesty's late proclamation in April last.

4to. Whereas it is libelled, that the defender having met with these persons at the bridge-end of Galston, he should have said to them he liked not runaways, and so is guilty of giving them treasonable counsel and advice to return and go back to the rebels. It is answered, That the words do not import counsel nor advice to these persons to go back to the rebels; and words and expressions can never infer a crime, far less the crime of treason, unless they clearly, directly and positively infer the crime. Next, these words do not fall under any of the acts of parliament libelled upon, which are only against the rising in arms against the king, and the wilful maintaining and doing favour to open and manifest rebels, that are declared traitors, or to reset, supply or intercommune with them; so that seeing these expressions do not fall under these express laws, they cannot infer the crime of treason, it being a certain principle in law, that 'quod lege non cavetur, in practica non habetur.' And these being penal statutes, cannot be extended beyond the express words,

especially seeing the defender was never hitherto tainted with disloyalty, but on the contrary was ready upon all occasions, to testify his zeal and affection to the king's service, and to suppress field conventicles, which are the rendezvous of rebellion, and upon all occasions, and in all companies did always inveigh against that execrable rebellion, and all rebellious courses, as being destructive to the king's interest, the peace, quiet and weal of the kingdom.

5to. Whereas it is libelled, that the defender spoke these words, or such like words to that purpose, is not relevant in such general terms; for seeing the crime consists in words, the particular words ought to be express and descended upon in the libel, otherwise it is not relevant.

6to. Albeit the words mentioned in the indictment, should amount to treasonable expressions, yet the defender is secure by his majesty's gracious act of indemnity in July 1679, by which his sacred majesty for the reasons and causes therein mentioned, does expressly indemnify all such as have spoken, written, printed, published, or dispersed any traitorous speeches, or have advised any thing contrary to the laws; and generally all such as are liable for any pursuit or occasion relating to any public administration, by convincings, actings or oppositions, or otherwise, preceding the date hereof, declaring the generality of these presents, to be as effectual to all intents and purposes, as if every circumstance of every one of the foresaid delinquencies or misdemeanours were particularly and specially therein insert; and that every one of the persons that might be challenged or pursued for the same, had a remission under the great seal or an act of indemnity past in his favours, discharging any of his majesty's officers or subjects to pursue any person or persons upon such account, either *ad privatam* or *vindictam publicam*, or to upbraid them therewith, and commanding all the judges to interpret this his majesty's remission, with all possible latitude and favour, as they will be answerable upon the highest peril.

As to the second additional indictment, always denying the same, whereas it is alledged, that the defender was guilty in contriving of the late rebellion, in the year 1679, and did contribute thereto, by bounding, levying and sending out men, as he had promised to Thomas Ingrham, and the other persons mentioned in the first indictment, and that he had sent out to the rebellion, the tenants and servants mentioned in the said indictment; at least having gone out to the rebellion, he thereafter reset them upon his ground. It is answered, 1mo. That it is a great mistake, for it is not so much as libelled in the first indictment, that the defender promised to Thomas Ingrham and the other persons therein mentioned, to send out men to the rebellion.

2do. It is absolutely denied, that the panel did send out these or other persons to the

rebellion, and the tenants going out to the rebellion, cannot make the master liable as a contriver, unless they went out by his express order.

310. Albeit the defender had reset any of the persons mentioned in the indictment, on his ground after the rebellion, yet it was not relevant to infer the crime of treason, far less to make him a contriver, because it is offered to be proven, that these persons did either take the bond *debito tempore*, obliging themselves never to rise in arms against his majesty or his authority, and so it was no crime to reset them; or they were tenants to other men, and so he could not be liable as resetting them on his ground, or if any of these persons had been in the rebellion, it was never known to the defender, or they were not declared rebels, or in any porteous roll, or denounced.

4to. As to Mr. James Brown, it is positively offered to be proven, that he removed out of the defender's family about fifteen months before the rebellion, and was never a servant thereafter in his family, but was servant to the deceased lord Craigy lord justice clerk; and if at any time thereafter the said Mr. James came to his house, it was only transiently for a night's time, and no man could refuse to give a night's lodging to one that was a servant to an officer of state: and the said Mr. James Brown did continue a servant to the lord Craigy till he died, and thereafter was a servant to Baldoon, but was never a servant in the defender's family after the rebellion, nor for fifteen months before.

5to. As to William Gilmore, the defender denies he was ever in the rebellion, or that he gave him a certificate in the terms mentioned in the indictment.

6. The resetting and intercommuning with the persons mentioned in the indictment, could be no crime, seeing they were not denounced rebels at the Market-cross of the head burgh of the shire where they dwell, as is clear from the 196 act, parl. 12. Jam. 6, by which it is provided, That albeit denunciation at the Market-cross of Edinburgh, shall be sufficient for the intromitting with the escheat, as the same had been made at the Market-cross where they dwell.

As to the third Indictment, seeing his Majesty's Advocate passes from it, the Pannel's Procurators take instruments thereupon.

Mr. William Fletcher further alleges for the pannel, that the libel is not relevant. For 1. All criminal libels, especially such, by which mens lives, fortunes, reputation and posterity are drawn in question, ought to be founded on clear and positive law and statute, and the assumption and criminal fact ought to quadrate with the laws contained in the proposition; whereas the crime libelled in this indictment, consisting of certain sentences and expressions, gathered up five years after the same are pretended to have been spoken in a transient way, to persons who were passing by, are not found-

ed upon any of the acts of parliament libelled, which do only declare what actions are treasonable, but do not inter forfeitures from light and rash words, and the utmost extent as to which the acts of parliament go as to this point, is only to punish with forfeiture, such treasonable speeches as are malicious and advised, as appears by second act, second session of his majesty's first parliament, where it is declared to be treason, 'for any person, by writing, printing, preaching, or other malicious and advised speaking, to express or declare their treasonable intentions, to plot, contrive or intend death or destruction to the king's majesty.' And this indictment not bearing that the expressions were advised and malicious, is not founded on the acts of parliament, and so is not relevant.

2. It has been the wisdom of the best governed nations, not to infer the crime of treason from light words, which may be rashly spoken, and the import and sense whereof may be easily mistaken: And therefore the Romans, who did not allow actions to arise from contracts, and pactions, and words, unless the same had been done by stipulation, or *verbo solemniter*, took care to provide by their laws, that rash words should not be drawn in consequence, as appears by the *Lex 7 § 3, Dig. ad. Leg. Jul. Majest.* which bears, that 'lubricum lingue ad pœnam facile trahendum non est, quoscumq; temerarij digni pœna, sio tamen et inanis illis parcendum est, si non tale sit delictum, quod vel ex scriptura legis descendit, vel ad exemplum legis vindicandum est.' And by the *Lex Viunia Cod. si quis imperatori maledixerit*, the emperors Theodosius, Arcadius and Honorius have declared, that 'si quis improbe petulantique maledicto nomina nostra credit derit lacestenda, ac turbulentius ob tractatur tempore nostrum fuerit, eum pœna notamus subjugare, sed, integris omnibus, hoc ad nostram scientiam referatur, ut ex pœna hominis diota pensemus.' And by the laws of England, the crime of treason cannot be inferred from bare words or expressions, without an overt or open act, as appears by what that learned lawyer sir Edward Coke hath written in his Institutions, upon the chap. of high treason, where he says expressly, 'that divers late acts of parliament have ordained, that compassing by bare words or sayings, should be high treason, but all these are either expelled or expired, and it is commonly said, that bare words may take an heretick, but bare words cannot make a traitor, without an overt act. And the wisdom of the makers of this law would not make words only to be treason, seeing such variety among the witnesses about the same, as few of them agree together; but if the same be set down in writing by the delinquent himself, this is a sufficient overt act within the statute. And the reason of these laws is, that the various accenting and pronouncing of words may give them a different sense, and that the memory of witnesses may be lubrick, and by the custom and practice of

this kingdom, treason has not been inferred from naked words without writ, unless there had been a long context of sermons and declamations, whereof the scope and design, as well as the words themselves, were clear and evident: But treason was never inferred from transient words and half sentences, which might be gathered together by ignorant hearers, who cannot take up the import and sense of a discourse.

3. As to that part of the libel, by which the words therein mentioned are constructed to be a treasonable counsel and advice of encouragement to the rebels to go back; the words cannot bear any such construction, and at most they can only amount to a rash, advised and a treasonable speech, and not to any advice that these rebels should return.

4. Albeit the words could be stretched to infer a counsel of rebellion, yet the same being 'consilium nudum, sine instructione,' it cannot import an accession to rebellion, which can only be inferred from such counsels which may be useful for carrying on the crime; and law hath distinguished betwixt an exhortation and a counsel to commit a crime, as appears from the last paragraph of the institutions *de facto*. The words are, 'certe qui nullam opem ad furtum faciendum adhibuit, sed tantum consilium dedit, atque hortatus est ad furtum faciendum, non tenetur furti.' And Vinnius upon this paragraph says expressly, that 'simplex consilium sine instructione, neminem furti obligat, quantumvis furtum secutum sit.' And Ulpianus in lege 50 § penult. Dig. de furtis. explaining what kind of counsel imports an accession to a crime, hath these express words. 'Consilium dare videtur, qui persuadet et impellit, atque instruit consilio ad furtum faciendum.' And Papinian, in Leg. 20, Dig. de his qui notantur infamia, says expressly, that, 'is qui exhortatur, mandatoris opera non fungitur.' And this is the opinion of Clarus, *parag. fin. quest. 86*, who says that it is *communis*. And albeit that such a counsel may import the crime of treason, the expression itself being treasonable, yet it cannot infer art and part of the crime of rebellion, when that comes under a distinct consideration from treasonable speeches.

5. As to the qualifications of art and part inferred from hounding out and ratihabition, the same are no ways relevant, and such qualifications can only import an accession to private crimes, which are committed for, or in name of any person, v. g. in revenge of a wrong done to him, but not at all in public crimes, which are not committed in contemplation of the party who bounds out ratihabites. And therefore lawyers are generally of opinion, that such hounding out, or ratihabition, does only take place in such crimes 'ubi vertitur in teresse privatum, vel vindictum privatum.'

6. The libel is not relevant in these terms, that the pannel spoke the words libelled, or some such like words to that purpose, because, 'in criminibus non licet vagari,' and all cri-

mal libels ought to be clear and distinct, and especially as appears from Damhuderius, *Prax. Crim. Cap. 80. Num. 4.* where he says, 'Prax. omnes libellos criminarios oportet esse clarissimos, and that they ought to express 'omnes criminis perpetrati qualitates.' Wherein also Bartolus and other lawyers upon the *Lex 3. Dig. de accusationibus*, do agree with him. And seeing the specific form of this crime consists in words, it is necessary that the same should be expressed, 'nec enim accusata, cum existimatione alienae jacturae, et discrimine vagari. Dig. de rei vind.' And by such a way of libelling the pannel should be prejudged of his defences; for if the words which are to be such like, were libelled, he would make it appear that they are not words to the same purpose, and that they cannot import the crime of treason, which can only be inferred from clear and illiquid expressions, and thereupon he would obtain an interlocutor from the lords of justiciary as to the relevancy; and it were a dangerous preparative, should points be reutilted to an assize: And if this should hold, then his Majesty's advocate needed not to libel any further than that the party were guilty of treason by giving counsel to rebels in general, which were most dangerous and absurd.

As to that qualification of the libel, that the defender ought to have apprehended the rebels, conform to 144 act, 12 parl. king Jam. vi, the same is not relevant to infer the conclusion of the libel. For it is evident that the act of parliament could only take place when the country is peaceable, but not when armies are in the fields, for 'inter arma silent leges,' and it would not be expected that any private gentleman should, by seizing upon the rebels, expose himself to the fury of a standing army, and 'que vis excusat a crimine,' which consists only in negligence 'et non faciendo.'

It likewise alledged, that the defender cannot be called in question from the crime arising from the words libelled, in respect the same are libelled to be prior to his Majesty's act of indemnity, which ought to be inviolably observed: For 1. Amnesties and acts of indemnity and oblivion, after countries have been universally engaged in crimes, do become the *Magna Charta* and fundamental security of the lieges, as to their lives, fortunes and posterity. And therefore all judges ought to be tender thereof, and rather to extend nor straiten the same by their decision and interpretation thereof.

2. It is the public interest of the king and nation, that such public indemnity should take full effect, seeing the same bears to be made for removing all fears and jealousies of the people, which do expose them to commit new crimes, and the least violating of, or impinging upon the very borders of such indemnities, doth again open a way for new fears and jealousies, no man knowing but what is another man's case this day, may be his to-morrow; and the interpretation of such indemnities being drawn from grounds of law, the people cannot know how far they may be overtaken

thereby, and therefore may return to their former apprehensions; the consequences whereof may come to be very dangerous for the peace and quiet of the kingdom. And it has been the prudence and policy of this and all other nations, that when crimes did abound and spread as a contagion, indemnities were granted in ample terms, and most punctually observed.

3. All pardons and graces of their own nature are favourable, and are to be extended, and crowns are preserved by mercy as well as justice; for, as Solomon says, Prov. xx. 28.

'Mercy and truth preserve the king, and his throne is upholden by mercy.' And it is the duty of the judges, inviolably to preserve in the minds of his people, a sense of his majesty's goodness, in securing to them these universal and public pardons, for 'nulla dote, nullo genere virtutis mortalitas propius accedit ad divine nature similitudinem, quam miserendo humane imbecillitati, ignoscendo erroribus, et injurias obliviscendo.' And there was never any king in the world that has given greater demonstrations of private bounty and cleanness to his subjects than his sacred majesty, and therefore the indemnity being suited to his majesty's own regal temper and disposition, it ought not to be straitened, but rather enlarged, if need were, by a rational interpretation.

4to. His majesty hath declared his enixa voluntas, that the foresaid indemnity should be interpreted with all possible latitude and favour, and hath commanded his judges to do the same upon no less certification, than the highest peril, which demonstrates, how serious his majesty hath been, that all the imperfections of his subjects should be covered, and that nothing might remain which might give them the least jealousy in time coming.

5to. By the 18th act, 7 Parl. K. Jam. 1, it is expressly ordained, 'That no man interpret the king's statutes otherwise than the statutes bear, and to the intent and effect they were made for, and as the maker of them understood, and whoso does in the contrary, to be punished at the king's will.' And this act of indemnity being one of his majesty's statutes and proclamations, wherein the peace and security of the kingdom is highly concerned, the sense and extent thereof ought not to be wrested and inverted contrary to his majesty's meaning and the propriety of the words; and his majesty having expressly indemnified all reasonable speeches and advices contrary to the laws, under which general, the words mentioned in the indictment are genuinely and naturally comprehended; for it is evident, that the general notion of treasonable discourse doth comprehend the same.

KING'S ADVOCATE'S ANSWERS.

His Majesty's Advocate craves leave to declare, that he is very much astonished to hear, that, by our law, it is not treason to hound out men to rebellion, and therefore, to shorten the

debate, resolves only to take notice of these four points.

1. That the words spoken are treason.

2. That the conversing in these terms, is an intercommuning with notour and open traitors, whom he knew to be such from the persons themselves.

3. That these words are relevantly libelled, quoad time and place, and there is no place for alibi here.

4. That the words and converse being treasonable, are not taken off by the act of indemnity.

As to the first, it is undeniable, that, to advise people to rebellion, is, by the law of all nations, rebellion, though the advice consisted only in words, as all advices generally do; and though there be no particular act of parliament, declaring the advising to rise in rebellion to be treason, yet all acts of parliament, that declare any crime to be punishable, but much more punishable by treason, do, by an infallible and necessary consequence, declare the advising that crime, or that species of treason, to be punishable as the crime itself, and a special law were needless; and with us particularly, art and part of treason is treason by statute, and counsel and to advise, is the highest qualification of art and part, because it gives life, and courage, and being to the crime: nor can it be denied, that if the doctrine of the defence were sustained, any man might at present go up and down the whole west, and invite and bound out to a rebellion, and who can doubt but he would be highly guilty of the rebellion, who did thus raise a rebellion? And advice certainly is far more dangerous than action, and so should be more punishable. Nor can it be denied, but if their words be true, Cesnock, the pannel, did more contribute to the rebellion, than these pitiful creatures he advised, his prudence, influence and interest being extraordinarily greater than their actions could have been. Likeas it is as undeniable, that, by the Roman law, advice to commit lese-majesty, were lese-majesty, *cujus opera, consilio, et L. 1, sect. 1, d. L. Jul. Majest.* and the seventh law cited doth expressly answer itself, making words to be punished for treason, 'si tale sit delictum quod ex scriptura legis descendit,' as with us art and part, or where it is 'ad exemplum legis vindicandum,' the words being of great consequence, and of extraordinary evil example. And albeit by that law, light and unadvised words, proceeding from petulance and extravagance, which are the very words of these laws, were ordinarily covered, by the emperors, with contempt, pity, or pardon; yet 'ubi locus venie, ibi semper subest crimen,' else there needed no 'venia' but in this nation; and in this case there is no place for this debate, for the speaker, and the advice, and the design, and every circumstance shew that these words are malicious, and advised words; for what could he more advised, than seriously to give advice to poor people whom he knew he could influence in

many repeated expressions, all tending to the same end, 'inculcatione et geminatione verborum?' and what could be more malicious than to upbraid them for leaving a rebellion, with the hateful name of Runaways; and not only advise them to return to an open and most flagitious rebellion, but to encourage them thereto, by promising them help, or assistance, or officers, which shew a rooted and malicious design to have that rebellion prosper? Nor are the words such mysterious expressions, as that every country fellow could not but necessarily understand, being fitted designedly for their capacity, nor could they forget them as loose and scattered words, being a sage, a designed advice from a man, whose parts, piety and interest they admired. And what man alive could be such a brute as to forget the most remarkable thing they ever heard, upon the most remarkable occasion, and upon a point wherein they were so much concerned, and which they could not but lay deeply to heart, and think often upon, because it concerned them all together? And so they would remember one another, and because it was to be the foundation of the greatest resolution that ever they could be concerned in. As to the generality, objected against, of some such words, his majesty's advocate craves leave to say, that an advice was never in more explicate and specific terms libelled; and in whatever terms an advice be given, it is still an advice to rebel, and so art and part of rebellion; nor seeks he any latitude in his libelling the words, further than that he said, they should have officers, or help, or some expression of help: and it cannot be denied, but if one man should say, they would get help, or another that they should be helped, yet all these are the same expressions, and the same advice, and the words are the more to be believed, that they are not expressly the same, being to the same purpose, and as to this he opposes his libel.

And as to the second point, it is undeniable that this is not an accidental meeting with rebels, but it is an intercommuning with them upon the rebellion, and upon encouragements thereto, and though they were not denounced, yet he knew them more to be rebels, than he could have known them by their denunciation; for they themselves told him they had come from the rebellion, and they were only going home to seek clean clothes, which was an acknowledgment that they were yet in the rebellion, and a part thereof: and this is far stronger than Monkland's case, and many others, who have been condemned for going to seek their bairns, or their horses; nor do the acts of parliament requiring denunciation militate in this case, since denunciation is but a legal, and supposed, whereas this is a certain and proper knowledge.

To the third it is urged, that it is an uncontroverted principle in our law, that no defence contrary to the libel can be admitted, for that were to admit a formal probation, that the king and the pursner's witnesses are still perjured,

it being undeniable, that if the king's witnesses prove that Cesnock's was in such a place at such a time, spoke such words to such men; but if Cesnock's witnesses prove that Cesnock was not there, certainly either of the two witnesses must be guilty of perjury, the fact being clearly libelled to have been expressly done, and therefore our law has justly abhorred; as well as rejected such defences as are contrary to the libel, and as, amongst many other instances, was expressly so decided in the case of Mr. William Somerwel, and in the case of M^r. Leod, and M^r. Niel of Bara, in which case *alibi* of five miles distance was repelled: and albeit *alibi* may be sometimes admitted, where it is consistent with the libel, as where the deed is not very specifically libelled; yet in this case, where the fact is specifically and clearly libelled to have been expressly done, and that the witnesses knew the pannels, and that there is no impossibility in the thing; as for instance, if Cesnock should have proven himself to have been for six months both by sea, and after, at London or Paris, and should have proven this by witnesses, beyond all exception, the justices might, *eo casu*, possibly prefer him to the probation of his *alibi*, because of the inconsistency and impossibility of the thing: yet it were most absurd, and of very irreparable consequence, to admit Cesnock to prove an *alibi* of half a mile, and by his own friends, tenants and servants, for he might, in few minutes, have gone to that town without observation; and is it not much more equitable, as well as legal, to believe three witnesses, who must be eternally damned for no advantage, and living in a country to which it will be impossible to return, if the thing be false, than the laird's own tenants and servants, who, besides the general kindness, are of one sect, that think there is no sin to bring off their own friends, as is to be seen in very palpable instances? And by the nature of our assizes of error, it is clear, that our law believes, that men are much more inclined to assoile than to condemn; nor shall ever the king prove the treason, or any clanned man may be proved criminal, if this kind of *alibi* be sustained, and for this cause no evidences are received and sworn against the king in England.

As to the Act of Indemnity, the act itself is opposed, wherein the whole scope will shew, that there is no design to secure by it, fauatic heritors and ministers, but only the poor and deluded multitude; and therefore his majesty does expressly except, not only the heritors and ministers who have been in the rebellion: But 2do. Such as were contrivers of it. And 3tio. Such heritors as contributed thereto by men or money; and what is a more clear and express contributing to a rebellion by men, than to advise men to go to it, and to encourage them to go to it, and to promise them assistance? And the laird of Cesnock's countenance and well-wishing to that cause, could have actually contributed more than a little heritor sending out one or two men, and yet that little

heritor would have been guilty, though contributing far less. As also, according to this his promise and encouragement, the pannel did send, or at least connive at a great many of his tenants and servants going to the rebellion, and, as a sign of his affection, did suffer them peaceably to live upon his ground, after their return from the rebellion: nor is his majesty's advocate resolved to debate this reset, as he might, to be, *per se*, the crime of treason and rebellion, being resolved here only for to use it as an high aggravation and qualification of his having contributed toward the success and encouragement of that rebellion; for though a nobleman or gentleman, who lived in a country distant from his tenants, or being amongst them, meddled a little with them, might pretend some favourable construction for his ignorance, oversight, or connivance; yet Cesnock having promised encouragement, and being himself, and for many years, founded upon the principles of self-defence, whereupon Bothwell-bridge was built, and having gone alongst, in the last age, in far more open and dangerous opposition to the king's authority than Bothwell-bridge was, and having very many tenants amongst whom he conversed every day, being a diligent and knowing man, it is impossible for any man of common sense to understand how any man of his intelligence and sense could not have been most watchful over them, and not suspect, having so much interest in these tenants and servants, whom even silly and remote strangers knew to have been in the rebellion, especially seeing so notorious a man as Mr. Brown, who, though he was not his servant, yet frequented his house, and wherever he lived, Cesnock could not but hear that he was in the rebellion, being the ken-speckled man in it, and his own porter, being born within a mile of his house, in his own land, and notoriously known by all his own servants, to have been in the rebellion, he having owned universally, without reserve or secrecy, to the whole servants, that he was in the rebellion; and yet, after he had kept him as long as he could agree with the young lady, he sent him away with a certificate and recommendation. All which being joined, does clear that that he was one of these ringleading contriving heritors, who is excepted by the Act of Indemnity, especially seeing, writing and speaking is not at all relative to rebellion, but to misrepresenting judicatories, &c. The citations adduced by the pannel's procurators are not answered, because his majesty's advocate thinks them only places common, and ill applied.

The Lords continue this criminal action and cause, and all further trial therein till to-morrow, and ordain the pannel to be carried back to prison, and the witnesses and assizers to attend, yik person under the pain of four hundred marks.

After hearing of these, the Court adjourned till the morrow, when the Pannel's Advocates made their Duplies.

CESNOCK'S LAWYERS DUPLIES. March 25, 1684.

Mr. Walter Pringle, for the pannel, as to the Defence founded upon the defendant's *alibi*, when the pretended expressions were alleged to have been spoken, duplies, That the said Defence is most relevant, and is no way elided by the Replies; for albeit the Defence is a negation of the Libel, yet it is not 'pure negatio,' but is 'negativa, coercitiva loci et temporis, quæ maxime cadit sub sensu testis,' and such negatives are perpetually sustained in all criminal actions; 'ad probandum incertiam rei,' according to the unanimous opinion of all lawyers who write upon the subject of crimes; and the defence that Cesnock was at home in his own house all that day, that the persons mentioned in the libel came to Galstoun, is so circumstantiated and circumscribed by time and place, as that it is naturally impossible he could have met with them at Galstoun-bridge that same day, except the absurd of 'bilocatio corporum' were allowed. And whereas it is pretended, that the Defence is never sustained, but where the distance of the place is such, as that it was impossible the party could be present:

It is duplied, that this pretence is most irrelevant; for albeit the distance of *alibi* were but half a mile, or only distinct rooms in the same house, yet it is as really *alibi*, as if the distance were an hundred miles; so that whatever be the distance, if it be clearly proved for the pannel, by famous witnesses, that he was all that day in his own house, it is as naturally impossible he could have been at Galstoun-bridge, as if he had been all that week at Paris. And it cannot be controverted, but if a murder were committed in the next room, and that a person in another room of the same house should be accused for it, the defence of *alibi* would be sustained, if he could prove by witnesses, that he went not out of his own room all that day when the murder was committed, the witnesses being present with him all that time; and as this defence is unquestionably relevant, so it cannot be presumed but to be most true, it being well known that Cesnock is a most circumspect person, and hath constantly, upon all occasions, declared his abhorrence of all rebellious courses, and hath always, at the bar, declared before Almighty God, upon his solemn oath, that he never spoke these words, nor any treasonable words to that purpose, directly or indirectly, to these nor any other persons; and if he were of such wicked principles, it is not rational to imagine, that he would disown them upon so solemn and sacred an oath, but that he would rather satisfy himself with a bare denial; especially when he knows his oath cannot absolve him, and consequently there was never greater reason, in any case, for sustaining the defence of *alibi*, than in this case, and his majesty's advocate ought to condescend upon the present day that the alleged words were spoken, all lawyers being positive, and particularly Casp

Par. 3; Quest. 103, Num. 35, that when the defence of *alibi* is proposed, the express day, when the crime was committed, must be expressed; and he asserts this as the common opinion, 'a qua nequaquam est recedendum,' and cites many of the famous lawyers, as Bassius, Clarus, Jason and Mascardus.

As to the Replies against the Defence founded upon the act of indemnity, it is duplied, that the defence is unanswerably clear: for 1mo, it cannot be controverted, but that the pretended expressions, mentioned in the libel, are comprehended in clear and express terms under the general clause of the act of indemnity, whereby in express words, all persons are indemnified, who have spoken, written, printed, published and dispersed any traitorous speeches, or have advised any thing contrary to the laws, which clause is so clear and comprehensive, that it is impossible to suppose any case where treason had been committed, either by transient speeches, or even by a tract of discourse, or by treasonable council or advice, but the same will fall under the said general clause, and be thereby indemnified.

2do. The exception, in the said act of indemnity, of all such heritors or ministers, who have been in the late rebellion, or were contrivers thereof, and such heritors as have contributed thereto any levies of men or money, can never be stretched to deprive Cesnock of the benefit of the indemnity; because, albeit the expressions libelled were true, as they are not, it is impossible that they can ever infer the several cases whereupon the exception is founded; for it is neither libelled, nor can it be pretended, that Cesnock, was actually in the late rebellion, nor yet that he contributed thereto by the levies of men or money, but on the contrary he concurred, to the utmost of his power, to suppress the same, and did always declare his abhorrence thereof, and kept his horses and arms from being taken by the rebels. And as to the other case of the exception, whereby contrivers are excepted, it is not possible, with any propriety of words, to infer from the expressions in the libel, that Cesnock was a contriver of the rebellion, because the true and proper sense and meaning of contrivers, is only where a person hath consulted and combined with the ringleaders to raise the rebellion, and hath laid down methods for that effect, which cannot in the least be inferred from the words of the libel, seeing the rebellion was contrived, formed, and had proceeded to a great height, before the pretended expressions were emitted; and therefore, by a necessary and clear consequence, can never be understood to have been contrived by these pretended subsequent expressions, which could never be the cause or occasion of that which had formerly taken effect, and had been so far consulted and contrived, as to break out to an open rebellion before the pretended expressions.

Stio. What is understood by contrivers, is clearly explained in the subsequent words of

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the exception, viz. Such heritors are only to be understood who have contributed by levies of men or money; which words are not insert alternative, but copulative, and as an explanation of the word contriver.

4to. If reasonable expressions relating to the late rebellion be so interpret, as to infer a contrivance thereof, then the benefit of the indemnity, as to all heritors and ministers, will be frustrated in every case, just as if the exception had been absolute and simple without any qualifications: for it is certain, that in all house and field-conventicles, the ministers did not only preach in downright terms, and maintained and defended the horrid principles of rebellion against his sacred majesty and his government, but also, in direct terms, encouraged and incited the people to rise in open arms, and the rebellion did immediately follow: and yet the lords of justiciary have never denied the benefit of the indemnity to any such ministers or heritors present at such conventicles; so that it appears evidently that treasonable preachings and discourses, albeit previous to the rebellion, never have been interpret to infer the contrivance mentioned in the exceptions, and far less can the same be inferred from treasonable expressions, emitted after the contriving and actual raising of the rebellion. And if such expressions should be stretched to infer a contrivance, it is impossible to suppose a case where an heritor or minister is guilty of traitorous speeches relating to the late rebellion, but he may still be brought under the compass of that exception, and be debarred from the benefit of the indemnity, because it may be always pretended, that such expressions and treasonable speeches, if previous to the rebellion, did encourage the people to rise in arms, and if subsequent to the rebellion, that they encouraged the people to continue, and infer a rathabitation; so that, by these pretences, the exception is as large as the rule, and the indemnity will prove a snare to all heritors and ministers who had just reason, by the general clause of the indemnity, and the express words, to look upon themselves as thereby secured from the guilt of all treasonable speeches, spoken, written, printed, published, or

*, and of all counsel and advice contrary to the laws, unless a clear contrivance of the rebellion by contriving with the ringleaders in raising thereof, and contributing thereto by levies of men or money, were made out against them, which is not, nor cannot be pretended against the pannel.

As by the common laws of all nations, all indemnities and acts of oblivion must be favourable, and largely interpret and extended, and not merely limited in prejudice of the persons who claim the benefit thereof, so, by the indemnity itself, all his sacred majesty's judges are expressly commanded to interpret the same with all possible latitude and favour, as they will be answerable upon their highest peril;

* This blank is in the Record.

and such clauses are usual in all his majesty's indemnities and acts of oblivion, as may appear by the indemnity after his majesty's restauration; whereby it is expressly ordained, that every clause and word thereof be understood in the most favourable sense the expression can bear; and consequently the pannel may justly expect, that the lords of judicatory will allow him the benefit of his majesty's gracious pardon, will not suffer the general word in the exception of contrivers, to be inferred from the pretended expressions mentioned in the libel, upon nice and empty debates and stretches, contrary to the true meaning, import and design of the said indemnity.

2do. Whereas it is pretended, that the exception does comprehend all heritors who have been actually in the rebellion, so it may comprehend all such heritors who are not art and part of the rebellion, or are accessory thereto.

It is answered, that the alledgance ought to be repelled, because the exception can only be understood according to the express terms and qualifications thereof, viz. That such heritors are only debarred who have been in the late rebellion, or were contrivers thereof, by contributing thereto, of levying of men or money, and art and part, or any accession to the rebellion, otherwise than according to these express qualifications, can never be understood to have been intended or meant by the exception; for then the exception had run in these express terms, viz. that all heritors or ministers should be excepted who were in the late rebellion, or art and part thereof, or accessory thereto; and the exception not being so conceived, it ought not to be extended beyond the precise qualifications of accession therein express, especially seeing his sacred majesty commands all his judges to expone this indemnity with all possible latitude and favour, as they will be answerable upon their highest peril: and to stretch and extend the exception to all the various cases of accession, or art and part, would be so far from interpreting the same with latitude and favour, that, upon the contrary, the interpretation would be rather rigorous and without any favour, and the exception would be as large as the rule, so that the indemnity should import nothing as to heritors in the case of treasonable speeches, albeit all persons, without any distinction, are indemnified for speaking, writing, printing, publishing, or dispersing any traitorous speeches, and even for giving counsel and advice in any thing contrary to the laws, which were to frustrate one of the greatest ends of the indemnity.

As to the additional libel, it is further alledged, That the same cannot be sustained, either simple or as an aggravation, because there is neither year, month, nor day condescended upon, in which the crimes libelled are alledged to have been committed, and the year, and month, and day are essential in all criminal libels.

Sir John Lawder for the pannel replies further, That the defences stand relevant, not

withstanding of his majesty's advocate's answer. And *quoad* the first, that the words alledged uttered by the pannel, are not naked treasonable expressions, but are art and part of treason, and must be presumed to have been malicious and advised speeches. For imo. This were to confound the limits of two distinct species of the crime of Perduellion, words having for their form and essence *nudam verborum emissionem*, which are liable to mistake, especially by persons of no breeding or quality, who can give no reminiscence after five years time, unless they had taken notice of it instantly, and redacted it unto writing; and lawyers make a very great difference between words, that of their own nature tend to the commission of a crime, and such as 'non causam, sed occasionem tantum præbeant delinquendi,' of which Anton. Matth. upon his title de *læsa Maj.* page 324, gives a very remarkable instance out of Farmacius, of a choleric captain in the march of the army; because their pay was not punctually paid, he broke forth into this seditious expression, 'It is a wonder that the soldiers mutiny not;' which being handed down amongst the companies, a sedition immediately arises in the camp; and yet the lawyers determine, that he is not 'perduellionis reus, quia non tam causam quam occasionem seditioni dedisset judicandum est.'

As to that part of his majesty's advocate's answer on the 126 Act, 12 parli. king James 6, that he needs not in this case say, that the parties with whom Cesnock is alledged to have had the conference, were denounced rebels at the head burgh of the shire where they dwell, because he had a more certain ground of knowledge out of their own mouth, than any such denunciation could have given him.

It is duplied, That their saying they came from Tolcross-park, could not put him in *malæ fide* to look upon them as rebels, because they might have been there by restraint, or other excusable occasion, or might have come away in obedience to his majesty's proclamation, commanding all these rebels to lay down their arms.

2do. Where the law has fixed upon a solemnity, such as denunciation at the market-cross, and private knowledge does not supply the want thereof, as we see in the case of intimations, of assignations, and many others, seeing 'id tantum scimus quod de jure scimus.'

As to the third alledgance made against the defence of *alibi*, That it is contrary to the libel, and that the defence condescended upon, is so inconsiderable, that it does not elide the libel.

It is answered, That in many cases defences contrary to the libel, are both admitted and sustained. As for instance, where one is pursued *super homicidium præmeditatio*, and he founds his defence upon the late act of parliament 1661, anent casual homicide and slaughter in self-defence, yet by that all the laws in the christian world is allowed to be received.

2do. There is a *propositio æternæ veritatis*. That Cesnock was in his own house all that

day, wherein Crawford and Ingham passed by the bridge of Galstoun, and which consequence is so deeply rooted in nature, that no rhetoric or conviction can persuade us of the contrary: And this demonstration is confirmed by no less testimony than that of an angel, who tells the disciples that Christ was risen, *ergo*, he was not in the grave, and yet he was at no great distance; and in these cases, 'majus et minus non variant specie,' and it is as infallibly true, that Cesnock, if he was all that day in his own house, was not at Galstoun no more than he was at Paris.

It is further added and argued in behalf of what is already alledged in the act of indemnity, that such acts by the inviolable laws of all nations, have been esteemed sacred and inviolable, 'non movenda, non tangenda,' without a curse, and the loosing or questioning such securities gives a fatal blow; as if Caligula had got his wish, of whom Suetonius in *ejus vita*, tells, That he wished the whole people of Rome had but one head and one neck, that with one stroke he might strike it off: and many thousands of his majesty's loyal deserving subjects, both in southern and western shires, would be in that case, if this act shall not be found to defend; and it were a strange analogy of the law, that the rebellious and seditious field preachings of these demagogues shall be comprehended within this act, and a few transient put up, and incoherent words alledged against the pannel, shall not be indemnified. As for example, it was reported that from the 22 of Joshua, verse 22, the God of Gods knows, and Israel shall know, that if we be in rebellion this day, God will not save us. These firebrands did assure the people, that every hair of their head should be a man, the grass of the field should fight for them, and that they behoved to come forth and help the Lord against their mighty oppressors; and yet these, which can admit of no probation, are certainly pardoned. And whereas it is pretended, that Cesnock falls within the compass of the exception, as a contriver and contributor of levying men or money. It is answered, that the words, except they be tortured, can admit of no such sense, 'et pro- pria verborum significatione standum est, nisi inde absurdus resultet sensus;' and there is much more reason here, where the indemnifying part is ordained to be explained with all favour. *Ergo*, a contrario sensu, the exceptions diminish and lessen this indemnity, ought to be taken in the strict and precise signification, without extension or amplification; and it is, known, without consulting critics, that contriving imports an antecedent accession, which could not take place here, it being acknowledged by the libel, that the rebellion was formed in being before this accidental rencounter, so that he is certainly within the terms of his majesty's indemnity, and craves his majesty's advocate's concurrence for maintenance thereof.

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Sir GEORGE LOCKHART's TRIPLIES to Cesnock's Advocates.

Sir George Lockhart for the pursuer, does insist upon that point of the libel, that the pannel did intercommune and converse with the persons condescended upon and libelled, who had been, and still were to be considered as in the state of rebellion. And as to the objection, that they were not denounced at the market-cross of the head burgh of the shire of the same, is most irrelevant, because, albeit after a rebellion is sopped and extinguished, and that persons who had been engaged in the same, did publicly converse, and go up and down, the act of parliament mentioned in the defence, may take place by denunciation at the market-cross, to proceed to put persons in *mala fide*; yet it is absurd and contrary to all law and reason, that the said act of parliament requires any such solemnity, as to persons engaged in an actual state of rebellion, it being strange to suppose or imagine, that his majesty's subjects might converse with rebels actually engaged in arms, or that it were a possible case to use the solemnities of denunciations at a market-cross against a concurrence and combination of execrable rebels, before they were dissipated, or the rebellion extinguished.

2d^o. The pursuer does also insist upon the libel, as founded upon the words and expressions condescended upon, as being reasonable in the highest degree, and a downright accession to the rebellion, it being certain by the common principles of all law, that 'mandans vel consules delictum, tenetur ad posnam or- dinarium delicti,' as being the spring, rise, and source of the same; and the words libelled, do directly import a counsel and advice to the persons condescended upon, to return to the rebels, and the reasons and motives condescended upon, that they would not want help or officers, were equally treason. And as to the objection made, that it was *nudum consilium*, and there was no instruction, and albeit the words should import the crime of treason, yet not an accession to the rebellion.

It is answered. The words and expressions libelled, are a clear, evident and plain advice, that are not capable of any benign sense or interpretation: And the pursuers do not understand what is meant by instruction; for there was no necessity to condescend upon the particular way and method, how they were to return and serve in the rebellion: But the words contain more than the law requires: for they not only contain a counsel and advice, but condescend upon motives and reasons, which are the highest and most rational instructions for enforcing of counsel, not only from the authority and influence of the person giver, in expressing his dislike with their coming from the rebels, but also containing a motive and reason of their encouragement, that they would not want help, or be supplied with officers.

And as to the pretence that the words are reasonable, yet they import no accession to

the rebellion. It is answered, That all counsels and advices import and assume the nature of that crime to which the counsel and advice is given. As for example, a counsel and advice to commit murder, is an accession to murder, and just so in the crime of theft, and all other crimes, and a counsel and advice to joyn with, or return to rebels, is directly an accession to the rebellion, the action itself, and the counsel to which it relates, being in all cases one and the same crime.

And as to that objection against the relevancy of the libel, that the words condescended upon bear that expression, or such like, and that 'non licet vagari in criminalibus.'

It is answered: The objection is frivolous, and the libel being special as to the words, there is no generality or uncertainty as to that clause, or such like, because it cannot admit of any variation which is material, or can alter the sense or import of the words libelled; and whatever defences can be competent to the pannel for taking off the words libelled, will no less militate against any words or expressions which are equivalent; and it is a rare conceit to imagine, that if the witnesses to be adduced to prove the libel, should vary in expressions not material, that therefore the libel were not relevant, or were not proven.

As to that alledgance, that the pannel was *alibi*, and was in his own house at Cesnock at the time, when the witnesses can be able to prove the words libelled, and that the pursuer ought to condescend upon the day, to the effect the defence of *alibi* may be competent.

It is answered, 1. That this objection is contrary to law, and there cannot be a more dangerous preparative to his majesty's interest, and whereupon the greatest of criminals and malefactors might escape: For 1. both the common law, and the laws of this kingdom, and the inviolable practick of the court in criminal libels, there needs no more condescendence than the year and month, and as to which the law is clear and positive, in that title where the same is *ex professo* under consideration, viz. 'Digest de accus. et inscript. Leg. 5.' where the words are, 'libellorum inscriptionis conceptio talis est. Lucius professor est se meminisse, Leg. Jul. de Adult. ream de ferri quod dicat eam cum Gavius Sevius in civitate illa, domo illius, mense illo, consulibus illis, &c.' and again, 'neque autem diem neque horam invitum comprehendit.'

2. It is the common opinion of all lawyers, particularly Gomes; in that Title 'qualiter formetur accusatio,' where he states the question, and does positively resolve in these words, 'Si vero factum aut delictum omni tempore est punibile' 'dies et hora commissi criminis non debet poni nec inseri in libello, nec probare, quia per hoc nimis coarctaretur accusator, et tenderet in grave damnum reipublicæ.' And again he says in the same place in express words, 'imo quod accusator, etiam monitus et requisitus ab adversario, non teneatur ponere diem, nec horam commissi crimi-

'nis, nec iudex possit eum ad hoc compellere;' and of the same opinion is Julius Clarus, Quæst. 12, Num. 13, Farin and others.

3. How is it possible it can be otherwise? for suppose that the witnesses to be adduced by the pursuer shall prove positively the crime, and the person who commits the same, and the circumstances in which it was committed, can there be no contrary probation allowed, either directly, or by inference, to take off the force of that probation? which were just to allow witnesses to depone 'contra dictum testimonium.' But as the point is clear in the general, so there is no necessity to enlarge upon this debate, as to this special case, in regard the *alibi* condescended upon, viz. that the pannel was at his house in the town of Galstoun, about half a mile distant from the place condescended upon and libelled, by no law was ever admitted, either 'in iudicio civili aut criminali;' and the reason is clear and undeniable, in respect it is possible in such a circumstantiate *alibi*, that the pannel might have been guilty of the words libelled, and might have had opportunity of meeting with the witnesses, specially there being no qualifications condescended upon to enforce the *alibi*, as that he was 'detensus in carcere,' or *affixus lecto*, but does acknowledge to be in perfect health, going up and down doing his affairs, and so is a case *toto calo* different from an *alibi* so circumstantiate and qualified by reason of the distance, that there was *impossibilitas nature*. And as to that alledgance, that the pannel has the benefit of his majesty's indemnity, which extends to all treasonable speeches, and to be interpret, in the greatest latitude, and most benignly and favourably.

It is answered, 1. That the act of indemnity is opposed; for first, it is clear by the act itself, it is not a simple indemnity, but contains the exceptions therein mentioned, and therefore must be congruously interpret, that it may not only import an indemnity, as to such for whom it was intended, but also that such as were excepted and excluded, should not enjoy the benefit of the said indemnity.

2. It is acknowledged, that treasonable speeches having no relation to the rebellion, do fall under the indemnity, and are secured thereby; and there are many instances of treasonable speeches, which need not be condescended upon.

The exceptions in the act of indemnity are plain and clear, that heritors who were contrivers of the rebellion, and contributors thereto, by levies of men or money, should not enjoy the same. The plain meaning, and English whereof, does comprehend all accession to the rebellion, and the words libelled do import a direct accession to the rebellion.

And as to the objection, that none can be reputed a contriver of the rebellion, but such who advised the first rising and eruption of the rebels.

It is answered: The pretence is most irrelevant; for a rebellion being equally to be con-

sidered in relation to the first eruption, and to all breaking forth of the same, it is against sense to pretend, that there is any rational difference, whether one did advise the first eruption of the rebellion in one corner of the kingdom, or did advise, in order to the increasing and strengthening of the rebellion in another corner of the kingdom, the crime as to the atrocity being the same; and rebellions are not to be looked upon as the result of formed and communicated counsels, but every act and every advice in relation to rebellion is of the same nature, and a contrivance, and a strengthening and increasing of the rebellion, and so justly excluded from the act of indemnity; and to advise, and to contrive a rebellion in the west, was just the same contrivance as to contrive a rebellion in Galloway, where it first broke out.

The case does also fall under that clause by contributing to the rebellion, by levies of men or money; for contributing by levies, cannot be understood as if levies were raised by authority, but only that persons run to the rebellion; and therefore the giving advice to any, either to go to rebellion, or to return to the same, was perfectly to contribute by sending of men to the rebellion; and if it were otherwise, the exceptions contained in the act of indemnity were of no import or significance; and all that was intended by the indemnity in relation to that rebellion, was but to secure the deluded multitude, who were easily imposed upon, and led by influence or example, but otherwise to secure heritors who were contrivers of the rebellion, or contributed thereto; and if any such thing could be sustained, it would evacuate the indemnity as to the exception, and condemn the public procedures already made against such persons who fall under that head of contrivers of the rebellion, or contributors thereto, albeit with that artifice and cunningness they did not appear, nor were not actually engaged in the rebellion.

To which, on the part of the Pannel, the following Arguments were set forth by way of Quadruplies:

CESNOCK'S LAWYERS QUADRUPLES.

Sir Patrick Hume quadruplies to that, that the expressions mentioned in the ditty are not only treasonable words, but do import counsel and advice to these persons to go back to the rebellion. It is answered, That the expressions mentioned in the indictment, are not treasonable words, seeing they do not fall under any express law against treason; and albeit such rash and inconsiderate expressions might make a man liable to an arbitrary punishment, yet they can never infer the pain of treason, which can only be inferred from these express cases mentioned in the laws; and penal laws are to be restricted and not extended, as is clear from all lawiers on that subject, and particularly *Carp. Par. 1. Quest. 9. Num. 13. 'Pœ-*

nales sanctiones in iis tantummodo casibus recipiendæ sunt, quorum expressa fit mentio in legibus, neque enim pœna gravior alicui imponi debet, nisi in casibus jure expressis.' And *Par. 2. Quest. 36. 'Quod in pœnis, vel statutis pœnalibus extra proprietatem verborum fieri non debet, ad Leg. 42. Dig. de pœnia, interpretatione legum, pœnæ moliendæ sunt potius quam asperandæ.'*

2. The expressions cannot import counsel and advice, so as to infer the crime of treason, seeing crimes cannot be inferred from remote causes and inferences, to make the party liable 'ad pœnam ordinariam.' As for instance, if a man having been fighting with his neighbour, they should be separated, and as they were coming out of the way, should meet with another, and he should ask him from whence he came, and he should answer him, he came from such a place where he was fighting with his neighbour, and that he came away and left him, and the person should say, he liked not runaways, and bid him take courage, and if he would bide by it he would get help; it were absurd to pretend the person that met him by the way, and had these expressions to him, should be guilty of the man's fighting with his neighbour; and the like may be instanced in many cases of the like nature.

It is the opinion of all lawiers, that when it is provided by a statute, that the person who gives counsel and advice should be liable to the same punishment, is only understood of counsel and advice before the committing of the crime, but not thereafter. *Bartol. in Leg. furtum, Dig. de furtis, par. 2. Marcel. Con. 30. Num. 31 and 32. 'Statutum dicens quod præstans auxilium, consilium vel favorem malefico, tali pœna puniatur, debet intelligi quando maleficus est in fieri, secus autem in maleficio jam facto perfecte et consummato, et sic ante non post delictum, quia de illo statuto loquitur.'* And *Minochius Cas. 351. Num. 6. requiritur quod consilium præcedat delictum, nam si secuto delicto daret consilium, illud certe is frustratorum, nec enim suasus delinquens eo consilio ad delictum perpetrandum processit.'*

Whereas it is pretended, that the indictment, in so far as it is libelled that the defender spoke these words, or some such words to that purpose, is relevant in these general terms, seeing the pursuers condescend that the defenders had the like words to encourage the party.

It is answered, That the defender spoke these words or such like alternative, is not relevant, it being a certain principle in law, that whenever a crime consists in words, the specific words ought to be condescended upon, for if the libelling of a crime arising from a particular fact, as the fact and deed must be condescended upon, and the libel will not be relevant in these terms, that the defender committed the fact and deed, or some such deed to that purpose; so by the same reason when a crime is libelled arising from words, the particular specific words ought to be condescended

upon, seeing the varying of a syllable or a letter, will also alter the meaning and sense of the words, and if it were otherwise, then the pursuer might libel no more but treasonable words in general, which were absurd.

Whereas it is alledged, that the conversing with the persons mentioned in the indictment, doth infer intercommuning with notour rebels, seeing the defender did know that they had been in the rebellion. It is answered, That it is absolutely denied that the defender did know that any of these persons had been in the rebellion, and private knowledge being 'actus animi et intellectus,' which can only be proven by writ, or oath of party, which cannot be admitted in this case; but if it were allowed, he could very freely declare, as he has already done, that he did not know that these persons were in the rebellion. And seeing the law has fixed on that solemn and specific act of denunciation at the Market-cross of the shire where the rebels dwelt, to be the only thing that puts lieges in *mala fide*, to supply or intercommune with these persons who had been at the rebellion, no other thing, how notour soever, can put the lieges in *mala fide*, but only the denunciation at the Market-cross of the shire, conform to the express act of parliament. And it is evident by his majesty's proclamation in April last, that the resetting, supplying and intercommuning with persons that have been in the rebellion, does not infer the crime of treason, unless they were denounced at the horn, and forfeited for rebellion. And seeing his majesty's advocate has already declared, that he makes only use of that article of the libel as a qualification, the defender needs say no more but oppose the act of parliament which sufficiently takes it off.

6. Whereas it is alledged that the defence of *alibi* is contrary to the libel, and so cannot be sustained. It is answered, that albeit it be no nullity in a criminal libel, if the libel bear the crime to have been committed upon one or other of the days of such a month, in such a year of God; yet if the defender desire the pursuer to condescend upon a precise day, he ought to condescend thereupon, that he may not be precluded of his defence of *alibi*, which is not contrary to the libel, but elides the libel. As for instance, if it had been libelled that the defender had killed a man at Edinburgh, on one or other of the days of June 1679, and the pursuer condescending upon a particular day, and the defender should prove, that all that day he was at home at Cesnock, this were enough to elide the libel, which is clear both from the civil and common law. Cap. final. parag. libellorum, quest. 8. and from all the lawiers who write upon that subject. And particularly Bartol. in Leg. is qui reus, Num. 10. Dig. de Imp. judicis, & Jason in lege arbitraria, 2 parag. si quis Ephesi. num. 6. de eo qui certo loco. And Farin Quest. 1 num. 20. And Gail. Lib. 1. Obser. 64. who is express, that albeit it be no nullity of the libel, albeit the particular day be not condescended

upon, yet if the party desire he ought to condescend, 'nam omissio diei reo auferret defensionem, ergo exprimenda, quia probare possit 'eo die in tali loco non fuisse.' As also this is clear from the law of our neighbour nation of England; as appears by 37 statute king Henry 8. by which it is statute, that in all criminal libels, the day and place must be condescended upon; and from our own law, cap. 8. quom. attac. By which it is provided, that the names of the parties, day, year, and month should be express, and damage must be condescended upon; so that by the law it is as necessary to express the precise time in the libel, if required as to condescend upon the party's name, the cause of complaints, and the place where the crime was committed. And as this is clear in the general, much more ought the pursuer to condescend in this particular case, seeing if the pursuer condescend on the day, the defender not only offers to prove *alibi* that day, but that he was all the day at home in his own house. 'Quæ est defensio certata loco et tempore;' and so being a positive exception, ought to be sustained to elide the libel, especially seeing it is likewise offered to be proven by persons that were present in company with Ingrham, Crawford and Fergusson the time they past through the Galstoun, that the defender was not with them at that time, and albeit the defender's house be not at that distance from the Galstoun, that it was impossible in nature he could be there, yet he condescends so pregnantly, that it is equivalent to a physical impossibility that he could be there, seeing it is positively offered to be proven, that he was at home at his own house all that day intirely, by persons that were present with him in company all the whole day, and the persons who were present with Ingrham, and the rest mentioned in the first indictment, all the time they past the Galstoun, and the defender was not with them, which is so circumstantiate an *alibi*, that it is beyond all question relevant to elide the libel. And as to Gomez and other lawiers cited, that seem to be of the contrary opinion, it is evident, that there they do not state the case of *alibi*, but only if the libel without condescending on the day be relevant, as to which it is not controverted. But these and all other lawiers upon that subject are clear of the opinion, that when the defender requires the pursuer to condescend upon the precise day, that it ought to be condescended upon, that the defender be not precluded of his just defence of *alibi*.

7. Whereas it is alledged, that the defender falls under the exception of the Act of Indemnity, both as a contriver and contributor to the rebellion.

It is answered, 1mo. That the defender cannot be reputed a contriver, neither can those words and expressions contained in the indictment import a contrivance, being only, as is acknowledged by the indictment, spoken at a transient meeting on the high-way, and it is not to be imagined that any man of con-

mon sense or reason would go and contrive a rebellion with any persons he met on the high-way.

2. Contrivance must necessarily be understood of consulting and advising things that are previous to the rebellion, and which might give rise thereto, and not by a transient discourse, and that contrivance should be so largely extended, as to comprehend all expressions that looked like treason; the exception would be as general as the rule, and upon that ground the former part of the Act of Indemnity would be altogether evacuate.

3. As these expressions cannot infer a contrivance, far less a contributing by lerying of men, which can only be understood in the proper terms of assembling men together to carry on the rebellion, which cannot be in the least pretended in this case; and the defender was so far from countenancing any thing that had the least tendency to rebellion, that he did upon all occasions testify his abhorrence of all rebellious courses, and gave a signal instance of it in April 1679, about a month before the rebellion; in so far as there being one of his majesty's soldiers killed by some of the rebels, and another wounded upon the confines of the shire, immediately the noblemen and gentlemen of the shire met, and wrote a letter to the lord chancellor, which was drawn by the defender, and subscribed by him, and a great part of the gentlemen of the shire, by which they acquainted his lordship with the murder of one of the soldiers in the night, and the wounding the other; as also of some armed field-conventicles of a considerable number of the commons occasioned by unsound, turbulent and hot-headed preachers, making it their work to draw the people to schism and separation from the pure ordinances, and instill in them the seed of rebellion, and out of their sense of their duty to authority, the good of religion, the peace and quiet of the kingdom, did think it fit to signify to the lord chancellor, their detestation and abhorrence of such horrid practices, and that they should endeavour not to be wanting in their capacities and stations, what was becoming good christians and loyal subjects. Which was a most loyal letter, and a clear demonstration that the defender is of most loyal principles, and was so far from being a contriver of the rebellion, or having an access thereto, that upon the first appearance of any insurrection, he did give timely advertisement to the lord Chancellor, that effectual course might be taken for preventing thereof and for crushing the cockatrice in the egg; so that it is not to be imagined that a man of these principles, and who did write such a letter, could be guilty of any expressions that had the least tendency to rebellion. And as a further evidence of his detestation and abhorrence of the rebellion, it is offered to be proven, that whenever he was informed that any of his servants went to conventicles, immediately he paid them their fees, and dismissed them out of his services, and would not retain any who

haunted conventicles; and when he got notice of any of his people that abstained from public ordinances, he did always acquaint the sheriff-depute of the shire, and caused fine and punish them according to law, and did never suffer any of the rebels to come to his house, nor got they any of his horses, servants or arms to assist. But immediately when he heard of any of the rebels being near his house, he left his house and came to Edinburgh to join with his majesty's forces, which was all a prudent and loyal man could do at that time. As also it is positively offered to be proven, that he dissuaded all his tenants to join in the rebellion, and informed them to take the bond; and therefore he ought to have the benefit of his majesty's gracious act of indemnity. And if such as have been at field-conventicles, or illegal administrators of the sacraments, and had maintained positions, that it was lawful to rise in arms for reformation of religion, condemned by the second act of the second session of his majesty's first parliament, and the preachers at all these conventicles, if such as these should have the benefit of his majesty's indemnity, as certainly they have, much more the defender, who has given such signal testimonies of his loyalty. Seeing it is clear, that his majesty's design is, that the said act of indemnity should be extended in the utmost latitude, which is agreeable to the common law, L. 3. Dig. de constitutione. 'Principio beneficium imperatoris, quod a divina sciz. ejus indulgentia profisciscitur, quam plenissime interpretari debemus.' And if the exception of the act of indemnity should be otherwise understood, there were hardly a gentleman in the West of Scotland, but he might be brought under the acts of parliament against treason; and the act of indemnity which his majesty designed for removing of all fears and jealousies, and the quieting the minds of his good subjects, should be rendered altogether elusory and ineffectual.

Mr. William Fletcher for the pannel further adds, and conjoins, that the Defences stand most relevant, notwithstanding of the Replies; For, 1. Whereas it was pretended, that the conversing and intercommuning with Daniel Crawford and the other rebels, was flagrant rebellion, and before any course could be taken to declare or denounce them.

It is answered, 1. That the pretended converse, being only a casual rencounter on the high-way, it could not subject the pannel to any crime, but especially the highest crime of treason; and there is no man in the world so innocent and loyal, who not have fallen in the same accident, considering the number of the rebels that were swarming in the country. 2. Any such converse and intercommuning being antecedent to the act of indemnity, the pannel is thereby secured, in respect that converse and intercommuning is none of the cases excepted in this indemnity, and 'exceptio fit, mat regulam in non exceptis.'

2. Whereas it is replied, That the pretended words do import a counsel *cum instructione*, in regard they contain motives and reasons for returning to the rebellion, viz. that they should not want officers and help. It is answered, That law in this case of counsel, requires more than reasons and arguments to persuade, viz. directions how to compass the crime, as in *crimine furti*, and what place and house may be most easily broke, and what instruments are most fit, which species of instructions are expressly cited in the forecited paragraph of the Institutions.

3. Whereas it is replied, That the counsel takes the nature of the crime which is counselled; it is acknowledged that this holds true in the general, but still it must be such counsel as is instructed, and in this case it was impossible that the pannel might have instructed the rebels, both with proper ways how to manage the rebellion, and likewise with arms and horses.

4. Whereas it is pretended, that the indemnity is not simple, but contains exceptions, and that albeit treasonable expressions be indemnified in the general, yet the indemnity cannot be extended to such treasonable speeches as import a counsel to rebellion, that being a proper accession to the crime by which the pannel becomes art and part thereof.

It is answered, 1. That '*verba legis, præsertim favorabilia, non sunt cavillanda*;' and it is impossible, without offering manifest violence to the propriety of words, that the expressions libelled should not be comprehended under the general of traitorous speeches; and albeit treasonable expressions may be distinguished into two sorts, viz. 1. These which do only import a slander and reproach of his majesty and his government. And 2. these which carry in them a counsel, mandate or command to commit the crime of treason; yet it would be a very bad rule in dialectic, to say that these words are not traitorous speeches, because they are not of the first kind of treasonable speeches. 2. If it be the sense and opinion of all persons, who hear these words repeated in this libel, that the same are traitorous speeches, then that genus of treasonable speeches must necessarily comprehend the same: but so it is, that the pannel doth appeal to the lords of justiciary, and all who hear the libel read, if that was not the notion which they had of these words, that the same are traitorous speeches. And albeit his majesty's advocate and these who concur with him, may subtilize upon the nicety of words, and reduce them to another class than these which are contained in the indemnity, yet words are to be understood '*ex populari, quem penis arbitrium est, et jus et norma loquendi*;' or otherwise words should become captions and snares, and the people for whose satisfaction the proclamation of the indemnity was made, should not be capable to understand the same; and it is not '*usus artis*,' but '*usus popularis*' which must be the rule in this case. 3. According to all the rules of interpretation,

in things which of their own nature are not odious, the words are to be taken according to all the propriety of popular use, *v. g.* an indefinite speech should be taken for one that is universal, and the indemnity is not only a matter not odious, but most favourable, and therefore '*a proprietatē verborum non est recedendum*.'

4. It is a strange nicety and catching of words, to pretend, that words libelled should be pardoned, in so far as they are traitorous speeches, and should not be pardoned in so far as they are a counsel to rebellion; for this were indeed to cleave an hair, and it is noways suitable to that free and native liberty which is inherent in such acts, to run to metaphysical niceties.

5. Whereas it is pretended, that the pannel falls under the exceptions of the act of indemnity in so far as an heritor, and that it is clearly imported by the words libelled, that he has contrived the rebellion, and contributed thereto by sending out men to the same, and that the accession arising from counsel, imports as much against the pannel, as if he had been actually in the rebellion.

It is answered, 1. That the act of indemnity is opposed, which excepts only heritors in three cases distinctly express in the act, viz. 1. Actual rebellion arising from these words, Heritors who were in the rebellion. 2. Contriving. 3. Contributing by levies; and that counsel and intercommuning is not under any of these three heads, for the extent of the rule cannot be better cleared and determined, than by the nature of the expression; and where laws have exceptions, nothing does so much illustrate and confirm the rule, as appears from Novel 7. Cap. 2. in initio, where these words are to be found, '*necessarium existimavimus quasdam exceptiones dare legi cum multis vigiliis et subtilitate ad inventas, ut eas habens in auxilio, lex nequaquam moveretur*;' and the exception in some case doth enlarge the rule, and does fully clear the same, and makes it extend to cases which otherwise would not be understood to be comprehended, as appears from Lex 12. parag. 43. where the case being stated, if when '*domus instructa, legata an continetur vestis*.' The lawier doth resolve, that it is doubtful in the general; but if there be anexception added of '*aurum*' or '*argentum*,' that the '*domus instructa*' must necessarily comprehend '*vestis, uam qui hæc exceptio, non potest non videri de cæteris rebus, qua mea essent, zensisse*.'

2. The words '*contrivance*' and '*plotting*' are synonymous words, and are express in the Latin by '*orlinatio et tractatus*,' and according to the common acceptation of the words, these only are understood to have contrived and plotted a rebellion, who have taken measures, and laid down ways how to carry on and maintain the same, they keeping correspondence in order to that end, drawing what number could be engaged, how they should be provided with arms, and the like, which can

noways be inferred, as is pretended, from words spoke on an high-way in a passing discourse. Like as, plots and contrivances of rebellion are of their own nature secret and latent actions, which are done 'clam et occulto;' and no rational man will presume that the pannel, who is known to be a man most circumspect in his words and carriage, could have fallen into that madness, as to have contrived a rebellion with ignorant, silly and mean persons (some whereof he did not know) in an open high-way: and it is hoped the lords of justiciary will in this case consider the person of the pannel; and seeing the words do not amount to a contrivance, or plotting a rebellion, 'rapienda est occasio quæ præbet benignius responsum;' and albeit in a lax and improper signification these words might import a contrivance, yet the pannel doubts not but the lords will have regard to the proper signification of the words seeing otherwise it is impossible to interpret the indemnity with that latitude which his majesty hath expressly required.

Whereas it is pretended, that these words do import a contributing to the rebellion, by levying of men or money: It is answered, that levying of men and money is a physical act, and not a moral persuasion; and no man will imagine that levying of men and money, can consist in words, but the same doth necessarily import deeds of drawing men together, and taking of their names in order to the forming them into an army; if words were levying of men or money, an army would be very easily supplied.

As to the former defence against the second libel, viz. that it wants month and year, and there is not least answer made, and therefore there cannot be least use made thereof.

The Lords continue this Court till to morrow and ordains the pannal to be carried back to prison, and the Witnesses and Assysers to attend, ylk person under the paine of fyve hundred merks.

That day in the entry the King's Advocate declared, he passes from the second and last indictments, 'pro loco et tempore.' The part of the libel he and sir George Lockhart insisted upon was, 'That the said Campbel meeting with the witnesses coming from the rebellion, enquired whence, and being answered, from the westland army, desired them to return, for they would not wait assistance, adding, He did not like runaways.'

The Lords debated very long among themselves as to the relevancy, replies and duplies, and at length came to give this Interlocutor.

'The Lord Justice-general, Justice-clerk, and other Commissioners of the Justiciary, having considered the indictment pursued by his majesty's advocat, against sir Hugh Campbell of Cesnock, with the hail debate above-mentioned, finds the first inditement as it is libelled, viz. 'That the pannel having met with the persons mentioned in the dittay, coming from the rebels in arms, June 1679, and

'having asked them where they had been, and when they had told him they had come from the Westland army, he said he had seen more going to them, than coming from them, and he having asked them if they were to return, and they told him they knew not, and he said to them, that he liked not runaways, and that they should get help if they would bide by it;' or words to that purpose, as they are declared by his majesty's advocat, viz. That they should have officers or help, or some expressions of help, relevant to infer the pain of treason; and remits the same to the knowledge of an assyse, and repels the defence founded upon the indemnity, in respect the dittay, as it is libelled, falls under the exceptions therein mentioned, and also repels the defence of *alibi* as proponed and circumstantial, and all other defence proponed for the pannel against the first inditement.

I do not find the lords were unanimous in the interlocutor, but it carried by plurality of voices. Every body was surpris'd to find that Cesnock's defence of proving himself *alibi*, that day condescended on in the libel, when he should have uttered the expressions above set down, to find this most valid defence, I say, repelled by the lords; and this was a presage of what the issue would have been, had not probation failed. With this Interlocutor the court adjourned to the 27th.

Upon Thursday the 27th, the assizers were called and sworn, no objection being made. Their names are, sir Robert Dalziel of Glenea, John Boyle of Kelburn, Bannantyne of Kellie, sir Patrick Maxwell of Springkel, John Veitch of Dawich, James Nesmith of Posso, John Skene of Halyards, George Drummond merchant, sir James Fleming of Rathobyres, sir John Dalmahoy of that ilk, Andrew Frazer of Kilmundie, Alexander Nisbet of Craightinny, James Somerwel of Drum, James Boyd merchant in Edinburgh, James Loch of Drylie.

For Probation the advocat produceth Thomas Inghram and David Crawford.

Sir Patrick Hume objected for the pannel, that they could not be admitted, "because *prodiderunt testimoniam*, and revealed what they would say to his majesty's advocat and others; and also, that his majesty's advocat had taken their oath previous to any warrant from his majesty's privie council, which is contrary to his majesty's letter, that being only recommended to the lords commissioners of justiciary by an express warrant from the lords of council; and it is a certain rule in law, that 'testis revelans testimonium suum partibus, a testimonio repellitur,' and the reason given by lawyers is, 'ne ex illius dicto alii, testes suberentur.' Mascard. de prob. concl. 359. No. 40. 2do. Because in proving the pretended crime, they acknowledged themselves guilty of the crime whereof the pannel is accused, as is clear from the common law, Cod. de accus. et in-script. 3tio. Because it is offered to be proven,

that Ingrham did prompt and sollicite others to depone in this cause, and so has given partial counsel. 4to. *Et separatim*, because they bear hatred and mallice to the defender; and it is positively offered to be proven, that since the rebellion he promised to meet the defender with an evil turn if it lay in his power by any manner of way out of hell; and it is clear by our law, Statut 2 Rob. 1, chap. 34, against those that are excluded from bearing witness, that 'nec socii, nec participes ejusdem criminis, nec aliquis hostis seu malevolus parti, nec incarcerati, nec vinculati,' can be admitted witnesses.

His Majesty's Advocate opposes to the first, the constant practice of his predecessors, whereby they have been always in custom to examine witnesses upon oath before intending of the libel, which a judge or privy counsellor of the nation may do both in Scotland and England, and his majesty's letter was only necessary after intending of a libel, for a warrant to the judges who were not formerly in use to examine, though they might always have done it.

To the second, his Majesty's Advocate opposes the constant and uncontroverted custom, nor could the crime of rebellion, or any other privileged crime be otherwise proven, for who can depone but they who are *conscii*, and all *conscii* in treason are *socii criminis*.

As to the third, his Majesty's Advocate alleges the same is not relevant unless they condescend to the fourth, that he said he had malice, the same is not relevant except the malice could be qualified to rise to an *inimicitia capitalis*, which can only repel a witness, especially in the privileged crime of treason, whereof the detection is of such importance, that many specialities, as to witnesses in other crimes, are relaxed in this, and therefore the promising of an ill turn is not relevant, nor the quality, though they should go to hell for it, which is a rash, foolish, and inconsiderate expression, but they may condescend upon the ground upon which that *inimicitia capitalis* arose, and which may very much determine the extent of it.

2do. Adhering to the former objection, it is added *separatim*, that the witnesses were suborned, in so as they were prompt, solicit, and instigate to depone in this cause against the defender: as also, that they solicited other persons to be likewise witnesses against the defender, which the lawyers clearly make a sufficient subornation to cast them from being witnesses, especially when they are to depone upon premeditate and formal words, and after so long a time, as is clear from Mascard Con. 341. and particularly, that he instigated Adam Miller to be a witness against the defender.

His Majesty's Advocate answers, 1mo. that tampering and soliciting *non relevant*, unless it take effect, and the witnesses succumb to the temptation. 2do. It is not relevant, except the money or good deed were condescended upon, that it may be known if it be a sufficient

temptation, and upon what account it was given. 3tio. The subornation or corruption must be by the pursuer, or some having warrant from him, for else even the friends of the pannel may take pains and corrupt, and a witness being desirous to come off may comply with it, all which should much hold in witnesses called for the king, which are presumed to be from calumny, and where no advantage can arise to any private party. As to the speaking to Adam Miller, Can thou not say, or knows thou not that Cesnock spake such words. It is answered, It is lawful for 'contestes' to ask at one another.

Sir George Lockhart answered, That the objection anent corrupting the witnesses is not relevant, unless the quantity of the money were condescended on, and that it were expressly alledged that money were given upon the account of deponing against the pannel in the terms libelled, otherwise the simple giving of money is not relevant. 2do. The time must also be condescended upon, whether it was before or after the citation as a witness, or at least after the raising of the criminal letters, for if it was before, it is not relevant, unless it were positively offered to be proven, that it was given upon treaty and agreement, that the witness should depone in the terms libelled against the defender, and adheres to the former answer, that the pursuer nor none for him did use any attempts of corruption.

Mr. William Fletcher duplies, That subornation, and corruption being latent acts which cannot be proven by any other probation than conjectures and *indicia*, all lawyers have sustained such probation which doth arise from violent suspicions, and it is sufficient for the defender to condescend in general that witnesses were suborned, instructed, and solicited, and what money was given, or good deed promised, will arise from the probation; and it is absolutely impossible, that in any such case, the party who objects against the witness can be special as to the quantity of the money; and it imports not, though the witness had been practised before the accusation, seeing it is positively offered to be proven, that they were suborned and corrupted in relation to the pannel, and that they might depone against him.

This is what I find in the Registers as to the lawyers debates upon the witnesses. By other papers I find that sir Hugh was asked, if he had any thing to say as to Ingrham, in particular. He answered, with the strongest asseverations, that he was most certain he had never seen him in the face, and as to other objections he left them to his lawyers.

His Advocates urged very forcibly, that Ingrham could not be admitted, because he just now took upon him to prove, that the said Thomas had several times said, that if there was a way out of hell how to be avenged upon the pannel for delating him as a murderer, he would be revenged, and straight offered witnesses to prove, that in many companies, he

(the witness) had most seriously expressed himself in these words; and urged, that Ingrham could not be admitted to Cesnock's prejudice, and cited many famous lawyers to prove this.

The King's Advocate replied, That giving, but not granting, that the said Ingrham had thus expressed himself in a passion, it could not rationally be thought, that now in cold blood he would so desperately and wilfully damn his own soul by perjury, to take away the life of an innocent gentleman, especially considering he could propose no other reward to himself than damnation. He added further, "to make it evident to the world, that the witnesses have no design to swear falsely, I am free to declare, that when they were brought in to me, I examined if they could say any thing anent the late rebellion, and Cesnock's accession thereunto. They answered, they could say nothing; but when once I had made them swear as to what I should interrogate them, they deponed in the same express words contained in the indictment, which, added he, clearly evinceth that they had, and yet have the expression upon their consciences of that dreadful majesty of God, who is Judge to this and all their actions:" and the advocate goes on, "had this man come in voluntarily and offered to depone against Cesnock, it would have said much; but seeing he was brought in by force, and without his own inclination, the objection made against him can be of no force." This discourse was abundantly well calculate, for keeping Ingrham firm to the deposition he had emitted in the precognition, which was all the advocate wanted.

Cesnock's advocate was in no difficulty to answer all the Advocate advanced. It was the easiest thing in the world to put matters in this channel to serve a turn; and people of no conscience, or under the power of revenge, have no great impressions of damnation, or of God and his awful majesty: and if any who adduced these considerations were privy to any concert and collusion in this matter, they have had as little impression of those tremendous truths.

But further, the Advocate for the Defender offered to prove that this witness was suborned to swear against Cesnock, and had got largely both of money and victual for his reward, and had not only sold himself to this abominable perjury, but had inticed and induced others to the same course.

Upon this allegation, the Justice-general desired, that particulars might be condescended upon. And sir Hugh declared, that he was well informed, and would instantly prove it, that this fellow (Ingrham) was hired by Hugh Wallace, sometime factor to the deceased lord Craigie.

When this condescension was made, the court could not but admit Cesnock's witnesses for the proof of what was advanced. Accordingly, two witnesses were adduced who deponed that Thomas Ingrham had sworn in

their hearing and presence a great oath, 'That he would be avenged upon Cesnock if there was a way out of hell to do it.' Great pains was taken to cross-question the witnesses, and the interrogatories were put to them severally in the others absence, yet they exactly agreed in every word as to this matter: But then in another query, viz. 'When spake you of this matter together.' The one answered, 'He does not remember that ever they spake of it together, unless it was yesternight; and the other declared, 'He did not remember they communed at all upon it.' This inconsiderable variation not affecting the matter of the cause, was handle enough to such who were seeking an occasion to cast every thing proposed in Cesnock's defence.

Next, two other witnesses were adduced, viz. Ingrham's father and mother, who deponed they had seen Wallace give to Ingrham several pieces of money, but of what value they could not tell; whereupon Ingrham himself was interrogate, and declared he had got from Wallace half a crown at one time, and ten shillings at another, but he knew not upon what design. The king's advocate said, it might be Wallace had given Ingrham that money for some services he had employed him in; and that he himself used to employ the said Wallace as being a sharp man, and very active for his majesty's interest.

After the Lords had heard these debates upon the witnesses, they reasoned at a considerable length upon them before they came to an Interlocutor. That eminent lawier, my lord Pitmedden,* debated much whether witnesses

* It appears from Wodrow, vol. 2, p. 605, that lord Pitmedden (sir Alexander Seton) one of the Lords of Justiciary at the time of this Trial, was, in June 1686, removed from that office by a letter from the king, which is recorded in the Justiciary books. "His carriage," says Wodrow, "in Cesnock's Case, stuck with the managers, and now he would not go into the measures laying down for bringing in Popery, and therefore he is turned out of his posts. His ability in law, particularly the criminal law, is publicly discovered in his edition of sir George Mackenzie's Criminals, and his love to all branches of learning appears in his curious and vast library."

Lord Hailes, in the Notes on his Catalogue of the Lords of Session (Note 78) has published the account which lord Pitmedden himself in his MS. Notes to the Acts of Sederunt gives of his removal. It is as follows: "There were great pains taken to bring over Pitmedden to the court side; and the lord Maitland, then popish, and many others, were sent by the king's commissioner to deal with him; and farther preferments were offered, on condition he would but forbear to argue for the penal laws. To which he answered, he was bound by the oath of parliament to give faithful counsel, as well as faithful vote; and being impregnable, the letter [of dismissal] was

could be examined upon oath in a precognition, and brought such arguments against this as could not be answered, save by the king's letter allowing it, impetrate with an eye to this and such like processes. My lord himself was pleased to inform me, "That he moved to the Lords, at least that this might be done; since by the king's letter the witnesses oaths had been taken, that before they were readmitted to swear in the same affair, their former depositions might be torn. But this, for as highly reasonable as it must appear, was peremptorily refused. However (added he) the witnesses in presence of the assize, deposed in favours of the pannel contrary to the tenor of their first depositions, which they were said to have given in the first precognition."

At length the Lords came to this Interlocutor. "The Lords having considered the objections against the witnesses, and the de-

produced against him; but not till he was acquainted of it, and had refused even to go to speak with the President of the Session, to whom the production of the letter was committed. And it is farther to be observed, that after production divers persons of quality were set on him to come back to his place, on condition of compliance in time to come: and to this end the king, who had preferred Pitmedden to be a Lord of Justiciary, for his parts, and suffering for the royal family, did forbear to present a successor to him in the session till 5th February 1687; and the Convention of Estates, A. D. 1689, made this and some other overturning of judges one of the causes of deposing king James from his royal dignity. Farther, king James, after his exile, was heard, both in Ireland and France, to regret his carriage to Pitmedden, and to blame his queen for it.

"St. Basil, being invited by Modestus, by command of Valens the emperor, to turn Arian, with a promise of rewards, and threatened, with punishments if he turned not, answered, 'Rewards were fit to tempt children, and threats to terrify cowards,' Theodoret Hist. Eccles. l. 4, c. 17."

Lord Hailes proceeds: "Lord Fountainhall observes, that in the parliament 1686, of all the Judges, Pitmedden only, like Athanasius, opposed the court, vol. 1, p. 447." In this page of Fountainhall, I find the following passage:—"Feb. 11, 1686, Mr. Alexander Malcolm, of Lchore, Advocate, his letter from the king is read, nominating him a lord of the session, in place of sir Alexander Seton, of Pitmedden; laid aside in May last, for opposing the papists in parliament," but nothing about Athanasius. Lord Hailes in his Notes on the Catalogue of the Lords of Session mentions, that in the year 1681, a new commission under the great seal was granted to the Lords of Session, and says, that upon that occasion lord Pitmedden (MS. Notes on the Books of Sedes-reat) observes, that "it makes their places, which, by the act of James 6, were *ad vitam*

bate thereanent, they, in respect of the answers, repel the objection anent *proditio testimonii*, and repel the second defence as to *socius criminis*. And the Lords having considered the other objections, and heard the witnesses adduced by the pannel for proving the same, ordain Thomas Ingham and the rest of the witnesses adduced by his majesty's advocate, to be received."

When Ingham was brought in, and holding up his hand to swear, sir Hugh directed himself to him, and said, "Take heed now, what you are about to do, and damn not your own soul by perjury, for as I shall answer to God, and upon the peril of mine own soul, I am here ready to declare I never saw you in the face before this process, nor spake to you."

Then Ingham was solemnly sworn, and interrogate upon the whole Articles of the libel. Several things fell in this witness his exami-

vel culpam, become arbitrary; and therefore I opposed it, and afterwards found the fruits of it, when I was turned out of my place, as one of the number, for no other cause, but the opposition I made to toleration of popish idolatry, in the parliament holden A. D. 1686."

Lord Hailes (*ubi sup.*) informs us, that the king's letter to the Court of Session, intimating the dismissal of Pitmedden, bears, that "We have removed him for reasons best known to ourselves."

The "Claim of Right" passed in the Convention of Estates at Edinburgh, April 11th, 1689, recites in the catalogue of measures by which it is found and declared, that king James "invaded the fundamental constitution of the kingdom, and altered it from a legal limited monarchy, to an arbitrary despotic power, and hath exercised the same to the subversion of the Protestant religion, and the violation of the laws and liberties of the kingdom, inverting all the ends of government; whereby he hath forfeited the right to the crown, and the throne is become vacant," the following article, "By sending letters to the chief court of justice, not only ordaining the judges to stop and desist *sine die* to determine causes; but also ordering and commanding them how to proceed in cases depending before them, contrary to the express laws; and by changing the nature of the judges' gifts *ad vitam out culpam*, and giving them commissions *ad beneplacitum*, to dispose them to compliance with arbitrary courses, and turning them out of their offices when they did not comply."

Lord Pitmedden published a treatise, "Of Mutilation and Demembration," subjoined to the second edition of sir George Mackenzie's 'Law of Scotland in Matters Criminal,' fol. 1699. This treatise shews that the author had read many books. Lord Hailes' Notes on the Catalogue of the Lords of Session. It appears that Seton was made a Lord of Session in the year 1677; and Wodrow, vol. 2, p. 605, speaks of him as being alive when that volume was published (1722).

nation, which we cannot expect to meet with in the registers. And therefore I shall give the Deposition of both the witnesses as they are recorded, and then a larger account of the circumstances from good vouchers before me.

Thomas Ingham in Borlands, aged thirty two years; depones, That having met the laird of Cesnock, at Daniel Crawford's house in Galstoun, at the time libelled, he heard Cesnock ask from whence they came, and Daniel answered, from the West-land party; and that he asked, who commanded them, Crawford said, one Hamilton. And the deponent being interrogate upon the rest of the libel, depones he knows nothing of it. And this is the truth, as he shall answer; and cannot write. *Sic Subscritur*, PERTH, 1. P. D.

Daniel Crawford, aged 30 years or thereby, married, purged, and sworn, depones negatively to the whole libel. And this is the truth, and depones he cannot write.

Sic Subscritur, PERTH, 1. P. D.

The assize, with one voice, by the mouth of *air John Dalmahey* their chancellor, having considered the indictment and depositions of the witnesses, against *air Hugh Campbell* elder of Cesnock, finds the libel not proven.

Sic Subscritur, J. DALMAHOY, Chancellor.

The Pannall's Procurators asked and took instruments upon the Verdict.

Thus, continues *Wodrow*, the process stands in the records, and more we could not look for. But it is worth the reader's while to have the detail of the circumstances of this remarkable Examination from the papers above mentioned. And they inform me, that *Ingham* deponed, that being in the house of — *Crawford*, *Cesnock* came to the door, and having called upon the said *Crawford*, he asked, what men those who were in his house; *Crawford* answered; they were men lately come from the West-land army. Then *Cesnock* asked, who commands there. *Crawford* answered, one *Robert Hamilton*. As *Ingham* was going on in his deposition, one of *Cesnock's* lawyers asked him, whether he had communicated this to any others, to seduce them thus, to depone, and told him, he was now under a deep oath, and nothing less than his soul at stake. *Ingham* answered, I believe I have spoken of it to severals. Then the justice-general asked, if *Cesnock* spake any other words to *Crawford*; *Ingham* answered, My lord, I am now upon my great oath, and I declare I do not remember he spake any more at all.

Upon this there was a great shout, and clapping of hands in the court; at which the king's advocate said in a great passion, that he believed that *Cesnock* had hired his friends to make this acclamation, in order to confound the king's evidence, and he never heard of such a Protestant ror, except in the trial of *Shaftsbury*; that he had always a kindness for that persuasion till now; that he was con-

vinced in his conscience, it hugs the most damnable trinket in nature.

After silence, the justice-general interrogates *Ingham* again; who answered, he had said as much as he could say upon oath. And the justice-general offering a third time to interrogate *Ingham*, — *Nisbet of Craigentenny*, one of the assizers, rose up and said, "My lord justice-general, I have been an assizer in this court above twenty times, and never heard a witness interrogate upon the same thing more than twice; and let *Cesnock's* persuasion be what it will, we who are assizers and are to cognosce upon the probation upon the peril of our souls, will take notice only to *Ingham's* first deposition, though your lordship should interrogate him twenty times." The Justice-general answered him with warmth, "Sir, you are not judges in this case." The laird of *Drum*, another of the assizers, presently replied, "Yes, my lord, we are only competent judges as to the probation, though not of its relevancy." Whereupon the whole assizers rose up and assented to what those said. The justice-general in a great heat said, "I never saw such an uprore in this court, nor, I believe, any of my predecessors before me, and it is not us you contemn, but his majesty's authority."

Silence being commanded, *Crawford* the other witness was called in, who being deeply sworn, and no objection being made against him, he deponed negative, "That he did not see *Cesnock* for a considerable time either before or after *Bothwell-bridge*; that he does not remember that *Cesnock* spake any thing to him, either about the West-land army, or who commanded them."

Whereupon there was another great cry made, and clapping of hands, which put the Justice-general and Advocate into a great rage, as what they reckoned an irreverent insulting of the court. Then *Cesnock's* advocates craved the Probation might be remitted to the knowledge of the Assize, which could not be refused. And after a short speech made to them by *Cesnock's* lawyers, they inclosed themselves, and very soon returned their Verdict, Not Guilty.

Upon which *Cesnock* took instruments, and his advocate craved he might be liberate, in respect nothing was proven against him. The Justice-general answered, that seeing he was the king's prisoner, they must have his majesty's mind before he be liberate. *Cesnock* replied, that he was content, for he was abundantly certain, the guilt charged upon him could never be proven. The court sat late, or rather early, it being about two of the clock on Friday morning before they rose, and *Cesnock* was returned to prison.

It is very evident upon the whole, there was a design formed to bring this worthy gentleman under a sentence of death, and at least to take his estate from him, though there were few gentlemen less obnoxious to the laws than he. We see that now no methods were boggled at, though never so vile, to accom-

plish wicked designs. Suborning of witnesses is very palpable in this case; who were guilty is not my province to determine: and the king must be drawn into this affair, by procuring a letter, which we have seen above, ordering recognitions to be taken upon oath by the judiciary; and yet we find in this case they were taken by the advocate alone.

It may be proper further to remark, in order to the reader's having some idea of this government, that the justice court, which ought to be most just and fair, and give all allowances in cases relating to mens' lives that law and equity suggest, were in this case evidently partial in refusing the relevant exculpation of *alibi*, at the time libelled, in casting Cesnock's witnesses for exculpation, and repelling the most relevant defence propounded upon a trifling circumstance; and in their unaccountable carriage to Inghram when upon oath, and their open endeavours to push him to perjury, so plain, as the assizers, none of them Presbyterians nor favourers of the sufferers, could not bear them; and in their hectoring and abusing these gentlemen, for acting as conscientious persons would do.

And if those were their methods with gentlemen and before lawyers, we may easily guess, how little justice or equity poor simple country people, who could not bell the cat with them, had to look for. And what sad work would we meet with, if we had full accounts of their procedure from one who knew forms and law, and had been a witness to their procedure!

I cannot pass this process without remarking, that several of the assizers, and other gentlemen in the house, were brought to no small trouble for the noise in the court, at Inghram's declaring he could say no more, which the advocate was pleased to call a Protestant rore. And indeed so he might, for it was an evidence of the satisfaction of the spectators, at the misgiving of the design of the managers now giving into a popish successor, and tyrannical and arbitrary measures. Several were brought before the council, and by them remitted to crave pardon of the judiciary. I give it as it stands in the criminal books, April 24.

"Appeared sir Patrick Maxwell of Springkel, Alexander Nisbet of Craigentenny, James Lindsay of Drumburg, being pursued before the council, for making a noise in the time of Cesnock's Trial when the witnesses were examined, and were ordained to appear before this court, and make acknowledgement and apology therefore, which this day they did.*"

We shall just now hear, that April 17th Cesnock was allowed free prison. And June 19 I find by the Registers that the witnesses against Cesnock are still in prison, but that day the council allow them free prison; and for any thing I know, they continued a considerable time in prison; For September 16 the council ordain Inghram and Crawford witnesses

against Cesnock to be examined by the Committee for public affairs. The day before, September 15th, they send Cesnock and Mr. John Rae to the Bass. October 19. I find the council order the witnesses against Cesnock to be continued still in prison, and they are allowed sixpence a day. What they expected from these witnesses, or for what ends they were so long detained I cannot say: only we shall find that Cesnock was afterwards forfeited, and his estate given to Melford. In all this matter this gentleman hath nothing relative to the plot laid to his charge, though that was the alleged cause of his imprisonment.

December 3d, 1684. The Council give orders to the Advocate to raise a process of forfeiture before the parliament, by a summons in Latin, after the old way, under the quarter seal, upon a charge of sixty days, against Cesnock elder and younger, Jerviswood, and several others.

January 7, 1685. In the Council a Letter is read from the king appointing certain noblemen and gentlemen to be processed before the ensuing parliament, and the Council form the following act:

'The lords of his majesty's privy council having a letter from the king dated Whitehall December 24, signifying, That his majesty having indicted a session of parliament to meet at Edinburgh the 10th March next to come; and seeing his majesty's royal brother cannot stay so long, nor is it fit to keep the members so long together, as sixty days may run from their first meeting, before the process, necessary to be raised against such as are accessory to the late treasonable conspiracy, and other crimes of treason, can come in; and it having been ordinary in the reigns of his majesty's royal predecessors, to issue out processes in such cases, for citing those who are to be accused; and therefore commanding his advocate to raise processes before the said session of parliament immediately at sight hereof against the whole persons aftermentioned, viz. Denholm of West-shiels, — Stuart son to Cultness, sir John Cochraue of Ochiltree, James Stuart son to sir James Stuart Provost of Edinburgh, the lord Melvil, sir Patrick Hume of Polwart, George Pringle of Torwoodlee, Andrew Fletcher of Saltoun, — Hume of Basenden, — Hay of Park, sir James Dalrymple of Stair, Walter Lockart of Kirkton, — Montgomery of Langshaw, John Weir of Newton, Mr. Gilbert Elliot writer in Edinburgh, — Campbell of Ardkinglass, sir Hugh Campbell of Cesnock elder, sir George Campbell younger thereof, the heirs of the deceased earl of Loudon, the heirs of the deceased Mr. Robert Martin late clerk to the justice court. The lords give warrant accordingly.'

In relating the criminal proceedings in Scotland, which were had during the next year,

* See Vol. 8, p. 831.

after this Trial of Sir Hugh Campbell, Wodrow writes thus :

“By the written Minutes before me of this Ederunt, I find that Cesnock's Bill for exculpation, was this day, May 1st, before the lords of the articles,* consisting of his defences that he was *alibi*, that such as he had conversed with, who were at Bothwell, had taken the bond, that his case was ‘*res hactenus judicata*’ and an enumeration of the steps of the loyalty : But the short hints before me do not bear what was done about it.”

May 13th. “The parliament ratify the processes of forfeiture against Robert Hamilton of Monkland, Mr. Robert Baily of Jerviswood, and Archibald late earl of Argyle. We have seen these were three of the most iniquous sentences pronounced by the Judiciary ; and had not the witnesses failed in Cesnock's process, we should have had all the unjust interlocutors upon that head ratified this day likewise in all probability.”

But upon reference to the Books of Parliament no proceedings concerning the Campbells of Cesnock have been found under this date.

* Of the jurisdiction of the Scots Parliament, Mackenzie writes thus :

“Since the parliament is the supreme judicatory, it may certainly cognosce all causes in the first instance. And of old, if a person accused for treason did absent himself, the criminal court nor no other inferior court could proceed to take trial by probation against him, and so all they could do, was only to denounce him fugitive for his absence, upon which denunciation his escheat did only fall, but he could not be forfeited ; and therefore since it was unjust, that he should by his own absence procure to himself an impunity and exemption from forfeiture, the parliament did, by their supreme power, cite the person guilty, to appear before them, and did lead probation in absence against him, and forfeit him in absence though guilty. But it being found inconvenient, that parliaments behaved either to be called, or such delinquents pass unpunished, therefore, by the 11 act : 2 parl. Char. 1. it is statuted, That the justices may proceed to try crimes by probation, even when the person cited is absent, in cases of treasonable rising in arms, and open and manifest rebellion against his majesty or his successors and their authority : so that the parliament are yet only judges to the trial of all crimes, by probation against absents, except only perduellion, or open and manifest treason. And albeit it may seem strange, that the justices should have been allowed to lead probation against absents, in this which is the greatest of crimes, and not in crimes of lesser importance. Yet this proceeded from the just detestation which the parliament had of this crime, and that the punishment thereof might not be delayed, where the delay might prove so dangerous.

“If the parliament forfeit any person after cognition of the cause, the sentence cannot be

May 15. Wodrow says, “The criminal process comes on against the noblemen and gentlemen who are cited to this day. The late alledged conspiracy was the pretext of forfeiting ; but this process was really intended against them because they were averse from prelacy, favourers of presbyterians and possessors of good estates. This day parliament have read before them the King's Letter to the council, and their orders to the advocate to cite them in the dittay against them all. There were present Cesnock elder and younger and some others, under date June 15th. Their dittay is read charging Cesnock with accession to Bothwell, and both of them with the plot. The advocate restricts their libel to the plot, and for probation adduces Commissary Monro, and the gentlemen's own confession, which was read, viz. that they acknowledge they were at the meeting mentioned in Monro's deposition, and throw themselves on the king's mercy. And Mr. Carstairs's depositions were read again, the parliament found the dittay proven. The lord Melvill and Langshaw are sentenced in common form, but in Cesnock's case, the

quarrelled by any inferior judge, act 39 parl. 2 king James 6. And though it be added to that act, that no forfeiture lawfully and orderly led in parliament, shall be quarrelled by any inferior judicatory ; for these words ‘lawfully and orderly led,’ seem unnecessary, since after the cognition of the cause by the parliament, no inferior judicatory can quarrel a decret of parliament, even though it be pretended that the said decret was not lawful and orderly : yet, if a person be only denounced fugitive by the parliament, the lords of the session may suspend in that case, if the process was not orderly led ; but whether they can reduce, even in that case, ‘*est altioris indaginis.*’ And some think that though it were very inconvenient, that such a decret should receive present execution, where possibly the party was not lawfully cited, yet that such respect is to be paid to the parliament, as that the illegality of that procedure before them, though not objected before sentence, should remain undecided till the next session of parliament.

“If the parliament should remit any such process for crimes, to any of their own number, to be decided finally before them, it hath been doubted, whether their decisions could be reduced by the session : and this act of parliament reaches only to decisions in parliament. But yet, since decreets pronounced by commissioners of parliament are reputed with us decreets of parliament, and since decreets pronounced by commissioners for valuation of tiends, are not reduceable, because these decreets are reputed decreets of parliament, as being pronounced by such commissioners of parliament, it seems that decreets pronounced by such commissioners, in crimes after probation, could not be quarrelled and reduced by the session, or other inferior judicatories.”
Criminals, pt. 2, tit. 3.

time and place of their execution is remitted to the king *simpliciter*. The commissioner having signified he had instructions to spare their lives if they would be ingenuous. After sentence was pronounced with the usual solemnities, old Cesnock desired leave to speak a word and liberty being granted he said "his sentence was very weighty, and he wished it might be noticed against all concerned, but one thing weighed him more than any thing which concerned himself, and that was, that his creditors were like to suffer with him, and humbly supplicate that his grace the commissioner might represent their condition to the king's majesty, for before they were losers he would rather be content to starve."

Upon reference to the Books of Parliament, these proceedings against the Cesnocks have not been found under this date. Under which however appears the Act of Annexation of several lands to the crown, specifying among other traitors whose lands are annexed. Sir Hugh Campbell of Cesnock, and sir George Campbell of Cesnock, as traitors lately forfeited. June 13, 1685. It is act 42 of king James 7th, 1st parliament, dated June 16, 1686.

In the Privy Council Register of July 1st, 1685, it appears that a Letter there inserted which was written the day before to the Lords Secretaries of State, was read, voted and past. This Letter among other matters desires "their lordships will be pleased to remember to send down the remission to the two late Lairds of Cesnock, which was sent up some time agoe marked with my lord Advocate's hand."

On the 9th of July, is read a Letter from Lord Secretary Murray, in which he writes, "As to Cesnock's remission I hope it shall be sent by the next post with the signification of his majesty's pleasure thereanent."

On the 3rd of September, "The Letter underwritten, direct from his most sacred majesty to his Privy Council, anent sir Hugh and sir George Campbles, sometimes Lairds of Cesnock, for sending them prisoners to the Isle of Bass, until his majesty should think fitt to declare his farder pleasure concerning them," being read, was ordered to be recorded. Off which Letter the tenor follows:

J. R.

"Right trustie and welbelovèd cousin and counsellor, right trustie and intirely beloved cousin and counsellors, right trustie and right welbelovèd cousins and counsellors, right trustie and well beloved cousins and counsellors, right trustie and welbelovèd counsellors and trustie and well beloved counsellors. We greet you well. Whereas we have been graciously pleased to grant a remission (of the date of these presents) to sir Hugh and sir George Campbles, sometimes Lairds of Cesnock, for the crimes of treason therein mentioned to be only extended to the securitie of their lives, in maner therein fully expressed. Nevertheless not being as yet resolved to sett them at libertie, It is now our will and pleasure, and we

doe heirby authorise and require you to send the saids sir Hugh and sir George Campbles prisoners to our Isle of the Bass, therein to remain prisoners until we shall think fitt to declare our farder pleasure concerning them, for dooing whereof this shall be to you and all others who may be therein concerned respectively, a sufficient warrant. And so we bid you heartily farewell. Given at our court at Whitehall, the 7th day of July 1685, and of our reigne the first year, by his majesties command. *Sic Subscribitur*, MORRAY."

"The Lords of the Committee of his Majesties Privy Council for publick affairs, Doe give order to the clerks of council, to write to sir Hugh and sir George Campbles, sometimes lairds of Cesnock, to repair immediatly hither to receive the councils commands."

On the 18th of September, "The Letter underwritten is direct from the Council to the Lords Secretaries of State, off which the tenor follows:

"My Lords; There being a Letter from the king, ordering the two Campbles, late of Cesnock, to be sent prisoners to the Bass, notwithstanding of his majesties remission to them for their lives and being at freedom and liberty. But the said Cesnocks being pfit at liberty upon the said remission befor the said Letter was communicate to the council, the Lords of the Committie this day mett thought fitt to acquaint your lordships howe this affair stands, to the end his majesty being informed of it, his royall pleasure may be known there anent, which shall be readily obeyed by the Committie. In whose name and whose command these are signed by your lordships' most humble servant. *Sic Subscribitur*, ALEX. GLASCUEN."

On the 5th of October, "The Letter underwritten, direct from the Lord Secretary Morray to the right honourable the lords of his majesties most honourable Privy Council appointed a Committie for publick affairs, anent the sending the two Campbles, late of Cesnock prisoners to the Bass, being read was ordered to be recorded, and ane dispatch was immediatly sent to Lewetenent Collonel Murray, for apprehending and bringing them prisoners to the said Bass, to remain therein till his majesties further pleasure. Followes the tenor of the for-said Letter:

"My Lords; I have received a letter dated the 18th instant signed by the Lord Archbishop of Glasgow, in your lordships' name, concerning a Letter formerly directed from the king to the Privy Council, ordering the two Campbles, late of Cesnock, to be sent prisoners to the Bass, notwithstanding of his majesties remission to them, for their lives. Whereof, I have given ane accompt to his majesty, by whom I am now commanded to let your lordships know he is not well satisfied with the delay that has been made in putting his pleasure concerning them in execution, as it was mentioned in the said Letter. And therefore it is now his majesties express pleasure that with all convenient dili-

gence your lordships cause them, the saids two Campbells, late of Cesnock, to be sent under a sufficient guard to the Bass, with the necessary orders for their being detained prisoners there during his majesties pleasure. I am, my lords, your lordship's most humble servant.

Sic Subscriptur, MORRAY."

Windsor, 29th Sept. 1685.

Follows the tenor of the Order given to Lewetenent Colhonnell Murray :

" You are hereby required and commanded upon sight hereof, to order a sufficient party of the forces under your command to apprehend the persons of the two Campbells, late of Cesnock, and immediately to cause the said party transport them, safely prisoners to the Isle of the Bass, there to be detained prisoners, dureing his majesties pleasure, conform to a letter direct from the lord Secretarie Morray, by his majesties command, dated the twentie nyynth day of September last, and the deputy governor of the said Isle of Bass, is hereby ordered to receive, and detean, the saids two Campbells of Cesnock *, prisoners untill his majesties furdler pleasure, given at Edinburgh the fift day of October 1685.

Sic Subscriptur, TARRAT.

DA. FALCONER RAMSAY."

The following Passages from Fountainhall's Decisions relate to these Proceedings :

" March 24, 25, 26, and 27, 1684. Were taken up in the criminal trial of sir Hugh Campbell for treason. The king's advocate first craved that the criminal lords might take a precognition what the witnesses for the king could say, conform to the power allowed by the king's letter, in such cases, before they should begin his trial. Alledged for Cesnock, 1. This were *prodere testimonium*. 2. It could not be now done, seeing the very day of the panna's appearance was come. 3. They could not precognosce even by the king's letter, without a warrant from the privy council. Whereupon a council was instantly called extraordinary, and they authorized them; and accordingly they examined the witnesses upon oath, as to what they could say.—As to the 1st objection, it was remembered, that lately, in a cause of Mr. Charles Lindsay minister at Covington against the laird of Cunninghamhead, in regard Mr. Charles had taken the declaration of some witnesses under their band, bearing that they would say the same if they were upon oath, the lords had found that he could not adduce these as witnesses for him, ' ob proditionem testimonii,' by the said pre-engaged declaration taken by a private person, without any warrant; and Dury marks a decision on

* " The old gentleman" says Crookshank, vol. 2, p. 337, " died soon after, and probably his death was hastened by the hardships he underwent."

the 14th of July 1691, betwix Livingston and Galloway, where the lords so far disapproved such extrajudicial declarations, that they imprisoned one for taking them.

" Then on the 25th the debate began; and it was alledged, that what they had libelled against Cesnock the pannel, were at most but treasonable speeches, and so were expressly pardoned by the indemnity in July 1679. 2. It was positively offered to be proven, that he was *alibi*, and not at the bridge of Galston, all that day on which he was libelled to have uttered these words. 3. *Non constat* they were rebels; they neither being denounced fugitive, nor declared traitors; and as for treasonable words, the laws of all nations have regarded them little. The Roman law says, ' Lubricum linguae ad panam facile trahendum non est,' l. 7. D. ad Leg. Jul. Majest. and the l. unic. C. si quis imperat. maledix. puts very favourable and charitable constructions on such escapes; and sir Edward Coke, one of the great judges of England, in his Institutes, tit. of treason, quotes cases, where seditious words were found not to infer the crime of treason.—But Perth justice general minded, that by acts of parliament in England, since Coke's time, viz. since this king's restitution, it is declared, treason may be committed in words; and thus Edward Stalley, goldsmith, was condemned and executed for treasonable words at the time of the breaking out of the popish plot in 1678. Yet our own acts of parliament, before the year 1661, were not so express against such words, except that species of leasing-making between the king and his people; and the 2d act parl. 1662, as it requires that such expressions be deliberate, advised and malicious, so it declares that for some sorts of rash and reflecting speeches on the king's government, they shall not be pursuable after eight months time. And whereas the king's advocate answered, that the treasonable words libelled against Cesnock, were ' counsel and advice;' and so not ' nuda verba,' but art and part of treason, falling under these words, ' ope et consilio:' it is replied, *Esto* it were treasonable counsel, (which is denied,) that is no more but treasonable words, and not art and part of treason; seeing ther words were not previous to the rebellion, but it was already formed; and by this we would confound the limits of two different species of treason, the one consisting ' in nuda emissione verborum,' liable to mistakes, especially of mean people, such as thir witnesses are, unless they had redacted the precise words uttered into writing immediately after they heard them: and lawyers make a great difference between words that of their own nature tend to the commission of a crime, and such as ' non causam but occasionem tantum delinquendi prae-bent;' whereof Matthæus, Tit. de læs. majestate, cap. 2. num. 11. gives a pregnant instance, in *centurione quiddam*. 2. ' Nudum consilium,' unless it be ' cum instructioe aliqua,' is not art and part, but still bare words; for Cesnock neither instructed them with money,

arms, ammunition, nor with advice how to manage the war, where to fall on first, what passes, bridges or forts to secure; which lawyers call 'ordinatio, tractatio' or 'apparatus ad bellum;' without doing of which the pannel cannot be reputed a contriver of the rebellion, so as to be drawn under the exception made in the act of indemnity in July 1679; and of this 'nudum consilium sine instructioe,' see Vinn. ad § 21. insutit. de obligat. ex delicto.—Sir George Lockhart (who was joined with the king's advocate in this cause,) argued; that these rebels who came out of Galloway, after the rebels were up, to fortify and assist the rebellion, were as guilty of contriving as they who began it in Lanerk shire; for it was 'in cursu,' and had 'tractum futuri temporis;' and that contriving is not 'actus momentaneus,' nor done only 'in ictu oculi;' and in construction of law 'mandans homicidium vel aliud delictum, eadem poena tenetur qua mandatarius.'

"And it being alledged for the pannel, that this part of the libel was not relevant, that Cesnock spoke these or the like words, this alternative being too general, and the king's advocate contending that he was not bound to condescend what the like words uttered by Cesnock were; it was replied, That this were to make every common fellow, who is adduced to be a witness, or an assizer; to judge what words are synonymous and of an equipollent signification, though that be a theme which has troubled the greatest critics. And whereas the king's advocate endeavoured to elide the 126th act 12th parl. James 6.; and that he needs not say thir parties were denounced, because Cesnock had a more certain knowledge out of their own mouth, of their being rebels, than any such denunciation could have given. It is replied, Where the law has fixed on a solemnity, private knowledge does not supply it; as we see in the case of intimations of assignations, and many others; 'et id tantum scimus quod de jure scimus;' and their saying, that they came from Towcorse park could not make him instantly esteem them rebels, seeing they might have been there by restraint, or upon other necessary excusable occasion, or might have come away in obedience to the council's proclamation, commanding these rebels to lay down their arms; so that their saying that they came from that army does no ways take off the act of parliament above cited. And whereas his majesty's advocate alledged, that the defence, offering to prove that the pannel was *alibi*, is not relevant; 1mo. Because it is contrary to the libel, and may infer perjury against his witnesses. 2do, The distance of the two places, viz. the bridge of Galston and Cesnock's house, (where he is alledged to have been all that day) is not so great but he might in a short time have been in either of them, being but half a mile: It is replied, that in many cases, defences contrary to the libel are sustained and found relevant; and it is impossible in law that it can be otherwise; for in 'pari casu pro res est respondendum.' As for

instance, a man is conveyed 'pro homicidio delibato;' he founds his defence and exculpation, that either he killed in self-defence, or, it was a casual homicide, according to the late act of parliament, in 1661. This defence, tho' contrary to the libel, has, by the laws of all the Christian world, ever been received and admitted. To the 2d, Whatever be the distance of place, this is 'propositio aeternae veritatis;' Cesnock was in his own house all that day of June 1679, when Crawford, Ingram, and Ferguson past by the bridge of Galston; ergo, he was not then at Galston bridge; and which consequence is so deeply rooted in nature, that it is 'praesumptio juris et de jure;' and till we renounce both our sense and reason, no conviction can persuade us of the contrary; and this demonstration is confirmed by no less authority than the testimony of an angel, who argues the disciples into the belief of a resurrection by this enthymeme, 'surrexit Dominus, est alibi, ergo non est hic;' and yet here our Saviour was at no great distance; for 'magis et minus non variant speciem' in such cases; and it is as infallibly true, that Cesnock was not at the bridge of Galston, if he can prove he was at his own house that individual hour he is alledged to have been at the bridge, as if I should prove that he could not be that day at Galston, because he was at Rome or Paris, or 1000 miles distant from it; and there can be no fallacy nor abuse here, whereby rebels can escape; for his majesty's advocate condescending on the precise day, it is positively offered to be proven that, all that day, he was in his own house; and that the pursuer is obliged to condescend on the day of the committing the crime, if the pannel requires him to do it, is a principle acquiesced in by the common sentiments of all criminal lawyers. But sir George Lockhart denied that he was bound to do it 'in crimine majestatis;' and required 'impossibilitas naturae,' that they could be in both places in one day, to make a relevant *alibi*; and that in Mr. William Somervell's case, and M'Neil of Bara's, &c. The lords found ten miles not a sufficient distance to infer an *alibi*.

"The justices having advised the debate, they repelled the hail defences, and found the words libelled to have been spoken by Cesnock to be such treasonable counsel as is not meant to be pardoned or included in his majesty's indemnity; and particularly repelled the defence of *alibi*, as it was qualified and circumstantiated, the distance between the two places being but small; and sustained the second additional libel, about Cesnock's harbouring and resetting rebels on his lands, as an aggravation only of the first libel. This interlocutor did not pass without some heat among the justices. Then a bill was given in for the pannel, desiring, since his majesty was the best interpreter of his meaning in making that indemnity, that the interlocutor might be stopped till they consulted the prince, conform to the appointment of l. 9, and l. 12. Cod. de legib. But it was refused.

The witnesses being called, it was objected against Ingram, 1mo. 'Prodidit testimonium,' because both major White and the king's advocate had examined him, and he had revealed to them what he had to say: and though the justices are impowered to examine before hand, yet even they must have, by the king's letter (recorded *supra*, 8th Jan. 1683), a warrant from the privy council; and others cannot do it at all. 2do, 'Est socius criminis.' 3tio, 'Est vinculus et carceratus,' being kept prisoner in Edinburgh castle. Vid. Stat. 2. Rob. 1, cap. 34, 'de his qui prohibentur testimonium dicere.' 4to, It is offered to be proven, he bears Cesnock an enmity and grudge; and the foresaid statute makes it enough to cast one from witnessing, that he is 'malevolus parti;' and all lawyers make 'inimicitie' a good exception; even though the witness were 'in articulo mortis, vel nuper sumpserat sacramentum eucharisticum.' Thus the famous criminalist Farinacius, tit. 6, de Test. quest. 53, lays it down as his positive judgment, and cites lawyers for it, 'quod etiam in talibus casibus non est ei credendum, nam non omnis moriens est Joannes Baptistus.' And Bouritius, in his Enchiridion Defensionum pro Captivis, says, 'inimicus etiamsi non sit capitalis et testimonio repellitur, etiam in criminibus exceptis, quales est læsæ majestatis;' and Hieron. Gigas de crimine læsæ majestatis, says the same. And this Ingram threatened he should do Cesnock an ill turn, if it were out of hell. 5to, The said Ingram cannot be admitted, because it is offered to be proven he was suborned by Hugh Wallace chamberlain to sir William Wallace of Cragie, and he himself was endeavouring to bring over and practise on Adam Millar to come to Edinburgh, and depone as he did; and gave this reason of it, that they owed Cesnock no favour; because if he and others like him had come out and helped them at Bothwell-bridge, they had not been defeated as they were.

Answered to the 1st; It was no 'proditio testimonii' for them to tell what they knew, or to reveal the truth, unless they had instigated the plea, and had informed in order to an accusation, that they might bear testimony; and their deposing was not voluntary, but by public authority; and sir John Nisbet, when king's advocate, was in use previously to examine witnesses; and their former depositions shall be cancelled and torn. And which being accordingly done by the king's advocate, in presence of the court, it contributed to Cesnock's escaping at this time. To the 2d, 'Socius criminis' is no objection in treason, where any person almost is a habile witness. To the 3d, 'Vinculus' is when one is in prison for a crime, but not where they are only in custody, and sequester, to erite corruption from the pannel's influence. To the 4th, 'Non relevat,' unless it were 'inimicitia capitalis,' and that the ground of it were condescended on, and proven to be a mortal feud;

and to the authors cited, he opposed a lawyer (whose authority in criminals yielded to none of them), viz. Julius Clarus, § final. quest. 94, who was clear on the point; and Statuta Roberti, mentioning 'malevolus parti,' must be understood 'habilitat, in terminis juris,' of a mortal malevolence; and the words spoke were only in passion, and not a permanent hatred; and 'out of hell' may signify, providing the revenge be not by unlawful means; and Ingram was content to purge himself of any malice: and it is more than three years since they are alleged to have been spoke, and so may justly be presumed to have been now digested and forgot; 'et dissimulatione et reconciliatione tales injuriæ verbales facile tolluntur.' To the 5th, Subornation *non relevat*, unless the pursuers, or some others having interest in the cause, were the suborners; which Hugh Wallace was not. 2do, They must say the subornation took effect; for attempting to do it, though it may give ground to punish the attempter, yet 'non relevat' to cast the witness, especially where it is only an attempt to bribe another witness in the cause, but not this now adduced. Yet Mascardus, voce Subornatio conclus. 1347, makes even that a great presumption.—And, at that rate, pannels, of purpose to set aside witnesses, may cause offer them money by their friends: and that endeavours used to search and find out witnesses against rebels, and to draw out of them what they can say, (they being in the west country most averse in discovering these things) must not be called corruption, seeing without such prudent methods they shall never find witnesses. 3tio, Subornation in general 'non relevat,' unless the quantity of money or other good deed be condescended on, that it may appear to exceed the witness's expences, or his damage, 'ex operis amissis,' by his attendance, both which may be lawfully remunerate to witnesses without incurring the *nota* of bribery.

Replied for the pannel, That the first three objections are conjoined, 'ut quæ non prosunt singula multa juvent.' As to the 4th, A mortal hatred may arise from a very slender ground, and a punctilio of honour; and we see daily for a cuff or a lie combats fought, and slaughter committed; and though thir resentments do not often possess mean people's breasts, yet sometimes they do; and 'informative' we condescend (though not bound to do it) upon the cause of Ingram's malice against Cesnock, because Ingram having beat one Wilson, who died of it within eight weeks; Cesnock by a letter delated him to the sheriff of Ayr, whereupon Ingram vowed him this mischief; and the length of time does not spite nor induce oblivion in revengeful men. To the 5th, 'Non refert' who corrupts; and it is relevant, that any from Cesnock offered to debauch them. 2do, The very attempting to corrupt a judge or a witness is unlawful, and leaves a suspicion of impression. 3tio, It were impossible ever to cast a witness on subornation, if the precise sum behaved to be conde-

ascended on, for that only arises from the probation; and the offering of a dollar to a poor man is as tempting and great a bribe as 100 dollars to a rich man; and if Ingram got money, he must tell some other cause wherefore he got it.

“The Criminal Lords, after a long debate among themselves, did repel the three first objections made against Ingram; and before answer to the two last, viz. the enmity, and subornation, (the first act before answer, I think, that was made in our Criminal Court, where always the relevancy must be discussed,) declared, that they would hear our witnesses for the pannel, to prove these two last objections, if they spoke probable and consistent things, or if they were but seduced to help Cesnock at this dead-lift, (as they jealoused,) and only to disparage the king’s evidences:—And though at first they agreed to examine them on oath, yet they would now only hear their declarations, not upon oath; and, albeit all pains were taken to expiscate circumstances, to cause them vary and titubate, yet Herries and Goudy declared positively, they heard Ingram threaten Cesnock an ill turn, if it were out of hell: but being examined *separatim*, in regard they discorded in some circumstances that were not material to the *dictum testis*, the main part of the testimony, as the hour of the day, and place of the house where they heard it, &c. The Justice-general rejected them; though Mascard. conclus. 1180 voce Pluralitas, gives an easy rule for reconciling such seeming discrepancies *inter testes*. Then the witnesses, about the subornation, were adduced, who proved against Hugh Wallace, Cragie’s chamberlain, his drinking with them till they were drunk, with other sneaking practices, but nothing of bribery directly; because the justices would neither grant a safe conduct to bring in a fugitive rebel, viz. one Adam Miller, to be a witness for the pannel, the Court never having allowed that practice; nor permit witnesses to be examined anent tampering with the said Adam, he being none of the witnesses adduced for the king: and it being complained, that the guards drunk with the two witnesses led against Cesnock; and though sometimes *in vino veritas*, yet men are very unfit to depone when drunk; it was denied, that any such thing was allowed; and prohibit to be done for the future. And the witnesses were ordained to be kept separate, that they might not compare notes together, nor know what another said. I remember Masuerius requires, ‘ut testes deponant *sejuncti*.’ However, after all this previous trial taken upon the two objections against Ingram and Crawford, of malice and corruption, the justices found no sufficient matter to repel them; and therefore ordained them to be received.—Cesnock’s advocates protested for a reprobat of their testimonies, which is not usual in criminals.

“This was now about 11 o’clock at night, and when the king’s advocate and that party thought all was fixed and sure, the Divine Provi-

dence, which overrules all from above, snatched the prey out of their teeth at this time: for the witnesses, who were so well prepared, and had so oft renewed their lesson, and got it inculcated, (having twice deponed on the individual specific expressions that Cesnock used to them, to encourage them to go back to the rebel army,) when it came to the push, by a miraculous consternation, both Ingram and Crawford, did not remember that Cesnock had any such expressions to them, as were libelled; either reproving them for leaving the Westland army, or bidding them return, and that ere long they should not want help nor heads, &c. Upon this the mobile in the Court gave a great shout; at which the king’s advocate and justice-general stormed, and said these were very dishyal and indecent acclamations; the like whereof had never been seen in Scotland, but was Shaftsbury’s way in England in carrying on his business with the ignoramus juries, and to dash, terribly, and confound the king’s evidences and witnesses. The king’s advocate pressing Ingram twice or thrice to give categorical answers to the expressions, Alexander Nisbet of Craiginny, sir Patric Maxwell of Sprinkell, Somervell of Drum, and others of the assize, complained why such pains should be taken to wring and elicit a testimony, when he had so often already told that he did not remember the expressions; and they being reproved for meddling too much, boldly replied, that the probation concerned them and their consciences, to see it was fair and equal. Cesnock himself objected against Daniel Crawford, that his name was not given him up in the list of the witnesses, conform to the last article of the act of parliament regulating the Justice Court in 1672, but one Daniel Carmichell. Yet he was received; because the king’s advocate had threatened in the beginning to continue the diet against Cesnock for two weeks, if he did not pass from that objection, which had only happened through mistake; in which case, all Cesnock’s witnesses, for prying his exculpation, would have gone home, he having detained them so long in the town from their labouring and sowing, with a great deal of difficulty and expence; and therefore Cesnock’s lawyers passed from it. But he alledged, that their renunciation of it could not prejudice him; yet he could not reclaim, for they had his warrant for it. The king’s advocate alledged against several of Cesnock’s witnesses, that they could not be received; because either they were not given him in list *debito tempore*, or were Cesnock’s tenants, or were not right designed, &c.—When his own witnesses failed, he fell into a great impatience, alledging that this would encourage all rebellion hereafter; for the king and the country should never get witnesses to prove treason in the West; because the Westland people thought it no sin upon oath to conceal the discovery of treason.—Although in law, his two witnesses could not be overtaken on perjury, because their former depo-

sitions were cancelled; and it was declared, to put them in freedom, that whatever they said now, the first should never meet them, yet in *foro poli*, and before God, they are guilty of gross perjury, and deserve to be declared infamous; for one of their two contradictory depositions is certainly false.—Cesnock said three things co-operated to the staging him; 1. His surname of Campbell, for his chief Argyle's sake. 2. His persuasion, as being reputed a strict Presbyterian. 3. his estate: but, in this last, it was alledged they were mistaken, not knowing he was denuded of the fee of all (save 3000 merks) in favours of his eldest son, by his contract of marriage, and which was confirmed long before emitting the treasonable words. It was observed both the factions concurred against him.

"The assize having inclosed near one o'clock in the morning, they in a short time cleared him, and brought him out not guilty, there being no probation against him. Yet he was remanded to prison, because the Duke of York had a very bad opinion of him, and suspected he was upon the late English fanatic plot which broke out in June 1683; on the jealousy whereof, he had been apprehended, and imprisoned at London, and he, the lord Melvil, sir John Cochrane, &c. were branded as being come then to London to join with the English rebels; but as they could make nothing of this out upon Cesnock, so it was not so much as touched or insert in his criminal libel, as an aggravation or presumption to enforce a credibility of his guilt in uttering these expressions; and really they who knew how cautious and prudent a man he was, were satisfied with the event; for they could never obtain from themselves a belief, that so foolish and insignificant a thing could escape him, as to give such treasonable counsel to three mean fellows accidentally on the high way; whereas (if he had been inclined) he could have done that party more effectual service another way.—But they having strong suspicions of his guilt, and hoping to reach him on some other head, did still detain him prisoner.

"This trial lasted longer than Argyle's, Blackwood's, Mr. James Mitchel's, or any since the king's Restoration; for it took up a day and three full afternoons. It was not so much as proven that the persons with whom he was alledged to have spoke, at Galston bridge, were or had been in the rebellion; and the king's advocate adduced no probation aenent the harbouring contained in the second additional libel; and he passed from the third indictment, of his dissuading his tenants in Balgray from taking the bond, and his being at the burial of one captain Campbell a rebel, who was drowned in the water of Irvine. They were so enraged, that they brought the two witnesses who had failed them, out of the castle, and put them in irons in the Tolbooth of Edinburgh; and alledged Cesnock's friends had corrupted them to go back from what they had so clearly deposed formerly. The

king's advocate threatened he would pursue Craigtintny and some of the assizers, as guilty of a riot in carrying themselves tumultuously at the trial, by disturbing the Court, and dashing and confounding the king's evidences; but they deny any thing wherein they exceeded their duty. This disappointment drove them to great extremities, for it was reported, that Perth and the Treasurer-depute his brother had assured the king, and duchess of Portsmouth, that they had sufficient grounds whereon to forfeit Cesnock, and that one of her sons by the king was to get the gift of his forfeiture; and they did not think that he was denuded of so much in favours of his son. Others said, the earl of Dumbarton was to get a part of his forfeiture.

"On the 3d April 1684, they brought down the two witnesses, Crawford and Ingram, to a privy council held in the Abbey, and there they abode positively at what they first deposed of his guilt; and being asked why they resiled at the barr, answered, that they were dashed, confounded and nipped, every one murmuring in their ear, "what, will you by your swearing take the honest old man's life?" This declaration was given after they were kept five days in the irons. Then the council gave order to raise a libel against Alexander Nisbet of Craigtintny, sir Patric Maxwell of Sprinkell, and Somervell of Drum, three of the assizers, for their misbehaviour; and named a committee to revise the debate made by Cesnock's lawyers, and to excerpt if there were any treasonable, indecent or dangerous expressions in it; and the justice-general caused raze out the latter part of the interlocutor sustaining the second additional libel aenent his resetting rebels, as an aggravation; and did insert a declaration of the king's advocate's just before the interlocutor, that he passed from the second and third additional indictments, only 'pro loco et tempore.' This alteration was said to be made contrary to what was truly done; that they might yet raise a new indictment against Cesnock for these things, as if it had not been tried already; to the effect, by this or some other means, they may get him yet forfeited, if possible.

"It was expected that sir George Lockhart, and the king's advocate should have debated this point, that the pannel's running to the act of indemnity was an acknowledging of the crime, like the using a private remission; but it would seem they did not think this argument tenable in law, and so did not urge it; and the king's advocate's own opinion is contrary, both in his Criminals and in his Institutions."

"June 4, 1684. At Privy Council, Sir Patrick Maxwell of Sprinkell, Alexander Nisbet of Craigtintny, and Hugh Somervell of Drum, are pursued by his majesty's advocate for a riot, in disturbing and interrupting the court in Cesnock's trial, and for confounding and dashing the witnesses in their deposing, and making

a noise and confusion in the court, contrary to the honour and gravity thereof. Alledged for them, that assizers are judges to the probation; and by the 90th and 91st. acts of parliament 1587, 'ad informandum suam conscientiam,' they may ask questions at the witnesses, or lords, for clearing dubious points; and all they did was, the witnesses having twice or thrice upon oath declared that they had no more to say, and remembered no more, they thought it was not fit to press or urge them any farther. The king's advocate alleged, the witnesses only opposed and demurred a little, being dashed; and in that case the Justice General might very lawfully interrogate them further, what they knew more; and that these West-land witnesses are loth to tell the truth against rebels, till they be pressed to it; and the assizers exceeded their duty in offering to stop this expiscation, and attempting to teach the justices their duty; and they gave occasion to an irregular and tumultuary noise that was raised in the court. The council repelled the defences; and admitted the libel to probation; and the criminal lords were led to be witnesses of it; at which they were very ill pleased. All this was done to palliate the affront they had suffered by the witnesses miscarrying; and some said, if assizers were thus used, it would make their office very troublesome, and very few would serve in that capacity."

"April 17, 1684. Hugh Wallace, servitor to sir William Wallace of Craigie, pursues Hugh Campbell, Cesnock's son, and Mr. Hugh Archibald Agent, for calumny and defamation of him, in alleging he had tampered to corrupt and seduce the witnesses against Cesnock. The defence by way of reconvention was, 1st. That the condescending on him in the criminal court as the practicer of the witnesses was necessary, being forced thereto by the Justice General, who repelled the objections of subornation otherwise proponed in general. 2dly. They had probable grounds to think he had

been over active, for some of Cesnock's witnesses deponed that he had drunk with them, and given one of them a little money, and pumped what they could say against Cesnock and 'quævis probabilis causa excusat a calumnia.' The lords found both the libel and reconvention relevant; and admitted both to probation."

"August 6, 1685. Campbel of Cesnock, elder and younger, are liberate out of prison, on a remission by his majesty for their lives only, but nothing reserved to them or their creditors of their fortunes; only they had Queensberry the commissioner's promise of some small allowance out of their estate."

"October 4, 1685. There arrived two letters from the King to his privy council, the first anent the twp Cesnocks, ordaining them (though liberate) to be reimprisoned in the Bass, notwithstanding the remission given them, which was only for their life: because sir John Cochran had deponed on their deep guilt, though they with great confidence always denied it. *Quæritur*, How far the remission should protect them from perpetual imprisonment, this being no new crime. They were liberate upon another letter from his Majesty in January 1686."

"By the written Minutes before me of this *Sederunt*, I find that Cesnock's bill for exculpation, was this day, May 1, [1685] before the Lords of the Articles, consisting of his defences, that he was *alibi*, that such as he had conversed with who were at Bothwell, had taken the bond, that his case was 'reshactenus judicata,' and an enumeration of the steps of his loyalty, but the short hints before me do not bear what was done about it. We shall find him afterwards forfeited." 2 Wodrow. 519.

I have not been able to discover any record of this proceeding before the Lords of Articles.

319. Proceedings against JAMES Earl of LOUDOUN, GEORGE Lord MELVILLE, Sir JOHN COCHRANE, of Ochiltree, and JOHN COCHRANE, his Son, for Treason: 36 CHARLES II. A. D. 1684. [Now first printed from the Books of Privy Council and Records of Justiciary at Edinburgh.]

Apud Edinburgum, primo die Aprilis, 1684.

Sederunt,

Chancellor.	Belcarres.
St. Andrews.	Dundonald.
Glasgow.	Kintore.
Treasurer Principal.	Livingstoun.
Privy Seall.	Bishop of Edinburgh.
Dowglas.	Kinnaird.
Montrose.	General Dalvell.
Erroll.	President of Session.
Marisshall.	Treasurer Deput.
Mar.	Register.
Glencairn.	Advocat.
Linlithgow.	Justice Clerk. *
Perth.	Castlehill.
Dumfriese.	Gosfoord.
Southesque.	Sir George Monro.
Papnair.	Claverhouse.

THE Lords of his Majesties privie council having considered a Petition, presented by the earle of Loudoun, representing; that he being cited to appear before the lords commissioners of justiciary, the eight of Apryle instant, to answer for severall alleadged crymes contained in the dittay. But being furth of the kingdome, the tyme of the citation, and yet is, and in a very sickly and distrest condition, and altogether unable to travell as is instructed by certificats, produced upon soull and conscience, he cannot appear at the dyet to vindicat his innoceny. And therefore, humbly supplicating, that the dyet might be deserted or continued to some competent tyme, that he may be in a condition to appear. The saids Lords doe referr it to the lords commissioners of justiciary, to grant the supplicant

* The Justice-Clerk, as the style of his office indicates, was not originally one of the judges, but only clerk of the justice-court: the earliest sederunt of Justiciary, in which the name of Justice-Clerk, as one of the judges of the court, is inserted, is that of December 1st 1663; and the insertion of his name upon that occasion seems to have taken place in obedience to an order of the privy council relative to the case of one George Graham. "It may, however, be conjectured (says Mr. Hume,) that this attempt thus indirectly to call the clerk of court from the table to the bench, had met with some resistance, or at least, was not received without displeasure. For in the sederunt of the 10th of December 1663; there is produced a second act of council, dated the 8th of that month, which, after directing the

such a competent tyme for his appearance, as they shall think fitt.

Apud Edinburgum, octavo die Aprilis, 1684.

Sederunt,

Chancellor.	Kintour.
Glasgow.	Livingstoun.
Treasurer Principal.	Kinnaird.
Hamilton.	General Dalvell.
Dowglas.	President of Session,
Montrose.	Treasurer Deput.
Errol.	Register.
Marisshall.	Advocat.
Linlithgow.	Justice Clerk.
Perth.	Castlehill.
Panmuir.	Gosfoord.
Tweeddale.	Sir George Monro.
Belcarres.	Claverhouse.

The Lords of his Majesties privie council, having considered ane Adresse made by James earle of Loudoun, supplicating, That as the council upon a former petitione, had for the reasons therein contained, recommended to the lords, commissioners of justiciary to continue the dyet in the criminal process against the petitioner, so ordor might be granted for stopping any denunciation against him for not getting cautione, for appearance for some competent tyme, that he may be in a condition to provide a cautioner, have thought fitt heirby of new again to recommend to the saids lords commissioners of justiciary, to give order for stopping any denunciation against the supplicant, for not getting of cautione for appearance for some competent tyme, that he may be in a conditione to provide a cautioner, he being now sick and furth of the kingdome, as was verified

justice and his assessors to do in the case of the said George Graham according to law, proceeds as follows; "And fardir declares, That the Lord Justice-Clerk is one of the Judges of the Justice Court, and has power to sitt and voatt therein, and that the said assessors have, lyke as the council give power, authority, and commissione to them to meet, sitt, voatt, and determine with the said Justice Clerk and Justice Depute in the said mattir." In this oblique and irregular manner, did the justice clerk enlarge, or transform the charter of his office; and obtain a seat and presidency in the court; which wera afterwards confirmed to him, upon the new establishment of the present judicature in 1671." See the History of the Court of the Justiciar in the first Volume of Mr. Hume's Commentaries, Chap. 1.

by certificates produced upon soull and conscience.

The lords of his majesties privie council having considered a Petition presented by George lord Melville, representing, that he being cited to appear before the lords commissioners of justiciary, this present day to answer for severall alleadged crymes, but being furth of the kingdome, the tyme of the citatione, and yet is, and in a very sickly conditione, and altogether unable to travell without manifest hazard of his life, as is instructed by certificats under the hands of phisicians from Rotterdam, produced upon soull and conscience, he cannot compare at this dyet to vindicate his innocency. And therefore, humble supplicating, that the dyet might be deserted or continued to some competent tyme, that he may be in a condition to appear, and that warrant might be given for stopping any denunciations against him, for not getting of caution for appearance for such a tyme as he may be in a conditione to provide a cautioner. The saids lords doe recommend to the lords commissioners of justiciary, to continue the said dyet for some competent tyme, that the petitioner may be in a conditione to appear, and to give order for stopping of any denunciations against him, for not getting of cautione for appearance to some dyet, that he may be in a condition to provide a cautioner.

CURIA JUSTICIARIE, S. D. N. Regis tenta in pratorio Burgi de Edinburgh, octavo die mensis Aprilis, anno millesimo sexcentesimo octuagesimo quarto, per nobilem et potentem Comitem, Jacobum Comitem de Perth, Justiciarium Generalem, et honorabiles viros Dominos Jacobum Foulis de Collingtoun, Justiciarie Clericum, Johannem Lockart de Castlehill, Davidem Balfour de Forret, Rogerum Hog de Harcaras, Alexandrum Seton de Pitmedden, et Patricium Lyon de Carra,* Commissionarios Justiciarie dicti S. D. N. Regis.

Curia legitime affirmata.

The said day anent our Sovereigne Lord's Criminnall Letters of Treason, raised, used and execute at the instance of sir George M'Kenzie of Rosehaugh, his majesties Advocat, for his highnes intrest against James earle of Loudoun, George lord Melville, sir John Cochran, of Ochiltree, and John Cochran, of Watersyde, his sone, maken mention, that wher notwithstanding be the third act of the first parliament of king James the first, and thretty seventh

* This sir Patrick Lyon of Carra, lord Hailes (note 82 to his Catalogue of the Lords of Session 4to. 1767,) says "had been a professor of philosophy in the Old College of St. Andrew's and afterwards admiral-depute. He drew up the Decisions of the court of session from November 1683 July to 1687."

act of his second parliament,* and be the ninth act twelfth parliament, king James the second, and one hundredth and forty four act twelfth parliament king James the sixt.† It is statute

* Many of the antient Scots acts of parliament are very concise. Of this 3d act of the 1st parliament of king James 1st, the title and enactment are as follows:

'That na man rebell against the kingis persane.

'Item, It is statute and ordained, that na man openlie or notourlie rebell against the kingis person, under the paine of forfeaulting of life, lands and gudes.'

In like manner the title and enactment of his 37th act (the 12th act of his second parliament) is as follows:

'Recepteres of Rebelles suld be forfeaulted.

'Item, It is decreeted and statute, that na man wilfullie sull receipt, mainteine, or do favor to open and manifest rebellares against the kingis majestie, and the common law, under the paine of forfeaultour.'

† It appears that these references are not altogether correct. In the copy of "The Laws and Acts of Parliament made by King James 1st and his Royal Successors Kings and Queen of Scotland," collected, &c. by sir Thomas Murray of Glendack, it is stated, that in the 12th parliament of king James the 2d, only eight acts were passed, and none of them has relation to what is here set forth. The 144th act of king James 6, (the 29th of his 12th parliament,) is intituled "Damage and Expences of Pley, suld be modified by the Judges," and it does not relate to the trial before us. It is probable that the act intended in the pleadings is the next but one of this same 12 parliament of king James the 6th. It is as follows. "For punishment of the receptors of traytours and rebelles. It is statute and ordained by our soveraine lord, with advice of his estates in this present parliament: that all former lawes and acts of parliament, maid of before, against the receptors of traitoures and rebellis, and punishment of them quhill contemptandly remains at the horne, sall be put to dew execution in all pointes. And specially quhair ever ony declared traytours, or rebelles, repairs in any parte of this realme, name of our soveraine lordis leiges sall presume to receipt, supply or enter-commoun with them: or to give them meate, drinke, house, harbery or any relief or comfort, under the same paine, for whilk they are forfeaulted, or put to the horne: and that immediatly upon knowledge of their repairing in the bounds, that all his hienneses obedient subjects doe their exact diligence at the utmost of their power, in searching, seeking, taking and apprehending of the said declared traitours and rebelles, and presenting of them to justice, or in following of them quhill they be taken or expelled, and put forth of the

and ordained that no man openly nor notoriously rebell against the king's person or authority or make warr against the king's leidges, and that wher any declared rebels and traitors repaires in any part of this realme, none of his majesties leidges shall presume to receipt, supply or intercomon with them, or give them any meat, drink, house, harbour, or any relieff or comfort

schire, and immediately to make intimation to the magistrates and persones of power and authority in the next schire: quhilk sall be holden to do the like exact diligence without delay, and sa fra schire to schire, quhill they be apprehended and brocht to justice, or expelled and put forth of the realme. And further, quhen ever ony maner of traitours, rebellis or unknawin men, vagaboundes, happenis to repair in the country, all his heinesses leiges knowing them, or amongst quhom they resort, sall with all possible speede certifie his majesty or some of his secreit councill or sum of the chiefe persons of authority and credite, dwelling within the same schire. That sick persones (gif they be knawen) are within the same, and if they be unknawen schawand their takens, and for what cause they pretend themselves to be wandering athort the country or lurking in ony part: under the paine, that the traytours, rebelles and vagaboundes, aucht to have sustained in bodies or guddes themselves, in case they had been apprehended, presented and convicted be justice."

The acts against treason, and rebellion passed in the reign of king James 2d of Scotland, are sixth parliament act 3d, (the 14th of his reign,) "That nane rebell against the kingis person nor his authoritie: Item it is ordained, that nane rebell against the kingis person nor his authoritie: and quha sa makis sick rebellion, to be punished after the qualitie and quantitie of sick rebellion be the advice of the three estaites. And gif it happens ony within the realme openly or notoriously to rebell against the king, or makis weir against the kingis leiges against his forbidding, in that case the king to gang upon them with assistance of the hail lands and to punish them, after the quantitie of the trespass." The 13th or 14th (for as to this there seems to be some confusion) act of same parliament (the 24th or 25th acts of his reign) is as follows: "Sundrie poyntes of treason. Item it is statute and ordained, that gif ony man, as God forbid, committe or do treason against the kingis person or his majestie, or risis in feire of weir against him, or layes handes upon his person violentlie, quhat age the king be of, zoung or auld, or receptis ony that hes committed treason, or that supplies them in helpe, redde or councill, or that stuffis the houses of them that are convict of treason, and haldis them against the king, or that stuffis houses of their ain in furthering of the kingis rebelles, or that assabries, castles or places where the kingis person sall happen to be, without the consent of the three estaites, sall be punished as traitours."

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under the same paine for whilk they are faulted and put to the horne, and that immediately upon knowledge of their repairing in the bounds, all his majesties obedient subjects doe their exact diligence at the outmost of their power in searching, seeking, taking and apprehending the saids traitors and rebelles and presenting them to justice, or in following of them till they be taken and expelled and put out of the shyre, and immediately that they make intimation to the magistrates and persones of power and authority in the next shyre, who shall be holden to do the lyke diligence without delay, and sua from shyre to shyre, while they be apprehended and brought to justice, or expelled and put furth of the realme. And furdur when any manner of traitors and rebelles happens to repair in the country, all his majesties ledges knowing them or amongst whom they resort, shall with all possible speed certifie the king's majesty or some of his privy councill, or some of the chief persons of authority and credit, dwelling within the same shyre, that sick persons (if they be known) are within the same, and if they be unknown showing their tokens under the paine that the traitors and rebelles ought to have sustained in bodies or goods themselves in case they had been apprehended presented, and convict be justice. And be the fourteenth* act sixt parliament king James the second, It is declared, that all who shall receipt such as are justified for crymes if the cryme be notour and the trespasser convict or declared guilty and ordained to be punished as the principall trespasser. And be the nyntie seventh act seventh parliament king James the ffyft, All sherreffis, bailzies and others are ordained to doe diligence to apprehend all rebells who are at the horne for capital crymes, and that no man willfully or wittingly receipt, supply, maintaine, defend, or doe favour to any of the king's rebells, and being at the horne within their houses, bounds, lands and bailzaries under the paine of death and confiscation of moveables. And by the ffyt act first session of his majesty's first parliament, it is declared that it shall be high treason for the subjects of this realme, or any number of them more or less upon any ground or pretext whatsoever, to rise or continue in armes, to make peace or warre without his majesties speciall authority and approbation, first interponed thereto. And be the first act eighteenth parliament king James the sixt, The estates of parliament faithfully promise perpetually to obey, maintaine and defend the prerogative royall of his sacred majesty, his airs and successors, and priviledges of his highnes crown, with their lives, lands and goods. And be the second act second session of his majesties first parliament, It is statute and ordained, that if any persone or persons, shall hereafter plott contryve or intend death or destruction to his majesty, or any bodily harm tending to death or destruction, or

* This seems rather to be the 15th act of king James 2d, though it is not recited exactly.
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any restraint upon his royall person, or to de- pryve, depose or suspend him from the style, honour, or kingly name of the imperiall crowne of this realme, or any others his dominions, or to suspend him from the exercise of his royall government, or to levie warre or take up armes against his majesty, or any commissionat by him, or shall intyse any strangers to invade any of his dominions, and shall by wryting, printing, or other malicious and advyseed speaking, express and declare such their treasonable intentions after such person or persons being upon sufficient probation legally convict therof, shall be doomed, declared and adjudged traitors, and shall suffer forfeiture of lyfe, honour, lands and goods, as in the cases of treason. And be the hundreth and twenty nyth act eight parliament king James the sixth, the royall power and authority in the persone of the king's majestie, his heirs and lawfull successors over all states as well spirituall as temporal, within this realme, is ratified, approved and perpetually confirmed. And it is statute that his highnes, his heirs and lawfull successors, be themselves and their council are and shall be judges competent to all persons his subjects of whatomeyer estate or degree, function or condition, and that none of them shall presume to declayne his judgment, his heirs and successors, or his councill under the paine of treason. And be the eleventh act of the first session of his majesties second parliament* it is statute and ordained, that in tyme coming in all cases of treasonable rysing in armes, and open and manifest rebellion, against his majesty, his advocat for the tyme may, and ought to insist against, and prosecute such persons as he shall be ordered by his majesty or his privy councill to persue, and if they be cited, and doe not appear, the justices, notwithstanding of their absence, may and ought to proceed, (if they be cited and doe not appear) to consider and give their interloquitor upon the lybell and upon the verdict of the inquest, finding the same to be proven, the doom and sentence of forfeiture ought to be given and pronounced, in the same manner as if they wer present and compeiring. Nevertheless it is of verity that the said James earle of Lowdoun, George lord Melvill, sir John Coehran of Ochiltree, and John Cochran of Watersyde his sone, shacking off all fear of .God, respect and regard to his majesties authoritie and lawes, have presumed to commit, and are guilty of the said crymes, in sua farr as John Balfour of Kinloch, the deceast David Hackstoun of Rathillet and others, having upon the third day of May, 1679 years, killed and murdered his grace the late arch-

* In sir Thomas Murray's Laws and Acts, only one session is noticed of this second parliament of king James 6th. In that session only two acts there appear to have been passed, none of which has any relation to this matter. The 11th act of the 1st session of the second parliament of Charles 2, is concerning the exercise and customs.

bishop of St. Andrews,* they fled into the western shyre, and their rose in open rebellion with nyne or ten thousand their accomplices, under the command of Robert Hamilton, brother to the laird of Prestoun, burnt his majesties lawes at the mercat crosse of Rutherglen, upon the twenty nyth day of the said moneth of May, drowned out bonfyres set on in commemoration of his majesties happy restauration: Issued furth treasonable proclamations and declarations, and upon the Sabbath day thereafter, did assault, resist, fight, and oppose a party of his majesties forces at Drumclog, killed and murdered severalls of them. Thereafter attacked and assaulted the city of Glasgow, and his majesties forces therein, rendezvouzed, exercised, and formed themselves in ane army. Appoynted officers and commanders over them, keep'd councilles of warre, plundered, robbed, and rifled the goods, horses, and armes of his majesties dutiefull and loyal subjects, and continued in open, avowed and desperat rebellion, committing all acts of hostility and high treason, till the twenty second of the said moneth of June, that they were defeated by his majesties forces, the said sir John Cochran was actor art and part of the said rebellion, and the other treasonable crymes above mentionel, in sua farr as Mr. William Gilchrist, sone to William Gilchrist, in Ochiltree, who was a pretended preacher, and frequented house and field conventicles, a common and notorious traitor and rebell, who was actually in the said rebellion, having thereafter returned, was receipt, harboured, conversed and intercomoned with by the said sir John Cochran in his house of Ochiltree, and several other places, gott lodging, meat, drink, and was otherways supplied and comforted by him. And being employed by Mr. Robert Miller indulged minister at Ochiltree, after the said rebellion to preach at Ochiltree, although the said sir John knew him to be a notorious traitor and rebell, yet he and his family heard him preach, and thereafter receipt him in his house, intertained, and lodged him, suffered him to pray, and exercise therein. And in the moneth of April or May 1682 years, the said sir John having gone to England, he carryed the said rebell from his own house alongst with him. And sialklyke the said sir John Cochran did upon the _____ days of January, February, &c. 1682 years, or ane or other of the dayes of the saits moneths of the said year, did treasonably harbour and receipt Master James Brown, ane open and manifest rebell and traitor, who was actually in the said rebellion, and conveyed him off the country, of purpose to evade the strock of justice to him by law, and lyke- wayes did harbour and receipt on his grounds and lands as his tenants, and received meall and duty from Andrew Paterson in Ochiltree, Charles Colvil younger in Townhead,

* See the Cases of James Mitchel, vol. 6, p. 1207; and of David Hackstoun, laird of Rathillet, p. 791, of this volume.

James Johnstoun sone to John Johnstoun in Ochiltre, David Dune in Closs, Peter Murdoch near the Kirk of Ochiltre, common and notorious rebels and traitors, who were actually in the rebellion, and were his tenants both before and after the rebellion. And also the said John Cochran of Watersyde, was actually in armes, with the saids rebels at their rendezvouze at Cumnock, and particularly upon the day of June the said year, the said John Cochran did associat himself to the laird of Baracobb and a party of the saids rebels, consisting of fyve or six hundreth, and being mounted on horseback, in armes rod with and amongst them, as one of their commanders, rendezvouzed and exercised with them, and he was so farr accessorie to the said rebellion, that he perswadged severall persons who were there to go alongst with the rebels, and joyne with them in their rebellious courses and practices, and thereafter he supplied them with wyne and other provisions, out of his father's house in Ochiltre, and entertained Master John Welsh and others therat. And since he came to the world, and to any knowledge, he has vented and practised rebellious and seditious principles, and practices. And sicklyke the said James earle of Loudoun and severall other disloyall and disaffected gentlemen and preachers mett together at Templeholme at the Watersyd near Galstounne, at Kilmarnock, the place of Loudoun and other places, and at the Kirk of Galstounne, at the burriall of the deceist George Campbell, a captaine of the rebels, upon the first, second, third, or ane or other of the dayes of the moneth of June, 1679 years. And there treated, consulted, and advysed apent the carrying on of the said rebellion, and aiding and assisting the saids rebels, and in order thereto he did furnish severall with horses and armes to goe to the said rebellion, and harboured, mtertained, corresponded, and conversed with severall declared traitors and fugitives for treason, and who continued in armes after the said rebellion for severall years, murdering and killing severall of his majesties souldiers; and particularly John Nisbet of Hardhill, a declared traitor, and severall other declared rebels and fugitives for rebellion upon the ground of his lands and as domesticks in his own house and family, and otherwayes aided, conversed with, and assisted them. And his Majesty in the said year 1679, having by his gracious proclamation allowed that all commons who had been in the said rebellion should betwixt and the tyme thereby prefixt, signe and subscribe a bond* not to rise in armes against him, and that before such commissioners as the council did appoynt within the respective shyres. And the earle of Glencarne being appoynted to receive the bonds sua signed within the shyre of Ayre, the said earle of Loudoun designing to frustrate his majesties gracious proclamation, and to continue the principles

and practices of rebellion in these parts, did cause John Campbell, *alias* Boltifoot, his officer, call and convene his wholl tenants together within the Closs of Loudoun, who having accordingly mett, the said John Campbell exacted two merks Scots from each persone, for subscribing the forsaidd bond. And the said John Campbell with the assistance of Andrew Mc'Rossey, Nottar, did most fraudulently and falsly by himself subscribe a pretended bond in name of many persons, severalls wherof being conveyened before major Whytt and others commissionat by the council, and interogat ament the subscribing thereof, they acknowledged and confest that they never subscribed the same, all which was done and perpetrat by the direction, advyce, and assistance of the said earle of Loudoun, and the said John Campbell his officer being conscious of the truth and veritie of the premises, fled immediately over to Ireland. Lykeas the said lord Melvill is guilty of and accessory to the said rebellion, in sua farr as his majesties forces having marched in the said moneth of June 1679, to the Westerne countrey, for subduing of the rebels then in armes. And the said lord Melvill being with his majesties forces at the tyme, and with as much outward zeal professing his earnestness to overthrow and subdue the saids rebels as the beat of his majesties subjects, yet he most perfidiously and treasonably, expressly contrair to his alleadgence and loyalty, religion and duty, dared and presumed to intercommon and correspond with the saids rebels, and to keep intelligence with them, and send commissioners to them, and particularly upon the twenty one day of June, the night before the rebels were defate at Bothwelbridge, the said lord Melvill did send and dispatch John Millar of Waterhaugh from his majesty's camp, to Mr. John Welsh and others, the ringleaders and commanders of the saids rebels, with letters and written commissions, at least verball orders, giving them ane accompt of the strength and number of his majesties forces, and of their resolutions, and severall other things tending to the prejudice of his majesties government, and the strengthening and fortifieing of the rebels, and which commissioner of his accordingly arryved in ther camp, and delivered the saids letters and commissions to Mr. John Welsh and others, the ringleaders of the said rebellion, and received such returns as the said rebels thought fitt to send to him upon the said occasion. And in lyke manner ther being a dreadful conspiracy and plot entered into by the late earle of Shaftsbury, and after his deceiss carried on by a pretended councill of state, vizt by the duke of Munmouth, the earle of Essex, the lord Russiil, Algernoon Sidney, Mr. Hamden, and severall others. They, for strengthening of their rebellious faction, resolved to draw in some discontented persons within his majesties kingdome of Scotland, and in order thereto, they did transact with the late earle of Argyll for raising ten thousand men, with which

* As to this, see the Case of John Spurell, at p. 795, of this Volume.

he was to beginne the rebellion in Scotland. And did commissionat Aaron Smith to goe for the said kingdome of Scotland, and to engage the said lord Melvill, sir John Cochran, John Cochran his sone, and severall others, who accordingly did repair to London in the moneths of May and June last, and ther they did enter into the said abominable conspiracy for raising a rebellion against his majesty, which they were to prosecute in conformitie with them in Scotland, to the ruine and destruction of his person and government, and to the absolute extirpation of monarchy itself, and that royall familie to which they had been so much obliged. Off the whitk crymes of treason and lese majesty, conversing with, harbouring, recepting, intertaining, and corresponding with rebells and traitors, and other crymes abovementioned, The hail fore named persons, and ilk one of them are actors atleast art and part. Which being found be ane asseyse, they ought to be punished with forfeiture and loss of lufe, lands, and goods, to the terror and example of others to committ the lyke hereafter.

Persewer.—Sir George M'Kenzie, of Rosehaugh, his Majesty's Advocate.

His Majesties Advocat produced the said criminal letters, duly execute and indorsat against the saids defenders upon lawful days, and in a legall manner by using all solemnities necessar, and leaving and affixing full doubles of the letters, with lists of the hail assizers and witnesses names, to be adduced against them.

Compeired lykeways James Guthrie, and William Hume, pursevants, executors of the saids letters at the defenders dwelling houses, and the respective mercat croces* with the wit-

* By the 33d act of the reign of queen Mary (the 6th act of her 6th parliament, 1555) entitled: "The Ordour for Summoning of parties to compeir before the Justice, or other Judges." It is statute and ordained, that ony person summoned to compeire before the justice, his deputes or uthers judges within this realme, havand power of justiciarie in criminal causes; the copie of the saidis letters, or precept, quhair-by hee is summoned, sall be delivered to him, gif he can be personallie apprehended, and failzieng thereof, sall be delivered to his wife or servands, or affixed upon the zet of his dwelling place, gif he ony hes, and thereafter open proclamation being maid at the head burgh of the schire, ane other copie to be affixed upon the mercat croce, providing always, that gif there be maa persons nor twa contained in the letter, being all called upon ane deede and crime; in that case twa copies to be delivered to twa of the principal named in the saidis letters, or then given to their wives or servandes, or affixed upon their zettes or dwelling places, gif they ony have, and ane copie left and affixed upon the mercat croce, quhair the publication is maid, to be sufficient to the hail persones, quhat sumever they bee contained in the

nesses contained in the executions, and made faith upon the truth and veritie of the executions in all poynts, James Dunbar Herald, executor of the saids letters at the mercat croce of Edinburgh, peer and shore of Leith, being in sickness and not able to come to the court, the lords appoynted three of their number to goe to his house, and take his oath upon the verification therof, who accordingly having taken his oath, he deponed he truly execute the samen conforme to the execution, and the witnesses contained in the execution being sworn, deponed the same.

His majesties advocat produced a warrand from the lords of his majesties privie council, for persewing the forsaid persons, and taking previous tryall against them.

The said day compeired Mr. David Cunningham, advocat, as procurator *excusatorio nomine* for James earle of Loudoun, and produced two Acts of privie council, the one dated the first, and the other the eight dayes of Aprile instant, wherby the lords of privy council, because of the said earle of Loudoun's very sickly and distrest condition, and inability to travell as was instructed by certificates produced upon soull and conscience before the saids lords of council, referred to the lords commissioners of justiciary to grant the said earle of Loudoun such a competent tyme for his appearance as they should fitt. And also recommended to the saids lords to give order for stopping any denunciation against the said earle, for not getting caution for appearance for some competent tyme, that he may be in a condition to provyde a cautioner, he being now sick and furth of the kingdome, as was verified by certificates produced upon soul and conscience, as said is.

The said day compeired Mr. James Grhame advocat, as procurator *excusatorio nomine* for George lord Melvill, and produced ane Act of privy council of the date the eight day of April instant, wherby: the saids lords of privy council, because the said lord Melvill was furth of the kingdom, the tyme of the citation and yet is, and in a very sickly condition and altogether unable to travell without manifest hazard to his life, as was instructed by certificates, under the hands of phisicians from Rotterdam, produced upon soul and conscience, recomend it to the Lords Commissioners of Justiciary to continue the said dyet for some competent tyme, that the petitioner might be in a condition to appeir, and to give order for stopping denunciation against him for not getting of any caution for appearance to some dyet, that he may be in a condition to provyde a cautioner as the said Act at length bears.

saidis letters. See likewise the 86th act of king James 6, being the 45th of his 11th parliament. Concerning the law as to citations, see Hume's Commentaries. chap. 8, sect. 4, 5, 6. The citation by proclamation, and affixing copies at the market cross is called *Edictal Citation*.

The Lords Justice General, Justice Clerk and Commissioners of Justiciary, having considered the saids acts of council, they, in respect thereof, continued the criminall action, and cause against the said James earle of Loudoun, and George lord Melvill, till the second Munday of November next, being the tenth day thereof, and ordained them to find caution for their appearance before the saids Lords Commissioners of Justiciary at the said dyet, betwixt and the sixth day of October next, with certification, if they find not the said caution they shall be denounced, conform to the said principall letters raised and direct theranent.

The said day sir John Cochran of Ochiltrie, and John Cochran of Watersyde, being oft tymes called to have compeired before the saids lords this day and place in the hour of cause to have underlyen the law, for the treasonable crymes above mentioned, and to have heard and seen doom and sentence of forffaulture led and deduced against them, and to have proponed their defences against the lybell, why the samen should not pass to the knowledge of ane assyse, and to have given their objections against the witnesses and assizers to be adduced against them, if they any had, as they who were lawfully cited in manner above mentioned, for that effect, lawfull tyme of day bidden, and they nor none of them compeir, and the Lords Justice General, Justice Clerk, and Commissioners of Justiciary, therfor be the mouth of James Henrysone, macer of Court, decerned and adjudged the saids sir John Cochran of Ochiltrie, and John Cochran of Watersyde, his sone, to be outlawes and fugitives frae his majesties lawes, and ordained them to be put to the horne, and all ther moveable goods and gear to be esheat and inbrought to our sovereign lord's use, for ther contempt and disobedience, which was pronounced for doom.

The Lords for severall causes moving them, continued the process of forffaulture against the said sir John Cochran and his sone till tomorrow, and ordained the witnesses and assyzers to attend, ilk person under the pain of two hundreth merks.

CURIA JUSTICIARIE, S. D. N. Regis tenta in pretorio burgi de Edinburgh, nono die mensis Aprilis, anno millesimo sexcentesimo octuagesimo quarto, per nobilem et potentem Comitum Jacobum Comitem de Perth, Justiciarium Generalem, et honorabiles viros, Dominos Jacobum Foulis de Collingtoun, Justiciaria Clericum, Johannem Lockhart de Castlehill, Davidem Balfour de Forret, Rogerum Hog de Harcarsa, Alexandrum Seton de Pitmedden, et Patricium Lyon de Carss, Commissioners Justiciarie, dict. S. D. N. Regis.

Curia legitime affirmata.

The said day anent the criminall action and

cause depending at his majesties advocat's instance against sir John Cochran of Ochiltrie, and John Cochran of Watersyde, his sone, for the treasonable crymes lybelled against them in manner mentioned in their ditty recorded yesterday.

The Lords with consent of his Majesties Advocats, continues the proces of forffaulture against the said sir John Cochran till the second Munday of July next.

This day the said John Cochran of Watersyde being oft tymes called to have compeired to have heard and seen the doom and sentence of forffaulture orderly led, and deduced against him, and to have proponed his defences against the lybell, and objections against the witnesses and assizers if he any had, lawfull tyme of day bidden and he not compeir, and the Lords Justice General, Justice Clerk, and Commissioners of Justiciary, conforme to the eleventh act second session of his Majesties second parliament, procedit to consider the lybell, and gave their Interloquitur thereupon, in manner following:

The Lords having considered that article of the lybell anent John Cochran of Watersyde, sustaines that part of the lybell relevant, that he was with the rebells at Cumnock or elsewhere, at a rendivouze when they were in armes, in manner lybelled, to inferre the paine of treason.

Sic Subscribitur.

PERTH, I. P. D.

ASSISA.

The Earle of Dumfermling.

The Earle of Linlithgow.

The Earle of Kintoir.

The Lord Duffus.

The Lord Lindors.

The Earle of Tarves.

The Lord Livingstoun.

The Lord Sinclair.

The Lord Blantyre.

The Lord Elrebank.

Sir William Nicolson, of that ilk.

Robert Gordon, of Gordonstoun.

Sir James Cockburn, of that ilk.

Sir Alexander Forbes, of Tolquhon.

Robert Ross, of Auchlossin.

The noblemen on the assyse pleadit the privilege of their peerage, that they might not be on the assyse of the said John Cochran, he not being a nobleman.

The Lords declared the said John Cochran was in the lybell, with the earle of Loudoun, and lord Melvill, who were now continued, but the assyse could not be changed, they being the persons given him in list.

The noblemen on the assyse declared they were verie ready and willing to serve his Majesty in this or any other affair. But protested for the preservation of their privilege, that their voluntar service should not infer a preparative. The assyse lawfullie sworn, no objection in the contrair.

His Majesties Advocat for Probation ad-

duced the witnesses after deposing, who were all purged of malice, hatred, ill will, and partial counsell, viz.

John Black, Smith in Duncanzearmoir, aged thretty six years or therby, married, purged, and sworne, depons, that some dayes before Bothwel-bridge, he thinks the Friday was eight days he sawe John Cochran of Watersyde att the Barr-hill of Cumnock with four or five hundred of the rebells, that were rendievouzing in order to their coming to Bothwel-bridge, that he sawe him particularly standing with Earlestoun and Barscobb, as if they had been speaking together, but at a distance he did not hear what they said. And this is the truth as he shall answer to God, and that Barscobb and Earlestoun were among the rebells, and that he knew him.

Sic Subscribitur. WILLIAM BLACK.

Mr. John Reid, Schoolmaster at Cumnock, aged twenty seven years, not married, purged and sworne, depons, that at the rendevouze of the rebells, at the Barr-hill of Cumnock, wher ther wer as he conjectures about ffyve hundred of them, he sawe John Cochran of Watersyde amongst them walking up and down, and that he the said John Cochran had a small sword about him, which was some dayes before Bothwel-bridge, and this is the truth as he shall answer to God. Depons he knew Watersyde.

Sic Subscribitur. MASTER JOHN REID.

John M'Cowan in Rigg, in Auchinleck parioch, aged twentie-seven years or therby, married, purged, and sworne, depons, that he was at the Barrhill of Cumnock at the rendievouze, mentioned in the depositions preceeding, and that he sawe John Cochran of Watersyde there, that he the deponent having a mind to come back to provyde himself with armes as he said; that the rebells would not suffer him to goe home, but putt a guard upon him till he should find a gentleman who was to goe alongst with them to be caution for him, and Watersyde asked him if he would goe out with Knockshinock which he said he would doe, wherupon Watersyde went and spoke to the rebells and gott him levee to goe home, that he might returne againe, and this is the truth as he shall answer to God, and that he knew Watersyde.

Sic Subscribitur. JOHN M'OWAN.

George M'Cron in Cumbock aged thirty years or therby, married, purged, and sworne, depons, that, at a rendevouze at the Barrhill of Cumnock, some dayes before Bothwel-bridge, he sawe John Cochran of Watersyde with the rebells at the rendevouze and that ther were about four or fyve hundred of them in armes, and to the best of his memory John Cochran had a sword about him, and this is the truth as he shall answer to God, and that he knew Watersyde.

Sic Subscribitur. GEORGE M'CRON.

William Wallace, in Ochiltrie, aged ffytte years or therby, solutus, purged, and sworne, depons that he sawe some people together upon the Calsay or Ochiltrie, some with guns, some with swords, and some with armes they had made, put on upon a staff, depons that for colours they had some whytt thing upon a stick, and that he sawe John Cochran of Watersyde there, and that ther was some of sir John Cochran's tenents sons among them, and particularie one William Mc'Ghie and William Howie; a weaver, James Muir and James Key, David Gillies and Thomas Reid, and this is the truth as he shall answer to God.

Sic subscribitur. WILLIAM WALLACE.

Archibald Mc'Ghie, Smith in Ochiltrie, aged ffyfy years or therby, married, purged, and sworne, depons that he sawe some men, to the number of twenty or therby, rendevouze att Ochiltrie, and that one David Gillies and John Sinclair did drielie them, and that some had guns, some partizans, and that the most part of them were sir John Cochran's tenents sons, and that he sawe John Cochran of Watersyde, near them, and that for colours they had about six quarters of linning tyed to a stick with a read ribbon, and depons this was some dayes before Bothwelbridge: and this is the truth as he shall answer to God, and that he knew Watersyde.

Sic subscribitur. ARCHIBALD Mc'GIL.

John Paterson, in Ochiltrie, aged ffyfy years, or therby, married, purged, and sworne, depons, that he sawe some men, wherof some were sir John Cochran's tenents sons, rendevouze at Ochiltrie, and that they had bits of forks, bits of swords and halberts, and that they had a whyte cloath tyed to a stick for colours, and that he sawe John Cochran, of Watersyde, whom he knew, come out and speak with them, and this was some dayes before Bothwelbridge: and this is the truth as he shall answer to God.

Sic subscribitur. JOHN PATERSON.

The Lords ordained the assyse to inclose, and returne their verdict to-morrow.

CURIA JUSTICIARIE, S. D. N. Regis tenta in pretorio burgi de Edinburgh, decimo die mensis, Aprilis, anno millesimo sexcentesimo octuagesimo quarto; per nobilem et potentem Comitem Jacobum Comitem de Perth, Justiciarum Generalem, et honorabiles viros, Dominos Jacobum Foulis de Collingtonn, Justiciarie Clericum, Johannem Lockhart de Castlehill, Davidem Balfour de Forret, Rogerum Hog de Harcars, et Alexandrum Seton de Pitmedden, et Patricium Lyon de Cars, Commissionarios Justiciarii, dicti S. D. N. Regis.

Curia legitime affirmata.

The said day the persons who past upon the assyse of John Cochran, of Watersyde, re-

turned their verdict in presence of the saids Lords, whereof the tenor follows :

The Assyse having inclosed and chosen the Earle of Linlithgow their Chancellor, they by unanimous voices doe find John Cochran of Watersyd, guilty of the cryme of Treason, & belted conforme to the depositions of the witnesses.

Sic subscribitur. LINLITHGOW Chancellor.

The Lords Justice General, Justice Clerk and Commissioners of Justiciary, having considered the said verdict of assyse; they therefore be the mouth of James Johnstoun Dempster of Court, decerned and adjudged the said John Cochran, of Watersyde, to be execute to the death detained as a traitor, and to underlye the paines of treason and utter punishment appointed by the lawes of this realme, at such a tyme and place, and in such a manner as the Lords Justice General and Commissioners of Justiciary, shall appoynt, whenever he shall be apprehendit. And ordains his name, fame, memory and honors, to be extinct, his blood to be tainted, and his armes to be riven furth and debate out of the books of armes, sua that his posterity may never have place nor be able herefter to bruck or enjoy any honours, offices, titles or dignities within this realm in tyme coming: and to have forfait amitted and tint all and sundry his lands, heretages, tacks, steddings, rouses, possessions, goods and geir, whatsoever, pertaining to him, to our soveraigne lord, to remain perpetuallie with his highnes in property. Which is pronounced for doom.

CURIA JUSTICIARIE, S. D. N. Regis in Prætorio Burgi de Edinburgo, decimo die mensis Novembris millesimo sexcentesimo octuagesimo quarto, per Nobilem et Potentem Comitem Georgium Comitum de Linlithgow Justiciarum Generalem et honorabiles viros Dominos Jacobum Foulis de Collingtoun, Justiciarum Clericum, Johannem Lockhart de Castlehill, Davidem Balfour de Forret, Rogerum Hog de Harcarse, Alexandrum Seton de Pitmedden, et Patricium Lyon de Caris Comissionarios Justicie dicti S. D. N. Regis.

Curia legitime affirmata.

The said day James earle of Loudoun, and George lord Melvill, being summoned to appear before the lords justice general, justice clerk and commissioners of justiciary within the Tolbuith of Edinburgh, the eight day of Aprill last, to have underlyen the law for the crymes of high treason, in contriving the death of our soveraigne lord the king, and his dearest brother James duke of Albany and to subvert the government. And for having further accession to the rebellion raised in Scotland the year 1679 for the recepiting, harbouring and intercommoning with rebels and traitors, in manner mentioned in the criminall letters of treason, raised at the instance of sir George

M'Kenzie of Rosehaugh, his majesties advocat against them theranent. And the fornamed persons being then called, and they nor none of them compeirand. By recommendation from the lords of his majesties priy council, the dyet was continued to this day, and now the said earle of Loudoun and the lord Melvill being oft tymes called to have underlyen the law for the treasonable crymes above mentioned, and they nor none of them compeir, the lords justice general, justice clerk and commissioners of justiciary, by the mouth of James Henrysone macer of court decerned, and adjudged the said James earle of Loudoun, and George lord Melvill, to be outlawes and fugitives frae his majesties lawes, decerned them to be denounced our soveraigne lord's rebella, and to be put to his highnes horne. And all their lands, heretages, goods and geir whatsoever, to be forfeaulted and escheat to our soveraigne lord's use, as outlawes and fugitives frae his majesties lawes for the crymes of treason forsaid. The lords continue the proces of forfaiture against the earle of Loudoun, and lord Melvill till the seventeenth of March next.

March 17th, 1685.

The Lords in respect the earle of Loudoun, lord Melvill, sir John Cochran of Ochiltre, John Keir of Newtown and Walter Lockhart of Kirkton, and sir William Scot younger of Harden, are cited before the high court of parliament * to the fyfteint of May next for the same treasonable crymes for which they are cited before the justices. They therefore continue the Dyet against them till the sixteenth day of the said month of May.

May 5th, 1685.

The said day anent the petition presented to the saids lords be sir George M'Kenzie of Rosehaugh his majestie's advocat shewing that wher albeit his majestie hath for punishing the late execrable plot, and some other conspiracies and treasons within this his ancient kingdom, given order for raising ane summones of Treason against sir John Cochran of Ochiltre, sir Patrick Home of Polwort, † George lord Melvill, — Montgomerie of Langshaw, Mr. Robert Fergusone, Mr. Robert Martine, Walter Lockhart of Kirkton, Thomas Stewart of Cultnes, — Denholme of Westsheills, Andrew Fletcher of Saltoun, — earle of Loudoun, — — Pringle of Torwoodlie, George Home of Bassindean, James Stewart son to sir James Stewart, yet his majestie is desyreous, that they should (untill they be found guilty) have all fair occasion and allowance of defending themselves, and least any of the saids persons might be precludit from proponing of their defences, on their be-

* As to the jurisdiction of the Scots parliament, see a Note in Cesnock's-Case, p. 919 of this Volume.

† See the Note in p. 654, of this Volume, and sir Patrick's Narrative published by Mr. Rose.

ing rebels and at the borne, that they be relaxed 'ad hunc effectum' alienarie that they may have 'personam standi in judicio.' But* prejudice to his majesty of any casualtie or benefice falling to his majesty through their rebellion, and the day of their compeance being before the high court of parliament the fyfteenth day of May instant. Beseeching therfor the saids Lords to grant relaxations to the fornamed persons 'ad hunc effectum' that they may have 'personam standi in judicio' before the parliament the said day. The Lords having considered the Petition above written given in be his majesties advocat, they allow relaxation to be exped for sir John Cochran and others above specified, 'ad hunc effectum' that they may have 'personam standi in judicio' and propone their defences befor the parliament the fyfteenth day of May instant. But prejudice to the king of any casualtie fallen to his majestie through their being at the borne.

Sic Subscribitur, JA. FOULIS,
DAVID BALFOUR,
J. LOCKHART.

Wodrow, speaking of the proceedings of the Scotch parliament in the year 1685, says, "Friday, May 22, dittay is read against sir John Cochran, and others; and the advocate insists imo against sir John Cochran. The first article of his libel, anent the plot, is voted relevant. Probationes, Alexander Monro, who is present, and adheres to his deposition formerly given in Jerviswood's process (see p. 673), which is read to him, and he signs it. Then, contrary to repeated promises and declarations, as we have heard, Mr. Carstairs's printed deposition is read, and the clerks deponed they saw him sign it. Next, Burn and another, Englishman's depositions, signed by the English secretary, are read. Then the advocate adduced the form of proceedings in the like cases before the parliament, in the case of the Popish Lords, 1594, and against Rober tLogan.

"After all, the Advocate had a speech to the parliament, wherein we may guess he would aggravate the conspiracy, from what we saw in Jerviswood's Case. Then the parliament voted the probation sufficient.

"The Advocate, in the next room, insisted upon the second article of the dittay, seeking and collecting money for the late earl of Argyle; and for probation, the laird of Pollock, and Craighends elder, their confessions in their own processes, were adduced, That sir John had demanded from the first fifty, and the other twenty pounds sterling. This probation is next voted good.

"Then the question was stated, Whether the panel being found guilty should be forfeited. Whereupon the bishop of St. Andrews, in his own name and that of his brethren, desired to

† See the "Divisions of Purley," Vol. 1, pp. 190, et seq. 213, 214, 215, 4to edit. of 1798.

be excused, though they had voted in the relevancy and probation, as to this vote, and asked liberty to remove. When he removed, he gave in a protestation, and took instruments in the Register's hands, that this should be but prejudice to their parliamentary privileges. The bishop of Edinburgh, at his removing, had a stated speech, exclaiming against Popery and Presbytery, as the great enemies of bishops, with a deduction of the sense and opinions of Canonists, as to bishops voting in cases of blood. When the bishops had removed, they were called in again at the advocate's motion, he alleging the parliament not full without them, wanting one of the three estates. During the calling of the roll they were silent. [As to this matter; see 2 Hume's Comm. chap. 11, p. 101. See also in this Collection the Case of the Popish Lords, vol. 7, p. 1217.]

"When the vote for forfeiting was over, Mr. Thomas Gordon read the sentence, and the king's trumpets sounded thrice, upon which the doom was pronounced by the Dempster,* and the trumpets sounded again; and the sentence was intimated at the Cross by the Lyon and Heralds. It is exactly in the same terms with Jerviswood's. (See p. 710).

"June 13th. They begin with the lord Melvil, and his dittay is read, bearing, that he gave intelligence to the rebels at Bothwell-bridge, and his accession to the plot. Both are voted relevant *separatim*. As to the first article, John Miller in Watershaugh depones, that the lord Melvil sent him upon Saturday June 21st, with letters to Mr. John Welch, and Mr. David Hume, and bade him tell them, if they would lay down their arms and surrender, they would get good quarter; that the king's army was decamped that night, and none knew whither they were to march, but the duke of Monmouth; and that he went to the rebels camp, and Wishaw went three miles with him; and that he met Cultness's man, Thomas Steil, who told him Wishaw had been at Cultness. Wishaw depones conform *in omnibus*. And John Strang, who kept a pass for

* "The form of giving forth the sentence," says Hume, (2 Comment. cap. 17, p. 343) speaking of the Justiciary, "has altered in modern times, from what it was of old. In cases not capital, the use had been, that it was read out by the clerk of court from the record, and was repeated after him, by one of the enacers, to the panel. In capital cases, with an attention which savoured of barbarity, the office of repeating the sentence was devolved on the Doomster, Dempster, as he is called, or common executioner. This rude ceremony was abolished by act of adjournal of the 16th March 1773, which orders that the sentence shall be pronounced by the presiding judge, and afterwards read out by the clerk, from the record; which is signed in this part, contrary to what is observed in the other steps of process, by all the judges who are present."

the rebels, depones, John Miller came to him at midnight, and let him see the backs of his letters. John Lockhard of Bars depones, he went with John Miller to Mrs. Nasmith's in Hamilton, and that the letters were directed to Mr. Welsh, Mr. Hume, and Robert Hamilton. This probation is voted good.

"As to the second article, for probation, commissary Monro's, and Mr. Carstairs's depositions are adduced, and the confessions of the two Cesnocks, as agreeing with what commissary Monro said of the lord Melvil. This article is also found proven. The lord Melvil is sentenced in common form.

"As to sir John Cochrane, August 17, I find the council order a party to be sent with sir John Cochrane, and his son John, with John called Colonel Ayrief, to put them aboard the king's yacht, to be transported to London.

"By the 40th act of this parliament *, The

* Upon the subject of forfeiture and corruption of blood, Mr. Hume, 2 Comm. cap. 17, p. 364, writes thus concerning the law of Scotland: "By custom time out of mind, every capital sentence is attended with a farther consequence, the confiscation, or escheat as we call it, of all the convict's moveable goods and substance, to his majesty's use; to which effect the sentence bears a general declaration, and an order and authority to the proper officers, to collect and bring in the effects. This had become the law of Rome under the emperors; but it is the custom also of several nations, who have not the same regard to the Roman law that we have, and has probably been derived to us from a less remote source. Except in cases of treason, the forfeiture of property on capital conviction, has never, at any period of our practice, extended to the real or heretable estate; which in England, at this day, seems to fall as escheat to the lord of the fee, in all cases of petty treason or felony. In this respect also, our custom is less rigorous than that of England, as we have never admitted that fictitious corruption of blood, consequent with them on attainder of felony; whereby all descent of property to the felon's kindred is obstructed, wherever they have to connect a title of inheritance through him to any of their predecessors."

The following observations of Mr. Laing (4 Hist. 160, 2d ed. 8vo.) throw light on this subject, and on other parts of this case, which fact, however, by no means constitutes the whole of their value:

"Amidst the new treasons which the parliament created, and the numerous attainders which it pronounced, an act of an opposite tendency was passed, to authorize the perpetual entail of lands. That the Scots should have remained so long ignorant, or have availed themselves at such a late period, of a feudal institution which other nations were desirous to explode, are circumstances sufficient to excite our attention and surprize. The statute

lands of sir John Cochrane of Ochiltree, lord Melvil, the Cesnocks, Jerviswood, Earlstoun,

of entails was evaded in England before the Scots had begun to study or to improve their laws; and the early sovereigns of the Stuart family would never have consented to a device adapted to perpetuate a feudal aristocracy, which it was the uniform policy of their house to depress. But the nobility at present were no longer the object of jealousy or fear. The estates were called upon to confirm the sentences of Jerviswood, Argyle, and Porterfield; to ratify the opinions of the court of session that it was treason not to reveal the demand of contributions for traitors, nor to abjure the treasonable declaration of the fanatics; to approve the practice of the justiciary court, in proceeding to trial and conviction the day after the citation was given; and the nobility were secretly alarmed at the retrospective treasons which they were employed to create. From these they perceived that the declaration of new laws, and of new crimes, was lodged entirely in the breast of the judge; and from the numerous attainders which they were required to pronounce, they felt with terror that their lives were exposed to the mercy, and their estates to the rapacity of the servants of the crown. To preserve their estates from forfeiture, and their families from ruin, it would appear that they sought an indirect expedient to elude the iniquitous laws and corrupt practices, which they were too dependent to reject or to resist. Entails had already been introduced in a few instances, but were reprobated as repugnant to the genius of the laws. Corruption of blood, which obstructs the course of succession, was a penalty never incurred as the consequence of attainder, unless it were inflicted by an act of dishabilitation; and the estates, relying secretly on the maxim, that nothing more could be forfeited than the person attainted was entitled to alienate, passed an act" [it is the act concerning tailzies, act 23d, of the 1st session of the 1st parliament of King James 7th,] "by which lands might be entailed to perpetuity, and the rights of an endless series of heirs be reduced almost to an usufructuary interest during their lives. Under the pretext of securing their estates from alienation or debts, the nobility undoubtedly expected to preserve their families, in the event of an attainder, from the forfeiture of more than the life-rent interest or escheat of the heir. The commissioner [Queensberry] consented to the act, to perpetuate his own acquisitions to his family; and from the tyranny of James, entails were introduced into Scotland when the rigor of the feudal system had almost expired. In a commercial country, above a fifth, or a third part of the lands is excluded from commerce; and entails will continue to increase, till the magnitude of the evil requires an extensive redress." Of the Articles of Grievances, (18th of the Acts and Orders of the Meeting of the Estates of the kingdom of

Douchal, and others, are for ever annexed to the crown *, not to be dissolved from it but by parliament, and that not upon general narratives, but particular causes and services to be specified, that it may appear the same is not granted upon importunity, or upon private suggestions, but for true, just, and reasonable causes of public concern.

“ I say no more of all these worthy persons but that they had justice done them after the Revolution.

“ This Annexation, with such solemnity, to the crown, was by people, who knew matters, reckoned grimace and farce; and upon the matter their estates were already in the hands of the chief managers of the persecution; and in the very next parliament, we shall find dissolutions of several of them made, upon no considerations of public concernment, but to gratify particular persons who had been active in the present measures, and were favourites, and made use of to corrupt people into the plot against the Protestant Religion. And it is certain enough the rents of all of them, and multitudes of others forfeited, were one way or other running to the private use of favourites.”

It appears, that in this same year, there was a suspicion that the lord Register, (sir George Mackenzie) and secretary Murray, had been in correspondence with lord Melvil. Wodrow, after noticing James's encroachments on the Royal Burghs, and interference as to the nomination of magistrates, proceeds thus:

“ While those bold steps are taking at London, which were a preface to what followed in England, as to corporations, much of the same nature, our managers seem not to be altogether of a piece among themselves; and informations are taken from Mr. John Veitch, and some accounts said to be given by sir John Cochran, with relation to the register and secretary Murray their corresponding with the lord Melvil, and some malversations of the king's advocate. Without dipping at all into this part of secret history, I shall lay before the reader what I meet with in the registers about it.

Scotland, April 13, 1689) the third is, “ That the forfeitures in prejudice of vassals, creditors, and heirs of entail are a great grievance.” See Mr. Laing's account of Act 7 Anne, c. 21.

* It is scarcely necessary to refer to the various acts for rescinding and restitution which were enacted shortly after the revolution, in favour of the families of those who had perished under the antecedent proscription, or of those proscribed individuals who had survived it. Mr. Laing, 4 Hist. 231, says, that “ by a single act upwards of four hundred attainted persons were restored by name.” I conjecture, that the act which Mr. Laing contemplated, was act 13, of the 2d Session of the 1st Parliament of William and Mary, July 4, 1690; and if so, I believe, Mr. Laing rather overstates the number of persons who were by same restored by it.

“ The Letter underwritten, directed to his sacred majesty from the council, being brought in from the committee appointed in the forenoon for that effect, being read, the same was approved of and signed, and ordered to be delivered to the lord marquis of Athole, to be by him presented to his most sacred majesty, which letter he accordingly received, with the principal examinations of Mr. John Veitch, and Mr. William Spence, upon oath, there being no copies left, by the council's special order. Follows the tenor of the foresaid letter:

“ May it please your most sacred Majesty;

“ According to your majesty's commands given by your royal letter, we have by your proclamation, adjourned your parliament to the first Thursday of April 1686, in the usual manner. As also, in obedience to your sacred commands, in another letter of the same date, we did intimate your royal pleasure to the council of Edinburgh, to continue the town council as formerly, and to forbear to proceed to any election of magistrates or town-council, for the ensuing year, until your majesty declare your pleasure. We judge ourselves always obliged to inform your majesty, as being of great importance to your majesty's government, and of the highest concern to all your faithful servants, that the committee for public affairs having appointed two days last week for searching of prisons, and examination of prisoners, they reported to us, that in the examination they found by Mr. William Spence, that sir John Cochran's son had been questioning him, if he had carried on any correspondence betwixt the lord register, and the late lord Melvil, by which it would appear, that sir John Cochran's son had been practising him, with a design to accuse the lord register, which correspondence is declared by the said Spence to be utterly false. There was another called Mr. John Veitch, who was close prisoner by the lord chancellor's order, and therefore when the council called for him, they removed all the clerks, and that Veitch did give his oath in writ, whereof, he said, he had sent an exact double to the lord chancellor, after his lordship's going from this, which reports, as if information had come from a rebel, or some of their correspondence, of your advocate's malversation in your majesty's service, which he also denies upon oath. We have likewise information, that albeit sir John Cochran would not voluntarily expose his secrets and discoveries, until he saw your majesty, no not to your officers of state; yet some have told here a day or two after sir John had parted from this, that he was to accuse the earl of Murray of conversing with traitors, and we having sent for sir James Roch-head the informer, we find he is gone for London. This in fact we humbly lay before your royal wisdom, as matters of extraordinary weight, lest by such practices your majesty's service

' may be more endangered, than by the enemy's open endeavours; and albeit such informations are to be received against the best servants, yet we in all submission offer to your majesty's consideration, how far the rage of defeated enemies, (especially when induced by threats or promises) will prompt them to concur in ruining your faithful servants, who have served your majesty faithfully, in ruining of them: and we humbly offer these, amongst many considerations, to your sacred majesty, that from your royal and fatherly interest in and over your servants, such directions may be given, and such notice may be taken of these informers, as will be most consistent with your majesty's interest, and with that which is a part of it, your majesties justice to your unjust servants. There is one Welsh, a forfeited traitor, taken, and brought before us, whom we have remitted to the justices, in order to his execution; and albeit severalls of these irreclaimable rebels be still skulking in the Mosses, yet at present there is a greater quiet in the western shires, than has been in them these many years bypast, and all possible care for their continuing so shall be taken by us. But since the lord privy seal, who has been present with us, and whose eminent appearance and fidelity on all occasions, in your majesty's service is so known to all, especially to your royal self, is now going to attend your royal majesty, we leave a more particular information to be given by him, of what relates to the aforesaid or other of the public concerns of your majesty's service here, and what further occurs, shall be faithfully transmitted on all occasions, by, May it please your majesty, Your majesty's most humble, most faithful, and most obedient subjects and servants. Subscribed *ut sederunt*, except the marquis of Athole.'

" October 24, the Council have the following Return to this Letter :

J. R.

' Right trusty, &c. We received your letter of the 21st of September, from the marquis of Athole, by which we were much surprised, that you had taken upon you to examine Veitch, committed close prisoner by our chancellor, with express order, that none of what quality soever, should have any access to him, and to take up the order given by our chancellor. Both which, we look upon as actions of that nature, as we cannot but admire how, or by what perswasion you came to do them; for supposing it has been possible for our chancellor to have done such a thing without our order, and that it had really been amiss, yet we ought to have been informed, and our royal pleasure known, before any thing had been done contrary to the order, especially where there was no danger in a much longer delay. This we look upon to be so much our immediate concern, that we must let you know how much we are dissatisfied with it, that for the future you might

' be more careful, that no such practice may be. We do likewise find in that letter, that some rebels have been induced by threats or promises, to accuse some of our faithful servants. We doubt not, that before you sent us that information, you were acquainted with the names of such as threatened or promised rewards in so wicked a matter, (as is well known to the world we would not suffer against the worst of our enemies) which names we desire to be sent forthwith to us, that we may make them examples of our justice to posterity. So we bid you heartily farewell. Given at our Court at Whitehall, the 17th day of October, 1685, and of our reign the first year.

' By his Majesty's command. MELFORD.'

" Such a letter required a speedy answer, and so, October 25, they make the following Return :

' May it please your sacred Majesty,

' We regret very much, that any thing in our conduct should have offended your sacred majesty, whose prosperity and greatness we have ever designed in all our consultations and actions; and since your sacred majesty has prescribed to us measures, for our conduct in the future, we shall by obedience shew what have been our former designs; nor would we insist upon what was done at the writing of the last letter, lest it might seem a justification, if your majesty's express commands in your letter did not ordain us to give an account of the motives upon which we proceeded. As to what concerned the examination of Veitch, we having seen my lord chancellor's order, which bears nothing of any warrant from your majesty; yet we thought it our duty, to have so much respect to a person of his eminent trust and merit, to continue Mr. Veitch close prisoner, according to his lordship's order, without ever taking up the same from the keepers, in whose hands it did and still lies, notwithstanding that Mr. Veitch has both deponed to his lordship and us, that he knew nothing of that affair, nor would we proceed on that examination, until we knew what he had said to his lordship; and accordingly he continues still close prisoner, so that whatever enquiry may be made as to him, is still entire; nor would we take any discovery from him, further than what was made to my lord chancellor, nor would we so much as keep a double of the same, but transmitted it to your majesty by an officer of state, and member of the private committee. And one of the chief motives that induced us to believe, that we might examine him, was, that my lord chancellor's order did not expressly bear, that no person or judicature should examine him, which, if it had been, we would have had that just deference to my lord chancellor's order, as not to have examined him; but the order bearing only, that no person should speak with or see him, we only considered Veitch to be in the condition of

other close prisoners, whom the council uses to examine. But whatever the practice has been, it is sufficient for us, that your majesty has excluded all examination in such cases for the future, which we shall humbly and heartily obey. And to shew that no interest of ours, did or shall induce us to believe, that your majesty by yourself or your order, may not examine any person whatsoever, either as to us or your majesty's servants; we again renew the acknowledgment in our former letter, that informations are to be received against the best of servants; and we may be the safer in this acknowledgment, that we are so happy as to live under a prince who will protect the innocence of his approved servants. As to that expression in your majesty's letter, that some rebels have been induced, by threats, or promises, to accuse your servants, we humbly offer to your majesty's consideration the clause of our letter, which bears, that we in all submission offer to your majesty's consideration, how far the rage of defeated enemies may prompt them to ruine your majesty's faithful servants, which was an abstract consideration in the general, without reflecting upon any particular person whatsoever, or arising from any examination mentioned in the letter, but from the sad experience we have of the rage of your majesty's enemies against your majesty's servants, and the great liberty they take to swear every thing they think for the advantage of their cause; and in this time when your majesty's enemies have nothing left them but this revenge, against those who faithfully serve, to ruine them, and who are irreconcilable with them and their interest, upon your sacred majesty's account, especially, beside our ruin, they may project to themselves a freedom from death and punishment, which, as they justly deserve, is the most terrification of all terrors. This is offered to your majesty by, May it please your sacred majesty, Your majesty's most humble, most faithful, and most obedient subjects and servants Subscribed *ut sederunt*, except Balcarras and Claverhouse.

Laird of Abbotshall,	The Earl of Balcarras,
C. Graham of Claverhouse,	The Lord V. Tarbet,
Laird of Gosford,	The Lord Yester,
The Lord Archbishop of Glasgow,	President of Session,
The Earl of Linlithgow,	The Lord Advocate,
	The Lord Justice-Clerk,
	Laird of Drumelzier.

"How this matter ended, I cannot say. If the procedure of the council after this year, had been insert in Registers, we might have known more of this, and other differences which fell in among the managers in this reign, of which I am not in case to give certain accounts."

Mr. Laing says that Cochraue [qu. both] escaped with Melvil into Holland, and it ap-

pears from sir Patrick Hume's Narrative (p. 9), published by Mr. Rose, that sir John Cochraue and his son John upon the news of king Charles' death, came, with other gentlemen, to Amsterdam, and sir John eagerly concurred in the concert which was there had respecting the invasion of Scotland, in co-operation with Monmouth. Sir Patrick Hume's narrative is an account of the occurrences in that expedition, in which he had a very active part.

The following is the account of Wodrow, into which he says, he has incorporated the papers which the earl wrote with his own hand, or dictated in prison. "These," he adds, "are evidently unfinished, but as to a plain narrative of the most considerable facts, they are the best account I have seen of this matter."

"Monmouth was not forward to do any thing during his father's life; but when he was dead, and that in so very suspicious a manner, he, with the banished noblemen from Britain, thought it high time to bestir themselves, judging things now come to a crisis, by the accession of a bigotted papist to the throne, and all like to go as Rome would have it.

"Accordingly, in the end of February, in March and April, there were several meetings kept in Holland; and an invasion was resolved upon as necessary. The duke of Monmouth, with the English refugees, were to land in England, and the earl of Argyle, with the Scots people, were to essay to land in Scotland; and it was agreed, that both should be as much as possible about the same time. The duke of Monmouth's attempt I shall wholly leave to the English historians, and confine myself to the earl's design upon Scotland.

"I have before me the Minutes of a meeting of our Scots people at Amsterdam, April 17, O. S. this year, and the reader will desire to have them here. There were present the earl of Argyle, Mr. Charles Campbel his son, sir John Cochran of Ochiltree, sir Patrick Hume of Polwart, George Pringle of Torwoodlee, William Denholm of Westshiels, George Hume of Bassindean, John Cochran of Waterside, Mr. George Wisheart, William Clellan, James Stuart advocate, and Mr. Gilbert Elliot. Sir John Cochran was elected *Preses pro hac vice*. They unanimously resolve,

"That the abovenamed persons, and other gentlemen of the kingdom of Scotland, joyning with them in a great undertaking, intended by them in the defence, and for the recovery of the religion, rights, and liberties of the kingdom of Scotland, shall assume and take upon them the quality and character of a council, for consulting and determining whatsoever relates to that great undertaking, and management thereof; and that no soon as they come to Scotland, such of the nation as shall joyn themselves to them in the prosecution of the said undertaking, shall likewise have access unto, and be joyned in the foresaid council.

‘The persons foresaid, in the character and quality above expressed, do resolve to make war to the effect abovementioned, against James duke of Albany and York, and such as shall adhere to him; and for the command and conduct of the army they shall be able to gather together, they did unanimously choose and appoint Archibald earl of Argyle, to the office of captain-general, with as full and ample power as any captain-general is ordinarily in use to have from any free state in Europe.

‘They elected and nominated Mr. William Spence their clerk, and recommend it to the said James Stuart, to perfect the declaration of war they design to publish, and that against Munday next.

‘It is resolved, that Mr. William Veitch, Mr. George Barclay, and William Clellan, be dispatched to Scotland, and instructed for that effect; and that the earl of Argyle, sir John Cochran, sir Patrick Hume, George Pringle, and William Denholm, meet tomorrow at the earl’s chamber at eight of the clock in the morning, to expedite their instructions, and adjourn their meeting till Munday at eight of the clock at night, to sir John Cochran’s chamber.’

‘No doubt they met at the time concerted, though I have seen no more of the minutes of their procedure, and I reckon then they agreed to the draught of their declaration, which shall in its own room be inserted. Probably after that, they did not often meet, for the time agreed upon ’twixt them and the duke of Monmouth and his company, was now hastening on. I find Mr. Barclay, and William (afterwards lieutenant-colonel) Clellan, were in Scotland before the earl came over, and no doubt kept by their instructions.

‘Upon the 1st of May, the earl and his friends left Holland, with a very few ships, and a considerable number of arms. The money expended on these, was mostly raised on the earl’s credit. The duke of Monmouth, with the English gentlemen, had faithfully engaged not to stay above ten days after them in Holland; but it was a month before they landed in England. Whether this was done of design, or necessarily, I do not determine. It was rumoured, that this delay was advised, that the English forces might be poured down upon Scotland, and their game thus be the easier in England. However, it is certain, the duke of Monmouth was extremely concerned when the earl’s party was broke, and the earl himself taken; and indeed his interest could not have met with a sorer dash. It is plain, the English not keeping to the terms of agreement, tended much to heighten the earl’s malheurs, and to the ruin of both.

‘The court of England had very exact and particular information of the number, force, and designs of the earl’s little squadron, before they came off. And notice accordingly was given to the managers in Scotland to be upon their guard. Their touching at Orkney did

further alarm Scotland; and so much had the late imposed oaths corrupted the generality, and so great was the influence of the managers, that there appeared a very general opposition against the earl’s attempt; and such was the consternation and terror upon friends, and so far were they sunk by long oppression, that at best they were silent, and would not so much as correspond with such as were sent over from Holland, and a coming.

‘In short, as the earl himself in the foresaid hints, more than once, remarks, ‘the Lord’s time was not yet come.’ The body of Presbyterians in Scotland, were sorely broken in the place of dragons, their ministers scattered, and the bulk of the people, who wished well to this enterprize, were perfectly dispirited under twenty four years sore sufferings. The furnace had not altogether healed the rents and breaches among them; and the party who were in arms, wandering and hiding in the fields, too many of them were gone to those heights, which did not permit them to joyn with any frankness in this design, as hath been observed; and the rest were miserably born down, and frighted with the soldiers and militia; and most of the honest Presbyterian gentlemen were either in prisons, or forfeited, and so scattered, as they could do nothing in favours of the earl. And above all, the self-conceitedness, cowardice, ignorance, and miserable differences among some who were embarked in the design, spoiled all; so it is no wonder I have a very melancholy and sorry account to give of this enterprize.

‘Before I come to give an account of the earl’s attempt itself, I shall insert what I meet with in the council-registers relative thereunto, till the earl was seized, from which it will appear how exact their information was. I take the appointment I find in the council-books, March 12, to have come from some hints of a designed invasion. ‘The marquis of Athole is ordered to raise five hundred highland-men, for securing the peace of the shire of Argyle, and that they have meat and drink provided, with arms and ammunition, out of the king’s magazine.’ Their information, it seems, has been very particular and early, for April 28, the council write a letter to the lords justices of Ireland, thanking them for sending down the forces to the coast, and acquainting them, that by this time they reckon the late earl of Argyle is sailed with three ships. That same day they publish a proclamation, ordering all the subjects to be in a readiness to assist the king in case of an invasion. And next day, April 29, they grant a commission to the marquis of Athole, to be lord lieutenant of the shires of Argyle and Tarbat. He is ordered to march with some forces to that shire, and every place he goes through is ordained to furnish him with baggage-horses. And May 8, the council-declare, that by that clause in the marquis’s commission, That he should take provisions necessary to such as were under his command, they understand that he may take quarters.

"May 11, the council publish a Proclamation, ordering out all the fencible men; which, since it is in common form with those at Bothwell and Pentland, needs not be insert.

May 17, Letters are writ by the council to the duke of Gordon, and a great many others in the northern shires, acquainting them, that the earl of Argyle is appearing on the western islands, and appointing them to call forth the heritors. That same day William Spence and

Blackadder, are ordered to be brought south to Edinburgh. And May 19, all the heritors on the south side of Tay, are ordered to attend upon the king's host. That same day, "Lord Neil Campbell, William Cochran younger of Ochiltree, the master of Melvil, and Pringle younger of Torwoodlee, are required to enter their persons within twelve hours, in the castle of Edinburgh." This is all I have observed in the registers, till June 20, when the earl of Argyle is ordered to be brought to Edinburgh under a guard, as we shall hear. I return now to give a narrative of the earl's attempt.

"At first their voyage was very promising, and in three days they were at Orkney, and happily escaped the dangerous tides there; and under a considerable storm they were kept together, and free of the rocks, when they could neither see the coast nor their lanterns, by reason of a thick mist: but next day, unhappily they found themselves on the wrong side of Orkney, and had missed the passage betwixt Orkney and Zetland; so they were forced to put in to get pilots, not without hopes of assistance, but were disappointed.

"Mr. Blackadder, son to Mr. John Blackadder, of whom before, was sent in by the earl to get intelligence, and Mr. William Spence would needs go with him, to visit an uncle of his who lived in Kirkwall, the chief town in Orkney. Both were discovered, and caught by the old bishop there. This was a great loss, and alarmed the country very much, and notice was soon sent to the government, of the small force the earl had with him.

"The earl was peremptorily resolved to recover the two gentlemen, and ordered sir Patrick Hume, with a party of fusileers, to attack the town where the bishop and they were, which might have been easily done; but some of the company influenced the earl, and much more the masters of the ships, pretending they might ly long there, detained by contrary winds; so the design was dropt, and only five or six prisoners seized.

"From Orkney the little fleet hasted away by the inside of the Western Islands, as the shortest course; and had they got thither straight, they would have surprized a gentleman, Ballechan, in Ila, with four or five hundred men: but the wind calmed, and afterwards blew hard and contrary, which made them tack in to the sound of Mull, that, if possible, the earl might touch at Lorn, a part of his own lands. And if such as they expected had joynd them, that country had been

easily raised, and the earl in full time at Ila, to have surprized Ballechan and his party; but they were kept back for forty eight hours, and missed him but by one hour.

"In Tobermore in Mull, they dropped anchor, and were by several rubs kept there three days, which was mightily to the disadvantage of their cause; for every hour's loss now was more than of a day at another time, and a day like a month. From Mull they carried three hundred men with them, and wafted over to Kintyre. Here they met with new disappointments, many, from whom they expected much, failed them. However, in this place they stayed some little time, and sent over some of their men to the Lowlands, to prepare the west to joyn them.

"At Campbeltoun in Kintyre, was first published and dispersed the Declaration and Apology, &c. drawn up in Holland, as the fore-mentioned minutes bear, by Mr. Stuart that eminent lawyer, and excellent person. I have two copies of it under mine eye; that printed at Campbeltoun in Kintyre, in the shire of Argyle, and the other reprinted some time after in Holland, said to be taken from a correct copy.

"This Declaration and Apology the reader will find drawn with a vast deal of judgment, candor and calmness, and it contains a most pathetic and affecting account of the present state of things in Scotland, and the preceding history will afford vouchers for many particulars in it. It might have been expected this declaration would have much awakened the kingdom, but indeed it had very little influence that way.

"When they were at Mull, or coming to it, the earl sent off his son Mr. Charles, and he went ashore at the castle of Dunstaffage, with letters to his friends. Some, whom he supposed to be his friends, basely discovered all, and others were very backward to joyn. The lairils of Lochniel and Loup had letters among other gentlemen of the shire. The first gave Mr. Charles his solemn promise to joyn the earl with all men he could raise, and that upon a day appointed; and yet most treacherously he sent by an express the earl's letters, and probably his declarations, to the council at Edinburgh, and afterwards joynd the marquis of Athole, with his forces, at Inveraray.

"Mr. Charles used all his interest in that country to convocatoe them; but, except an hundred or two hundred volunteers, he had very little success. Some pretended they did not believe the earl was come in person, otherwise he himself would have come to the shire; others professed their willingness to stand and fall with the earl, but pressed he might go and fight the enemy, otherwise their families lay presently at their mercy; and indeed the best of the gentlemen in the earl's company were for this, but it was as violently opposed by others.

"All Mr. Charles got done, was putting a garrison in the castle of Carnasory, the dwelling house of sir Duncan Campbell of Auchin-

breck, and the settling of himself with a few men in a little town belonging to sir Duncan, about four miles distant; and informed his father thence, of the state of the country.

“ While the earl was at Kintyre, he had letters from Mr. George Barclay, who had been sent over, as we heard, and was a considerable trustee in the Lowlands. By those he had accounts, that all possible was done, in order to dispose the country for befriending him; but no assurances could be given of any considerable party there joining him; that several had the matter under their consideration, but were come to no resolution. In short, all was but faint probabilities.

“ Matters standing thus, we need not wonder the earl and his party stayed some time in Kintyre. The earl was indeed very much blamed, as losing time, and giving his enemies time to draw together an army; but necessity hath no law. And further, as was then given out, he had promised to the duke of Monmouth, to continue in some retired place of the country, till he had notice of the duke's being in action in England. He had likewise given assurances of raising a considerable number of men in his own shire, and we see how much he was disappointed. Scarce any of his friends there, save sir Duncan Campbell of Auchinbreck, with about eight hundred men, joyned him.

“ Very few resorted to him while in Kintyre; only he had one addition of about three hundred foot, and one hundred horse. Upon this small accession, he proposed to send off a West-country gentleman to the castle of Ardmillan, who declined going till some intelligence came; and then he was not only willing, but rash and hasty to undertake that expedition, till, with much difficulty, the earl hindered him, having received advices the country was full of forces, and some English frigates upon that shore.

“ About this time the good news came, that Auchinbreck's men were ready; whereupon the earl ordered him to march with them to the Tarbet, a very central place, and opposite to the Lowlands; and thither the earl came with his three companies from Ila, and three companies from Kintyre, commanded by colonel Aylief, Robert Elphinstoun of Lapness, and major John Campbell, afterward executed at Inveraray, and a troop of horse commanded by Rumbold.

“ At the Tarbet, upon the 27th of May, the earl printed, and caused disperse his own Declaration. This Paper bears the reason of it in its own bosom. The earl had concurred in the former large declaration; but it was given out by his enemies, that he had private views to recover his own estate, and the lands of his neighbours. This he fully obviates, and promises to pay not only his own but his father's debts. The other particulars the reader will find in the paper itself, and so I say no more of them. This declaration, it seems, very much displeased the government, since they print it

at full length; whereas the former declaration is printed in some short hints, with perverting clauses insert by way of commentary, and for the refutation of it, of which some notice hath been taken. Both were published by authority.

“ At that same place, about a thousand men joyned the earl, mostly with sir Duncan Campbell. Here the earl modelled his very small army into three regiments, which were not much above five hundred men per piece. Sir Duncan Campbell, John Aylief, and the laird of Lapness, were colonels; major Alexander Campbell, the laird of Barbreck, and a third, were lieutenant-colonels; James Henderson, John Fullarton, and major John Campbell, were majors; and all inferior officers were at this time nominate, and this handful put in the best order might be.

“ The earl was fully determined to have attacked Ballechan, who was lying about Inveraray, waiting for the marquis of Athole and the earl of Broadalbin their coming up: this was a very reasonable proposal. That gentleman had but about six hundred men with him, which might have easily been given account of, and Argyle shire settled and secured, and the earl's army at least doubled.

“ But I find in the abovementioned paper, that sir John Cochran and some others of his party would by no means consent to this; but were peremptory to have some hundreds of men, and half of the arms and ammunition, brought from Holland, given sir John, and him sent to the shire of Air instantly: he was so peremptory, that he said, if no body would go with him, he would go alone with a corn-fork in his hand. This was not the only contradiction sir John gave the earl, if the accounts of those times may be credited.

“ To do every man justice, as far as my accounts afford materials in this irksom story, I am apt to think, sir John laid too much weight upon some informations which came from the Lowlands, and promised himself a great deal more than came to pass. I have before me a letter without any date; but I take it to be at this time, from William (afterwards lieutenant-colonel) Clellan, to sir John, which, with some other accounts of such a nature, might have put an edge on sir John's expectations, especially in a matter he would so willingly have had true. It deserves a room here, as what at least will let us in to the activity and endeavours of that gallant gentleman, in the trust committed to him. It follows:

‘ S. P. I.

‘ If you knew what hazards I have run, and travel I have been at, you would be satisfied I have not been negligent. I have turned all stones, and hope, by God's assistance, things shall go well. The great multitudes of enemies, and the remissness of some friends, have retarded mightily. By God's help, I hope the malecontents are gained, and begin now to act: I have this order to write in their

names, that if Mr. Ker be for the work of reformation, carried on from the 1638 to the 1648, they are for him. Let him not spare to speak them fair, and not to be any way troubled for what they may write to him. Keep you strong where you are, and keep the enemy in as great vexation as you can, till you see a beacon upon Lowdon-hill. I hope in eight days or thereby all shall be in a flame. Send us intelligence to Moffat-well, if possible, where I shall have a man or woman with a knot of broad red ribbons about their right arm, to whom they shall give all their intelligence. Haste to send it. The enemies did prevent us as to horses, but we are minded to retake them. If you could frequently alarm the enemies, it would exceedingly weaken them. In short, things are brought to a probable posture.'

"This probability did misgive, and those termed malecontents, the society people in the south and west, fell into differences, as we heard, as to the terms upon which they would joyn with Argyle. But I can find nothing of their scruples as to his being against monarchy, and for a commonwealth, which is a mere reproach: And nothing was effectually done.

"However, such accounts as these made some of the gentlemen stiffly oppose the earl his going to Inveraray, when he had an excellent prospect of many advantages by so doing. To determine their different sentiments, a council of war was called, and there, contrary to the earl's sentiments, it was resolved to make an invasion upon the lowlands. The earl calmly submitted, but indeed this step was mightily to their loss.

"At the isle of Bute, another stop befel them; a company of foot, and some of Rumbold's horse, could not have boats to come up soon enough, and waiting for them, the earl was detained three days. When they arrived, the good project upon Inveraray was laid aside, and the forces transported, the best way they could, to Cowal in Argyle shire, just opposite to the lowlands, whither the gentlemen would be. And sir John Cochran, colonel Elphinstoun, and major Fullartoun, were sent to the lowlands.

"By this time the coasts were guarded, and some English frigats came up, so that sir John durst not land in the Largs in Air shire, as was projected, but put in towards Greenock for intelligence, and some meal for their army.

"When they came within musket shot of land, there appeared a body of horse upon the shore. Sir John having the command, ordered colonel Elphinstoun to essay landing with about twenty men, which was all they could land at once for want of boats; but the thing being impracticable at that place, and the colonel's orders being only to obey in as far as reasonable, taking this to be just the losing so many men, he flatly refused.

"Sir John prevailed upon major Fullartoun,

with about a dozen of men, to attempt to land in another place near by, which he did under the fire of the militia, and got safe ashore, and into a sort of ditch for shelter. The printed account abovenamed, bears, 'That the militia seeing them ashore, gave over firing, and the young laird of Houstoun, and Crawfordsburn, came up to the major, and another with him, and had some conversation, and passed their mutual words of honour, to use no hostilities till the parley was over. After they had asked some questions at the major, to his great surprize, they discharged their pistols at him, which happily missed him, and he returned his, and killed one of their horses, and wounded another. By this time some more men were landed to the major's assistance, and those with the first party behaved so well, that the militia retired to the face of an hill opposite to the ships, who fired some guns at them, which reached so near them, that they retired, and some did not draw bridle till they came to Paisly.' This is the account given in the printed narrative beforementioned; I cannot assert it as certain, and have set it down as I find it.

"Having communicated what is above, to a worthy gentleman present at this little scuffle, he is pleased to acquaint me, 'That the heritors of Renfrewshire, formed in a troop under the lord Cochran, at the council's appointment, were at this time keeping guard at Greenock. When Mr. Fullartoun landed near the kirk of Greenock, John Houstoun younger of that ilk, lieutenant of the troop, and Thomas Crauford of Crawfordsburn elder, quartermaster to it, with some gentlemen in company, rode down towards Mr. Fullartoun and his men, who had put up a signal for parley; and Houstoun having expostulated with the major on their invasion, he answered, they were come to their native country, for the preservation of the Protestant religion, and liberties of their country, and it was pity such brave gentlemen should appear against them, in the service of a popish tyrant and usurper. Upon which Houstoun said he was a liar, and discharged his pistols amongst them, as did also the rest of the gentlemen with him, and the major and his men returned their fire very briskly, but did no execution; only Houstoun's horse being of mettle, and unused with fire, threw him, but he soon remounted, and returned to the troop.'

"Upon their flight, sir John with the rest came ashore, and entered the town of Greenock, and endeavoured to prevail with the inhabitants, to joyn in defence of religion and liberty. He seized about forty bolls of meal, instead of the two hundred the earl had ordered him to bring for the use of the army; and then, upon a false alarm, went off in the night, and sailed back to Cowal, and there, too late, declared it was folly to attempt the lowlands as yet, they being every where guarded with soldiers and militia.

"All now left to the earl, was to make the

best he could in his own country; and so he renewed his design to attempt Inveraray, though now at a vast disadvantage. Accordingly, he divides his small army, and gave the one half of it to colonel Rumbold, and sent him to guard a pass, by which the marquis of Athole might attack him; and likewise to raise the country as much as possible: The other half he took with himself to Inveraray; but the winds being contrary six or eight days, and the English frigats being come up, he was forced to shelter his vessels under the castle of Allangreg. There he took out such arms and ammunition as he at present stood in need of, and laid them up in the castle, which he fortified as well as in so short a time he could, and then marched by land to Inveraray, resolving to attack the marquis of Athole, if his ships should get up to him. He left two companies of men in the castle.

“Colonel Rumbold, with about five hundred men, went and seized the castle of Ardkinglass; and when the marquis of Athole sent off a large fisher-boat full of men, to know the colonel's numbers and strength, captain Duncanson manned out a little fishing-scout, with ten men, and chased her within pistol-shot of the town, very much to his honour: However, some regiments were ordered from Inveraray, to retake the castle of Ardkinglass.

“But the earl, by this time, was got up with the regiments he had with him, to Rumbold; and the enemy finding their mistake, made a halt at the head of Lochfin. Upon which the earl himself, with five companies of foot, and two of horse, went to attack them, leaving the rest to be brought up by sir Duncan Campbell. The marquis of Athole being apprised of this, sent off some of his men in boats, to land upon the earl's rear, and cut off his retreat; but sir Duncan prevented that by his reasonable coming up.

“The earl with the first named companies, attacked the first body of the enemy, and entirely put them to the flight, and pursued them a good while up a steep hill, till the ground grew so disadvantageous, that he saw fit to sound a retreat. In this action he had but one man killed, and severals of the enemy were killed and wounded.

“After this advantage the earl returned to the castle of Ardkinglass, and designed next day with his little army to attack Inveraray, where the marquis of Athole was reckoned five thousand strong, to be sure the earl was scarcely 1900. But unhappily the king's frigats and men of war, at this time were coming up pretty near the castle of Allangreg, where the earl's ships were; and some of the gentlemen who would not come with the earl to Ardkinglass, and had differed with him all along, threatened to quit all and go to the lowlands: The earl therefore, after four or five hours refreshing his men, was obliged to return to the castle of Allangreg with three companies of foot, ordering the rest, under Rumbold and sir Duncan, to

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meet him at the kirk of Glenderule, if there was need; which they did.

“Thus a second time the earl was married in his design upon Inveraray, when it had most probably succeeded, though the marquis of Athole had double his numbers, since upon this small ruffie great numbers of the marquis's men left him. In short every thing went cross the earl's design, and that when just about to be happily executed.

“When the earl came to Allangreg in this critical juncture, he resolved to man out four prizes he had got at sea, and thirty large cowans or fisher-boats, with the thousand men he had with him, and join his own three ships with them, and attack the men of war that were coming up; but another mutiny was raised among the seamen, by those who still embarrassed the earl, so the design was entirely broke, and the earl forced into the measures of those, who, cost what it would, resolved to be at the lowlands.

“Thus the castle of Allangreg was left to the Laird of Lapness, with a sufficient garrison, and men to guard the ships, and the governor ordered, in case he was not able to hold it out, to blow up the magazine, and either to draw up the ships, so as they might be recovered, or to sink them. But two days after the earl with the forces had left them, the garrison forsook all, being, as they said, in want of provision, leaving a train of powder to blow up the castle, and neglecting the ships intirely; and which was worse, they left behind them the few prisoners taken at Orkney, who being left at liberty, immediately acquainted the captains of the frigats, who came ashore in long boats, discovered the train, and seized all.

“No wonder that this vexed the earl, when the garrison came up to him in his march, toward the head of the Gare-loch; and now nothing was left him but to march into the lowlands, under a thousand disadvantages. In the way they met and defeated several of the enemy's parties; and such of them who escaped, alarmed the country before the earl, and hastened up the regular forces, acquainting them of the road the earl had taken; so that when he crossed the water of Levin, a little above Dumbarton, he found all the king's army and militia upon him, treble to him in number, and the earl of Dumbarton on their head.

“Here the earl of Argyle took up a ground, which was inaccessible and safe, but they could not stay in it for want of provision. By their miserable divisions they lost another opportunity here, to have fought a part of their enemies before general, cannon, or ammunition were come up. This was pressed by the earl, but he was over-ruled. When all the king's army was come up, and they must either do or die, the earl calls his council of war.

“The bulk of the gentlemen were for marching by the enemy, and letting them fall upon their rear, which in the foresaid Hints, says the earl, would have been present destruction.

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The earl and Aylicff were for engaging, knowing indeed they were treble their number, but that likewise they wanted not friends among them. This was violently opposed by the other side, as perfectly impracticable. Rumbold moderated their heats, and a night attack was agreed upon; but the earl was again over-taken and balked in that also: so that it ended in a retreat to Glasgow, or Bothwell-bridge, and so towards the south.

“Accordingly fires were kindled, and men left with them, which took so well, that they got all pretty well betwixt the enemy and Glasgow. Several of their own number gave them false alarms, pretending to see parties marching towards them, and such like imaginations. Sir John Cochran is charged in the printed account, as being very instrumental in discouraging the men, and pressing them to separate and flee; how truly, I am not at this distance to determine.

“But it is certain enough, their guides misguided them, and carried them near four miles about, and instead of leading them to Glasgow, brought them down upon Kilpatrick; and the earl in the forecited Hints, says, he was a mile in the dark before he perceived the cheat, and could neither help it, nor persuade them to halt, to draw up, so that their retreat turned to a rout. He stayed in the rere, and sent Rumbold to the van to stop them, but, says he, it was impossible, and concludes, so I was left necessarily to be taken.

“At Kilpatrick a few of them put a militia company to flight, and had it been possible to have rallied their scattered forces, they might have got out of the reach of the enemy; but that was impracticable, when a good many of themselves urged separating and fleeing.

“Sir John Cochran, sir Patrick Hume, and some other gentlemen went straight to Clyde, and would not so much as stay to reason the matter with my lord Argyle. They were received with the fire of some of the militia horse, when they came to the other side. The laird of Lapness, the laird of Barbreck, with a few soldiers, coming up in another boat, fired at the militia, and obliged them to bear off with some loss, and having got ashore, they joynd the rest, and were pursued for some time by two troops of militia, commanded by captain Clellan of Fasken. At length a scuffle happened near Muirdyke, in Lochwinnoch, where in captain Clellan and some others were killed, and the laird of Blair, (other accounts make it sir Adam Blair of Carberry,) with some others, wounded. Upon the other side, a gentleman of the name of Campbel was killed, and major Henderson, and Mr. Archer (of whom afterwards) was sore wounded.

“Having given this account of what passed since the earl's coming from Holland, before I enter upon the earl's personal misfortunes, let me subjoyne here several other hints concerning this attempt, and particularly the encounter at Muirdyke, from a narrative come to my hand, since I wrote what is above, written by

a person of good reputation yet alive, who came over with the earl, and was present at the Muirdyke encounter. ‘When we set sail from

‘Holland, we were not above three hundred men in all, but had our three ships laden with good arms and ammunition. We had a quick passage, but came to the wrong place of the kingdom, Orkney, where two of our men were taken. When we came about to the earl's country, a good many highlanders joynd us. Upon notice of an English man of war in pursuit of us, we went down a little creek to the castle of Allangreg, where we lodged all our arms and provisions, and built a fort on the west side of the castle, and planted some cannon, in case the frigats should come down. We left an hundred and fifty men there, and went in quest of the marquis of Athole's men, who constantly fled from us. Thus we were taken up several days: mean while the frigates came down upon the castle, which our men could not defend, and were forced to quit it, laying a train to blow all up, which misgave, and all fell into the enemy's hand.

“This mightily discouraged the earle, and we left pursuing Athole's men, and marched to the lowlands, hoping our numbers would increase. When at night we were setting our watches, a party of the king's troops appeared, so that instead of getting rest, we marched all night towards Glasgow; and after we had sent out for provision, which we very much wanted, the whole of the king's army appeared; so we drew up on a Muir side, there being a water betwixt us and them, being firmly resolved to fight them, though much inferior in numbers; but they never approached us all that day. At night we marched off, leaving great fires in our former camp, and our leaders mistaking the way, led us into a moss, which quite disordered us, so that though we were a good army at night, there were not five hundred of us together in the morning. Our discouragements being great, multitudes, and Rumbold, and many brave men who had no mind to part with us, lost their way. Those who kept together came to Kilpatrick. We crossed Clyde, where was a troop of militia horse, which sir John Cochran and Polwart soon defeated, and made them run more than a mile before they halted: So we sent the boat to and again, till we brought over an hundred and fifty men, and the earl with the rest refused to come over. On the south side of Clyde we refreshed ourselves with some provision, in a gentleman's house at the water side, which had been designed for the king's forces, and indeed we needed it, for some of us had tasted little these three days, then we resolved to march in a body south to England.

‘But the militia troops we had chased from the water side, had got two others joynd them, and came toward us, which made us alter our rout. Sir John Cochran divided us into three companies, one he commanded

‘ himself, Polwart the other, and major Henderson the third. We went to attack the militia, who fled, and we saw no more of them till the afternoon. Two troops commanded by captain Clellan, and my lord Ross, with some militia, came near us, who now were decreased to about seventy, and attacked us; we stood our ground, and had Mr. Thomas Archer wounded. A treaty was begun, and they offered quarters, which we refused, and got into a little fold-dyke, which was a kind of defence unto us. There they made a furious attack upon us, wherein captain Clellan was killed, and renewed their attack, wherein we were told my lord Ross was in hazard; and if he had not had harness, would have been killed, as several others were. We had one man killed, and two wounded; and sir John Cochran had two shots, which lighted on his buff-coat, and smarted much, but did not pierce it. After this, the enemy retired a little, and compassed us round at some distance, which gave me (says the writer) opportunity to observe Mr. Archer lying, who was extremely weakened by his bleeding. He was carried into the Herd’s house, where the enemy afterward found him, and he was taken into Edinburgh.

‘ When night came, sir John ordered us to march out from the fold we were in, in a close body, and endeavour to force our way through them, apprehending they resolved to guard us in till more forces should come up. But we found them retired to Kilmarnock, and so after staying about a day’s time together, in a tenant’s house of sir John Cochran his father, and upon hearing that the earl of Argyle was taken, sir John dismissed us, and we separated, and shifted for ourselves the best way we could.’

Hereupon king James published the following Proclamation :

PROCLAMATION AGAINST TRAITORS AND FUGITIVES, JUNE 24, 1685.

‘ James, by the grace of God, king of Great Britain, France, Ireland, defender of the faith: To Macers of our privy council, or messengers at arms, our sheriffs in that part, conjunctly and severally, specially constitute, greeting: forasmuch as Archibald Campbel, late earl of Argyle, (that arch and hereditary traitor) having, with some other his accomplices and associates, both of this and other nations, combined together to disturb our government, and the peace and tranquillity of this our ancient kingdom, and having associated to themselves the vile and sacrilegious murderers of James late archbishop of St. Andrews, and even that bloody miscreant Rumbold the malster, who was to have embred his hands in the sacred blood of our dearest brother, and to have been the principal actor of that hellish tragedy, designed at the Rye

‘ in England; they, pursuant to their traitorous and wicked plots and designs, having landed in some of our western and highland islands, and there pillaged and harassed our people for a considerable space bygone; and now, after all their desperate endeavours, it having pleased Almighty God to give our forces that good success over these our enemies, as to defeat and totally rout them, many of whose chief ringleaders are now taken, and particularly the said arch traitor Archibald Campbel, Rumbold the malster, John Aylief, called colonel Aylief, (which last, out of the terror of his atrocious guilt and despair, endeavoured to kill himself after he was taken, by giving himself a wound in the belly with a knife, in the prison of our burgh of Glasgow) and many others: and whereas there are several of that hellish crew not yet taken, who may skulk and lurk in this our realm, with these of their party, and be sheltered by disaffected persons; and we, being resolved to prosecute and pursue those execrable rebels and traitors, until they be apprehended and brought to condign punishment, do hereby, with the advice of our privy council, require and command all our good and loving subjects, and particularly all our sheriffs and other magistrates, and the officers of our standing forces and militia, to use their utmost endeavours for apprehending the said rebels and traitors, and bringing them to justice; and for that effect, to convocate our lieges, and use all other warlike force against them: and for their encouragement, we hereby not only indemnify and fully pardon them of any blood, slaughter, mutilation, fire-raising, or such like inconveniencies, which may fall out in this our service; but we do hereby promise and assure any person or persons, who shall apprehend the persons underwritten, dead or alive, or discover them so as they may be apprehended, the rewards following, viz. For John Cochran, sometime called sir John Cochran of Ochiltree, Patrick Hume, sometime called sir Patrick Hume of Polwart, forfeited traitors, Archibald Campbel, son to the lord Neil Campbel, Charles and John Campbels, sons to the said arch traitor Archibald Campbel, — Pringle of Forwoodlee, sir Duncan Campbel of Auchinbreck, and each of them, the sum of eighteen hundred merks Scots money; — Denholm of Westshields, and — Balfour, and — Fleming, murderers and assassines of the said late archbishop of St. Andrews, William Cleveland, called captain Cleveland, and — Stuart younger of Cultness, grandchild to sir James Stuart, sometime provost of Edinburgh, and each of them, one thousand merks money foresaid; for — Wisheart master of one of the ships who came alongst with the said arch traitor Arch. Campbel, 500 merks, and for every fanatical preacher who was with the said rebels, 1000 merks money foresaid. And we further declare, that if any of our subjects shall be so desperately wicked, as to harbour,

‘reset, entertain, intercommune, converse, correspond with, or comfort any of the said persons, any manner of way, or shall not give intelligence of them, or shall not give their assistance against them, that they shall be holden, repute, treated, and demeaned art and part of, and accessory to the said horrid crime of treason and rebellion against us, and our royal government, with the utmost severity of law. And generally, we hereby prohibit and discharge all our subjects, from harbouring, resetting, lodging, or entertaining any persons whatsoever, unless they have a pass from these authorized by our former proclamations to grant the same, as they will answer at their highest peril. And that this our pleasure may be known to all our lieges, our will is, and we charge you strictly and command, that incontinent, these our letters seen, ye pass to the market-cross of Edinburgh, Linnithgow, Stirling, Lanerk, Air, Renfrew, Rutherglen, Glasgow, Irwin, Dumbartoun, Wigtoun, Kirkcudbright, Dumfries, Inveraray, and all the other market-crosses of the head burghs of the shires of this kingdom, and there, by open proclamation, in our royal name and authority, make publication of our pleasure in the premisses. And we further hereby recommend to the right reverend our archbishops and bishops, that they cause this our royal proclamation be read from the pulpits, by the ministers of the several parishes in their dioceses, respective, upon the first Lord’s-day after the same shall be delivered to them; requiring hereby all our sheriffs, to cause publish and deliver this our proclamation in manner above said, immediately after the same comes to their hands, as they will answer the contrary at their highest peril.

‘Given under our signet, at Edinburgh, the 24th day of June, 1685, and of our reign the first year.

‘Per actum Dominorum Secreti Concilii.

‘Col. MACKENZIE, Cl. Secr. Concilii.
‘God save the King.’

“Cochran had a rich father, the earl of Dundonald; and he offered the priests 5,000*l.* to save his son. They wanted a stock of money for managing their designs: so they interposed so effectually, that the bargain was made. But, to cover it, Cochran petitioned the council that he might be sent to the king, for he had some secrets of great importance, which were not fit to be communicated to any but to the king himself. He was upon that brought up to London; and, after he had been for some time in private with the king, the matters he had discovered were said to be of such importance, that in consideration of that the king pardoned him. It was said, he had discovered all their negotiations with the Elector of Brandenburg, and the Prince of Orange. But this was a pretence only given out to conceal the bargain; for the prince told me he had

never once seen him. The secret of this came to be known soon after.” Burnet.

I know not what were the transactions of lord Melville in the interval between his escaping to Holland and the Revolution. I do not find that he partook in the enterprize of Argyle: his name is not mentioned among the persons attending the Council held at Amsterdam, April 17. 1685; nor do I perceive it among those of the nobility, who on March 16, 1689, subscribed the ‘Declaration of the Estates’ concerning king James’s Letter. He was king William’s commissioner in the 2d and 3d sessions, 1690, of that king’s 1st parliament, but soon displaced to conciliate the favour of the Episcopalians. See 4 *Ladg.* 355.

The following are the Declarations mentioned by Wodrow :

DECLARATION OF THE EARL OF ARGYLE, WITH THE NOBLEMEN, GENTLEMEN, &c. 1685.

They must be altogether strangers, or very little concerned in the christian world, who (after all that the nations and churches about have seen, of the Lord’s mighty hand and stretched out arm, in the late wars betwixt king Charles I. and his people and parliaments of Scotland, England and Ireland, against the then conspirings of popery and tyranny, to the ruin of true religion and liberty, the wonderful advancement of the gospel and kingdom of our Lord Jesus within these kingdoms, that thereupon ensued, with the general refreshment, joy and security of all the protestant churches abroad, that thence redounded, and the no less rooted and firm loyalty of the same people, who, notwithstanding of their long, bloody and fatal contendings with the father, did yet, upon reasonable, fair and just treaties concluded with all the assurance that either religion, honour, or gratitude could promise, call back and restore Charles II. his son, to his throne and empire), are not fully convinced and satisfied, that, considering the perpetual contradictings and counteractings of all these sacred and solemn engagements, that immediately, and ever since have been practised, the whole reign of the aforesaid Charles II. (through the sinistrous and subtil influences of a wicked and popish party, now manifestly discovered), was a constant and uniform course of ‘perjury, apostacy and violence, begun with open rebellion against God, the rescinding not only of particular laws, but by an unparalleled, most unpolitick and pernicious device of whole unexceptionable parliaments, for the space of twenty seven years preceding, notwithstanding both our religion and liberties were therein expressly, legally and well provided for, and the cruel shedding of the best protestant blood, in the most unjust execution of the late marquis of Argyle, and many other worthies contrary to all law and reason, carried on by the smiting and casting out of more faithful and pious

pastors, and scattering and dissipating more true flocks and followers of Christ, than was done in most of the ten primitive persecutions, and the deluging of these lands with all villainous debaucheries and abominable licentiousness, to the very profligating of conscience, morality and common honesty from among men, and thence forward accomplished by a most unrelenting persecution, and oppression of the generality of God's people, in their consciences, persons and estates, with vexations and rigours almost incredible, and that for no other reason, but because they could not actively comply with these notorious perfidies, and the manifold profanations and mischiefs wherewith they are attended.

But this hellish mystery of antichristian iniquity and arbitrary tyranny, imposing upon many at home, too willing, through their love of ease, to be abused, and deluding the protestant churches abroad (in that woful and viable indifference that every where reigns) by the vain pretext of the mere notion of our courts empty and simulate protestant profession, having of a long time, under the late king, made most remarkable advances in the following particulars, and many more that might be enumerated, all too evidently seen, and heavily felt, to need any explicite proof or demonstration.

As *1mo.* Not only in the abovementioned open and avowed revolting from God, by breach of sworn treaties, covenants and coronation oaths, and slighting and despising spontaneous promises and proclamations, the overturning the very foundations of parliaments, and ranserving, at one blow, our best and most legal establishments; the ungrate, as well as unjust putting to death of most innocent and faithful men, upon absurd pretences, cancelled by the laws and customs of nations, and that in the time of God's greatest indulgence towards the authors; the desolating of the churches, and changing of the ordinances of God, for setting up the frivolous and superstitious inventions of men, the countenancing and encouraging all vice and profanity, and the violent and grievous persecuting of all conscience and conscientious men.

But next, and more particularly, in the coniving at papists their meetings and idolatrous masses, while, in the mean time, all protestant nonconformists are persecuted with endless severities.

The raising, keeping up and increasing of standing forces, the very bane of all civil and lawful government, and that without any other measure, save what the indigence of court luxury and profusion did necessarily put unto it.

The declaring and appointing all judges and officers to enjoy their places only during pleasure, on purpose to make them more supple and compliant to all their master's designs.

The abusing of the great trust of calling and dissolving parliaments, the most high and necessary courts of the kingdoms, by iniquous

packing, unseasonable proroguing, pernicious discharging, and insolent baffling them at pleasure.

The exalting of the king's supremacy, under the colour of his pretended right and power, about the external government and policy of the church, to an express and absolute power of enacting and statuting in all church-meetings and matters, as he, in his wisdom, shall think fit, a ready and prepared tool to bring us back, not only to popery, but to paganism.

The strange perversion of the high trust of the militia, committed to his majesty expressly for the protection of good subjects, and the assistance of all our protestant friends abroad, only to the invading and oppressing, by lawless hosts of the worst, both of Highlanders and Lowlanders, in times of profound peace, the best parts of the kingdom, purposely to ruine them, because too protestant, by free quarter, and other illegal exactions, and the making war most causelessly and obstinately against the states of the United Netherlands, our best neighbours, and the strongest bulwark of the protestant interest.

The forcing of poor people, by the extreme rigours of exorbitant finings, imprisonings, beatings, stigmatizings, spoilings, banishments, and other violences, for the simple cause of nonconformity, to take arms in their own defence, as at Pentland and Bothwell-bridge, and then demeaning and executing them, what in fields, what on scaffolds, as the most desperate of traitors, and, at the same time, involving whole countries, upon the most slender and absurd pretexts of inevitable intercommunings and reset, both in their crimes and punishments.

The setting up the most violent and obnoxious of men to be ministers of the law, and packing juries and assizes most partially for their worst ends.

The straining, stretching and wresting of law, not only in prejudice of every one suspected to be disaffected to their evil courses, but the violation of all right, for spoiling and robbing cities and incorporations of their ancient and undoubted privileges.

The transporting of freemen, as slaves, to foreign plantations, for not making faith to answer (against law) *super inquirendis*, as also for not delating men upon oath (according to a most impious law lately made against nonconformists) in matters, wherein the party, put to swear, judges them to be in their duty, and without exception of his nearest relations.

The arbitrary imprisonings and detaining of free subjects, without either bringing them to trial, or allowing them any hearing.

The torturing of several persons, even five times more, of conscientious nonconformists within these twenty years, than of all sorts of felons and malefactors in Scotland these hundred years by past, and that without either just previous grounds, regarding of legal methods, or observing the measures of common humanity.

The eliciting of promises of indemnity, and

the public faith interposed, for that effect voluntary confessions of some, as of Mr. James Mitchel, &c. and then not only retracting and disowning the promise and condition upon oath, in face of the Justice-court, but farther, witnessing the confession to the poor man's condemnation, notwithstanding the books of council, containing the foresaid indemnity, were produced and laid open before, and at the very time of their swearing: Like as, of late, after most cruel and exquisite tortures practised upon Mr. Spence and Mr. Carstairs, and a full and ample promise thereafter made them, with an act upon it, that neither they, nor their evidence should ever be made use of to their, or to any other mens hurt, they nevertheless cause produce, and do sustain Mr. Carstairs's deposition against Bailly of Jerviswood, for an adminicle or aid to their lame and defective probation.

The making men offenders, yea, traitors for words, and these true, fair and innocent; as the earl of Argyll for declaring before the council after leave given, and with submission, and only for exonerating his own conscience, that he believed, the parliament intended no contradiction in the test, and therefore was willing to take it in their sense, viz. for securing the Protestant religion, and that he did not thereby mean to bind up himself from endeavouring lawfully, in church and state, what religion and loyalty might oblige and allow him do; for which words nevertheless he was tried and condemned, as a traitor, in the loss of his life, lands and goods, and stands *de facto* deprived of both lands and goods, having only saved his life, in the extremity, by a gracious providential escape.

The cruell executing to the death of several hundreds within these twenty years, besides many hundreds more, that have either fallen in the fields, or been made to perish in their imprisonments, or transportations, and that for the alone cause, or on the occasion of their conscientious nonconforming; and some of them (of which number several poor women) for their bare opinion about the king's breach of trust never before by them vented, but simply declared upon examination, and most part of them dispatched with that barbarous inhumanity, as that (after no better example than that of the bloody duke of Alva) they were, by beating of drums, hindred to speak to the people their last and dying words; and some of them, contrary to the perpetual custom of Scotland, and all the forms used in the christian world, and as of it had been on design to destroy both their souls and bodies, tried, sentenced, and put to death in one day, yea, the time and hour of their death industriously concealed from them, that they might be cut off by a more mortal surprise.

The condemning some to death, others to the boring of their tongues, and fining many in most exorbitant sums, even to 100,000 pounds sterling, for calling the duke of York a Papist, notwithstanding the notoriety of the matter to

all men, and his recusancy found and declared by a grand jury, and expressly supposed by an exception in his favours, contained in an act of parliament, and that now he goes openly to the Mass, and marches in solemn processions to the horror of all good Protestant subjects.

The loosing and exempting the king's sons and brothers from what themselves conceived to be the best fence, and greatest security for the Protestant religion.

The imposing and pressing of oaths, without law, manifestly contradictory, and that by terrible menacings, violent beatings, rigorous imprisonings, and irreligious swearings, no less barbarous than what was practised by the Spaniards in christianizing the wild Indians.

The eating up of men by free quarters, or otherwise falling on them by downright violence, as driving with drawn swords, to constrain them to hear, whom they, in their conscience, judged unsent and uncalled curates, to the effacing of all conscience, and open scorn of God, and that pure and free religion which he only accepts.

The compelling the heritors of shires to assess themselves and the free subjects within their bounds, a thing expressly denied by law to the king himself, and only reserved to parliaments.

The sorning upon, harassing and destroying the best parts of the country by four extraordinary circuits upon one and the same subject of Bothwell-bridge, on purpose, as it were, to justify his highness's judgment to his late majesty, that it would not be well with Scotland until the South of Forth (the better and more substantial half of that kingdom) were turned to a hunting field. And to verify the late chancellor, the earl of Aberdeen, his affirmation at the council-board, that there was not a loyal subject westward of the castle of Edinburgh.

The industrious stifling, hindering and eluding the detection of all Popish Plots.

The shamming of mock plots upon good Protestants.

The suborning of witnesses, hounding out and encouraging of assassines to murder and cut the throats of honest men.

And generally in the studied and constant ensnaring, or ruining, upon every shadow of pretence, all esteemed either fixed to the Protestant interest, or well affected to their country's liberty.

This wicked mystery, we say, and conspiracy of popery and tyranny, inseparably twisted both in experience and reason in all their attempts, upon these great and mighty nations, so unanimously united, and firmly fixed in their contrary profession, rights, and liberties, having made so great a progress by the steps abovementioned, is now at length evidently disclosed, revealed, and brought to full maturity, by the most suspicious (though withal most ingrate) cutting off of the late king, as having indeed very unhappily acted all that part of which the conspirators did judge him capable. The ascending of James duke of

York, a notorious apostate, and bigot Papist, to the throne, notwithstanding his being thrice excluded by the commons of England; and that he neither hath given, nor can give, without an hypocritical and damning cheat, repugnant to his profession, and contemptible to all ingenuous men, the oath and security indispensably required of him, before and at his entry to the government. Jam. 6, p. 1. c. 8, the approaching of two parliaments both called by him, one in Scotland by his own vigilant providence, (in procuring it to be enacted in the last parliament held by him in that kingdom, that for the future, not only all members of parliament, but also all their electors should take that contradictory and irreligious oath, commonly called the test, which no man owning conscience, or caring for any religion, can possibly approve) long since prepared for all his pleasure. And the other in England packt, ohabled, and returned by all the arts and methods that either fraud or injustice could invent, to render it plicable to his intentions; and which no-doubt he will cajol with all the fair promises, and large offers of laws, that can be desired for securing both the Protestant religion and their liberties, providing they will but give money, which answers all things, and which will as assuredly frustrate and ranverse all their vain cautions. The pursuing with indefatigable malice, even without the bounds of the kingdoms, and in all foreign parts, all honest men, escaped for their lives, and that either by public addresses or private violences, so that they are necessarily reduced to that fatal dilemma, either to do, or die. The entering into, and entertaining more close correspondences than at any time before, with Popish princes and states, especially the king of France, a most notorious enemy both of the true religion and liberty of mankind. And lastly by all that may be already seen in the changes and alterations he hath lately made, and that for hereafter may be apprehended from a false and bloody religion, always breathing forth, and practising fire and faggot, murders and massacres, and a provoked and enraged mind, possessing and reigning in the most determined of princes, unquestionably capable, and ready to execute all these bloody cruelties.

Which things being all of them either palpable perversions or utterly inconsistent with the true and great ends of government, rendering our common-wealth our common calamity, and him who pretends to be its protector, its most hostile enemy, and consequently importing no less than a total dissolution of all the bonds of subjection, which the rulers have first so wickedly broke and cut asunder; and the liberating and allowing all distressed subjects, whether those already overwhelmed by, or who may justly for hereafter fear to be involved in these miseries, that undoubted right and power, which both God and nature, with common reason, and the constant custom of all nations have given us, for recovering, defending, and maintaining our lives and liberties, and

above all, the inestimable blessing of our pure religion, to the effect that the same pure religion, with our just rights and liberties, so valiantly asserted by our ancestors, may be by us faithfully transmitted to our posterities.

We have been, and are obliged and constrained by extreme necessity, and for common safety (the supreme laws) to take up just and necessary arms in the name and fear of the great God, and the confidence of his mercy and assistance, for our own and our country's relief, from the aforesaid most grievous and intolerable tyrannies and oppressions, the defence and re-establishment of the true and pure Christian religion, commonly called Protestant, in opposition to that anti-christian Roman religion commonly called Papistical, and the recovery and re-establishment of all our just rights, liberties, and privileges, according as we stand indispensably obliged thereto, both before God and men; and that against the said James duke of York, and all other his accomplices, our most unnatural and wicked enemies and oppressors.

Desiring in the first place to be deeply humbled each of us before God, for our manifold sins and provocations, especially our false-heartedness, and unsteadfastness in, and revoltings from our great and manifold engagements to him, that alone have brought upon us all these sad mischiefs, earnestly, and with our whole hearts supplicating, that he would cease from his anger, cause his face to shine upon us, and save us for his own name's sake.

And in the next place declaring, likewise we hereby expressly declare, that our sincere and single ends and designs in this our undertaking, are first, the restoring and settling of the aforesaid true, reformed, Protestant religion, in its power and purity; and with such a just comprehension of pure Christian charity, as may through the good hand of our God upon us, be truly satisfying to all that fear him, and love our Lord Jesus Christ in sincerity, renouncing and detesting as well imposings as errors, in all matters of conscience, and trusting that, after the many teaching experiences we have had, we shall be for hereafter preserved from all unhappy misunderstandings; but rather through the spirit of truth, love, and peace, graciously led into all the paths thereof.

2dly, The suppression and perpetual exclusion of antichristian Popery, with all its idolatrous superstitions and falsehoods, as also its most bitter root and offspring, Prelacy, with its new and wicked head the Supremacy, and all their abuses, that so not only the gospel and work of God may be revived in these lands, but also all the churches of Christ abroad thereby refreshed and strengthened.

And 3dly, The restoring of all men to their just rights and liberties, especially the recompensing of all sufferers, whether unto blood, or loss of liberty and goods, the relief of such who are in present distress, the removing of all oppression, and establishing such righteous laws and methods of government, as may be

most for securing of liberty and property, with the greatest ease and equality.

Which things as we purpose and hope to accomplish, only through the presence of our God with us, and his blessing upon us, so we are most willing and resolved, that they be all settled and perfected by a free, full, just, and sovereign Representative of all the present undertakers, and such as shall hereafter sincerely concur and take part with us; and that in such forms and ways, as God by his good providence can only most happily direct and conduct us unto; declaring and protesting further, that since such have been, and are the manifest perfidy, treachery, and falsehood of our adversaries, not only in their treaties and covenants, but also in their pardons, indemnities, and indulgencies, as that they leave no ground or tolerable assurance of faith and trust to be given to them, we will never enter into any terms of capitulation, treaties, or conditions with them, as to the great ends of this undertaking; but on the contrary, prosecute the same with all reality, constancy, and vigour, without any separation, division, or backdrawing, until they be perfectly and finally obtained. Upon which grounds, and for which ends abovementioned, we not only hereby most sincerely and firmly protest and declare, as in the presence of God, constantly and perpetually to adhere, to assist, and maintain one another to the uttermost, against all deadly; but do moreover, freely and heartily resolve and engage ourselves, to countenance and concur with all our persecuted and oppressed brethren and friends, in England and Ireland, who, from the like reasons and motives, shall be induced and stirred up to the like undertaking, for the same or the like ends.

Wherefore, we most seriously and humbly beseech and obtest, in the bowels of our Lord Jesus Christ, all that love his truth, and this our righteous cause, none excepted, though either formerly little concerned for, and favourable to us and these interests, or even still in actual opposition against us and them, (their sincere repentance being at all times to God most acceptable, and not to be better witnessed before men, than by a contrary and vigorous amendment) to come and joyn with us for God's glory and gospel, our country, lives, rights, and liberties, and our posterities, and all our hope, against an apostate papist, an usurping and persecuting tyrant, by the most sacred article of his religion, our mortal enemy under the pain of his own damnation, and by the fundamental and express laws of the land, Jam. 6, p. 1, c. 9, and p. 80, c. 5, incapable of the nearest office within the kingdom, and in effect a declared enemy and rebel, Jam. 6, par. 3, c. 47, and who even by the act lately made by himself for paving the way to his succession, Char. 2, parl. 3, chap. 2, can have no shadow of pretence to the benefit thereof, unless he first instruct himself both to be the lawful, and the immediate and nearest heir of the crown, which without satisfying the old law, Jam. 6, parl. 1, chap. 8, at the same time ratified,

Char. 2, parl. 3, chap. 1, by swearing to embrace and maintain the true reformed protestant religion, he can never possibly be, as was then distinctly understood and declared by the principal framers of that act, and against his adherents and partakers, a perjured, revolved, and self-condemned generation, upon whom the Lord, who will not give his glory to another, hath formerly got himself a name and renown before all the nations, whom our sins only have exalted, and whose hearts can never endure, or their hands be strong, when the Lord of Hosts, who is on our side, and hath a perpetual indignation against all the wicked in the earth, shall arise and deal with them. And this our most earnest call and request, we confidently hope shall be the more readily hearkened unto, and heartily and seriously complied with, that in the issue, through the blessing of God, it assuredly promises not only the restitution of truth, prosperity, and glory to these long misgoverned, harmed, and disgraced nations; but the sure defence and protection of true religion and liberty every where, (Britain's certain and great interest, of late most shamefully abandoned) and even the depression of antichrist, and the advancement and exaltation of the kingdom of our Lord Jesus Christ in all the earth.

Let us therefore be of good courage, and play the men for our people, and for the cause of our God; and the Lord do that which seemeth him good.

ARGYLE'S DECLARATION TO HIS VASSALS.

I shall not mention my Case published and printed in Latin and Dutch, and more largely in English, nor need I repeat the printed Declaration, emitted by several noblemen, gentlemen, and others of both nations now in arms; but because the suffering of me and my family are therein mentioned, I have thought it fit for me to declare for my self, that as I go to arms, with those who have appointed me to conduct them, for no private nor personal end, and only for these contained in the said Declaration, which I have concerted with them, and approved of; so I do claim no interest, but what I had before the pretended forfeiture of my family, and have sufficient right to; and that I do freely, and as a Christian, fully forgive all personal injuries against my person or family, to all that shall not oppose, but joyn and concur with us in our present undertaking, for the ends mentioned in the said Declaration; and hereby I oblige me never to pursue them in judgment or out of judgment. And I further declare, that obtaining the quiet and peaceable possession of what belonged to my father and myself, before the pretended forfeiture, I shall satisfy all debts due by my father and myself, as far as any heir or debtor can be obliged.

And as my faithfulness to his late majesty and his government, has sufficiently appeared to all unbiassed persons, void of malice, so I do with grief acknowledge my former too much

complying with, and concurring at the methods have been taken to bring us to the said condition we are now in, though, God knows, never concurring to the design.

I have now with God's strength suffered patiently my unjust sentence and banishment, three years and an half, and never offered to make any uproar or defence by arms, to disturb the peace upon my private concern; but the king being now dead, and the duke of York having taken off his mask, and having abandoned and invaded our religion and liberties, resolving to enter into the government, and exercise it contrary to law, I think it not only just, but my duty to God and my country, to use my utmost endeavours to oppose and repress his usurpation and tyranny; and therefore being assisted and furnished very nobly by several good Protestants, and invited, and accompanied by severals of both nations, to lead them, I resolve, as God shall enable me, to use their assistance of all kind, toward the ends expressed in the said Declaration, I do hereby earnestly invite and obtest all honest Protestants, and particularly all my friends and blood relations, to concur with us in the said undertaking.

And as I have written several letters, so having no way fully to intimate my mind to others; I do hereby require all my vassals every where, and all within my several jurisdictions, with the fencible men within their command, to go to arms, and to joyn and concur with us, according to the said Declaration, as they will be answerable at their highest perils, and to obey the particular orders they shall receive from me from time to time.

The following Passages from Fountainhall's Decisions relate to these Proceedings :

"April 8, 1684. This was the diet to which the earl of Loudon, the lord Melvil, sir John Cochrane and his son, were cited, on 60 days, because abroad. Melvil's crime libelled was accession to the rebellion at Bothwell-bridge, by treating, parlying and keeping correspondence with the rebels there; but the most they could prove, was his sending a message to Mr. John Welsh and the other ministers, bidding them lay down their arms, and come in the king's mercy; now even such communication as this is not safe, without a warrant from the king or his counsel, or the general, to do it. Some say he had the duke of Monmouth's licence and commission for it. Testificates were produced from Drelincourt and other physicians in Holland, that Melvil and Loudon were indisposed; besides Loudon durst not come home for captions and debts. Alleged, the testificates are not probative, not being also from the magistrates of the place where they stay, nor the granters examined upon oath as to the truth of the excuse. The justice court being to proceed according to their form either to lead probation against them, (which

in absence, by the 11th act of parliament 1669^r can only be done in the case of actual rising in arms, or else to denounce them fugitives, in their behalf, recommended to the justices to continue the diet against them for some competent space. Accordingly, on the 9th April, the council's recommendation being read in the criminal court, the justices continued the diet against Loudon and Melvil till the 2d Monday of November next; and ordained them to find caution for their appearance the first Tuesday after Michaelmass, otherwise to be declared and denounced fugitives. But the justice general and king's advocate gave three general advtiments, 1. That they would hereafter admit of no certificates anent an absent pannel's sickness, whether they were abroad or within the country, though they were upon soul and conscience of the attesters, unless they were also under the hand and broad seal of the magistrates or burgo-masters of the place where they stayed, bearing that the physicians had compeared before them, and had deponed anent it; and that by the old adjournal books it appeared, no other testificates used to be admitted as excusations and essoignies in criminal cases, but where the minister, elders physician and witnesses compeared in the court and deponed thereupon: and though in the circuit court, they sometimes admitted such certificates; it was only because of the great multiplicity of business that forced them to continue causes there; but they would not do so hereafter. Yet see act 79. parl. 1587, against continuing justice courts. The 2d caveat was to assizers, that, though by act 91. 1587, they might modestly inform themselves of any doubts, yet they behaved not insolently to direct the justices; this was levelled against some of Cesnock's assizers; and now he intimated and required the clerks of court and macers, to be ready to advert to any disturbance should happen in the court, that they may be able to bear witness for the king, when adduced. And as to assizers who absented themselves, he declared it would not be their fine of 100 merks that would bring them off; See act 76. 1587, and act 166. 1593; but that he could pursue them for consequential treason, by suffering rebels to escape unpunished by their not attendance, which was a tacit favouring of rebels. The third reproof was to the advocates who plead for pannels, (this also looked asquint to Cesnock's lawyers) not to adventure to justify crimes, or to palliate rebellion; for the preparative was bad; seeing these restless mutineers would poison our posterity, by printing what made for them in these debates."

"April 9, 1684. The king's advocate continued the diet against Weir of Newton, accused of treason, for sending a man with horse and arms to Bothwell-bridge, to the second Tuesday of July next; as also against sir John Cochrane of Ochiltree; but in the mean time, ordained him to be denounced for not finding

cautious; which seemed inconsistent and incompatible with the continuation of the diet.

“ Then he insisted against his second son, John Cochrane of Waterside; and in respect he was to be forfeited in absence, the king’s advocate exactly observed the formality of swearing the herald who executed the summonings of treason against him, at the market-cross of Edinburgh, pier and shore of Leith, and the two witnesses, that the same is really done, (which is not used when the pannel is present,) and in regard James Dumbar the messenger executor was lying sick on his death bed, (whereof he died before the next day) three of the lords of justiciary (who make a quorum in vacance,) were sent from the bench to his house, who took his oath there; and it being returned, the libel was read; which was found relevant, (after some altercation amongst the lords themselves, because of the 11th act of parliament 1669, allowing the justices only to forfeit in absence in case of treasonable rising in arms, and open rebellion,) in their terms; that Waterside was with the rebels at the rendezvous, in farms, at the Barhill of Cummock, and in his father’s town of Ochiltree, &c., For drilling men under colours, without the king’s warrant, they judged open rebellion; and accordingly they proved the same against him by sundry witnesses. It happened, that several of the nobility fell to be upon his assize, which needed not, he being only a baron, and not a peer; but the advocate apologized for it, and declared their privilege should be observed, only to be cited upon noblemen’s assizes; but of old with us the great barons, which were the nobility, and the small ones did not differ specie; and then he added a reflection against Cesnock’s assizers that the gentlemen whom they were making use of for assizers, were turning capricious; but the king would always trust his loyal peers. The assize returned him guilty of treason; so he was forfeited in absence. He was but a boy of 16 years old at the time of Bothwell-bridge rising.—His right to Waterside was only a disposition from his grand-father Dundonald, under reversion of a rose-noble; *Quæritur*, If he may redeem it now, no order having been used before the doom of forfeiture; and what reason can there be for his losing his faculty of redeeming except that he resettled him after the crime? Then his arms were torn at the cross, and Middleton got the gift of his forfeiture.

“ November 10, 1684. At Criminal Court, the earl of Loudon, and George lord Melvill, having been continued from the 8th and 9th of April last to this day, they were now called on again, and a testificate is produced for Loudon, in the terms required by the act then made viz. under the seal of the town and university of Leyden, bearing that the physicians had deposed before them on his distemper, together with a petition, representing that his foot was so exceedingly sore, that these three months he could not set it to the ground; and craved that the diet for his appearance might

be continued till summer, when he can travel; as also produced an instrument where, in October last, one Grier a taylor was offered cautioner for his appearance. The lords found the cautioner then offered not sufficient; and none being now offered, they rejected the petition, and testificate, and denounced him fugitive. But it was afterwards attested that he was dead in Holland before this denunciation.

“ For Melvill it was alleged they offered to prove that he was indisposed and unable to travel; for proving which they craved the term of law, contained in the 8th chap. § 20. lib. 1. Reg. Majestat. of forty days for those *ultra mare*, and ratified by the 114th act, Parl. 1429; and offered to find caution to prove it. The king’s advocate answered, that esoinings and excusations are of their own nature but dilators, and so ought instantly to be proven; and as to the 40 days mentioned in the Majesty, they have had since April last 6 times 40 days. Replied, the 40 days run after the proposing of the excuse, which was not then proposed. The Justices repelled the defence, and denounced him likewise fugitive, and discharged all the lieges under the pain of treason, to keep any correspondence either with him or Loudon.

“ Then the leading of probation on the process of treason against sir John Cochran, and Lockhart of Kirkton, (who were denounced out-laws and fugitives already,) in order to the forfeiting of them, was continued to the first Monday of January 1685.

“ May 22, 1685: At the parliament, the libel of treason against sir John Cochran, sir Patrick Hume of Polwart, George Pringle of Torwoodlee, and Mr. Robert Martin deceased, and John Martin his son, being read, and voted to be relevant to infer the pain of treason; the probation was then led, viz. for proving sir John Cochran’s accession to the conspiracy and plot, Alexander Monro, and the depositions of Monro, Shepherd and Burns. Then the principal records of parliament were read, anent the forfeitures of the earls of Angus, Huntley and Errol, in the parliament 1594, whereby it appeared, (as also by the earl of Gourie’s in 1600, see vol. 1, p. 1359, and of Robert Logan of Restalrig in 1609, see vol. 2, p. 707,) that the parliaments then judged on notoriety, flight, denunciations, letters, and depositions of witnesses not present. This was to help the parliament over Carstairs’s case, who was absent. Then the king’s advocate summed up the probation against him as to the plot; and, to make it a preparative against Cesnock, he put it to the vote, if the probation he had adduced proved him guilty, and it carried *affirmative*. But there is a disparity between the cases.

“ Then the king’s advocate adduced sir George Maxwell of Pollock, and Cunningham of Craighend, as witnesses to prove the second article of his dittay, viz. that sir John Cochran sought money from them to send to Argyle after he was forfeited. And this being put to the vote, it was carried proven *non. con.* The

the third vote being stated, if the parliament would inflict the pain of treason on him; this carried also in the affirmative. But the archbishop of St. Andrews, before the vote began, signified the clergy resolved not to meddle 'in causa sanguinis,' but protested it might not prejudice their privilege to vote when his Majesty thought fit. The bishop of Edinburgh had a pretty discourse as to the bishops right of voting in capital cases. Then the dempster pronounced the doom of forfeiture against him; and the lyon and his brethren heralds tore his arms, and the trumpets sounded, and they renewed the same at the cross of Edinburgh."

"July 1, 1685. We had the news that sir John Cochrane, and his son Waterside, and one Dumber a surgeon, were apprehended at Gavin Cochrane his uncle's house near Kilbarchan, in Renfrewshire, being discovered by Gavin's wife, out of revenge because she was sister to captain Cleland, who in the rebels retiring was slain by them, he being on the king's party. Sir John, his son, &c. were brought into the Tolbooth of Edinburgh, on the 3d of July, being ignominiously conducted thither, bound and bare headed, by the hangman."

"July 9. The English packet coming to Edinburgh, was twice stopped and robbed about Alnwick. Some conjectured it was Pol-

wart's doing; others that it was by sir John Cochrane's friends, least there should have any warrant from the king by these packets to have executed him; that the earl of Arran might have leisure to inform the king what sir John could discover, and so obtain a countermand. Sir John's son, Waterside, at his first taking, was of the wild Cameronian principles, wholly disowning the king; but his father seemed more timorous and penitent. Others thought it was a clandestine stratagem of the high-treasurer's, who was now beginning to be jealous of the chancellor, to find out what secret correspondence he was keeping with his brother secretary Melfort, and his own open enemy."

"October 20, 1686. The lord Melvill obtained a pardon for life and fortune; but pays a large sum to the secretary."

It appears also in 1 Fountainhall, 366, that while sir John Cochrane was himself under sentence of death upon this conviction of treason, he was received to give evidence upon the trials of others for treason, and when he excused himself as unworthy to be a witness in any case in the circumstances he stood in of a forfeited traitor, the king's advocate told him that any were capable *dictationis testimonii* against rebels. But see Mackenzie's own Book of Criminals, part 2, tit. 26, sec. 6.

320. Trial of JOHN PORTERFIELD,* of Duchall, for Treason: 36 CHARLES II. A. D. 1684. [Now first printed from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARII, S. D. N. Regis tenta in Pretorio Burgi de Edinburgh, vigesimo nono die mensis Novembris, anno millesimo sextentesimo octuagesimo quarto, per honorabiles viros Dominos, Johannem Drummond, de Lundine Secretarium Status, et Jacobum Foulis, de Collingtoun, Justicie Clericum, Commissionarios Justiciarii dicti, S. D. N. Regis virtute Commissionis.

Curia legitime affirmata.

Intran,

John Porterfield, of Duchall, Prisoner.

INDYTED and accused, that wher notwithstanding be the common law, and law of this, and all well governed nations, the treating

* Wodrow (Vol. 1. p. 198) mentions, that in July 1664 Porterfield had been brought before the High Commission Court for not hearing the curate of his parish of Kilmacomb, upon which the court finding he could exculpate himself from that charge, interrupted the proceedings upon it, and required him to take the Oath of Allegiance, well enough knowing, as Wodrow expresses it, the supremacy in it would

for supplies to rebels, or the concealing that ther are supplies tolerated or craved for them, is high treason, since therby the government may be undermined and collections made and by these collections forces raised, and since by the uncontroverted law of this nation, the concealing and not revealing of treason is treason; and that the raising or leveiing of men or money in any case without his majesties authority, but especially to assist open and declared traitors is treason, and so the concealers of it might be guilty of treason. And by many clear and express acts of parliament, the rying of

choke him. He refused the oath unless they would allow him to give in an explication before he took it. Whereupon they sentenced him to pay a fine of five hundred pounds sterling, and to be confined [not, as I understand it, imprisoned] in the town of Elgin. Under this confinement he remained till July 1668, when he petitioned the council, that his constraint might be taken off, and his bonds for keeping his confinement given up. The lords granted his petition, upon his finding caution under the pain of five hundred pounds sterling, to appear before them within four days after he should be called. See 1 Wodrow 295.

his majesties subjects or any number of them, the joyning and assembling together in armes, without his majesties command, warrant and authoritie, and when the samen is not only without, but against and in opposition to his majestie, and his authority and laws, are most horrid, and haynous crymes of rebellion, treason and lese majesty in the highest degree, and all persons committing or guilty of the saids crymes, or any wayes accessorie thereto, or who doth abait, assist, receipt, harbour, intercommon or keep correspondence with such rebells, or otherwayes doe supply them in any manner of way, and being requyred by proclamations or otherwayes doth not rise with or assist his majesties lieutenant or others having power or authority for repressing the saids rebells ought to be proceeded against and severie punished as traitors. Lykeas by severall acts of parliament, and proclamations, all the subjects are discharged, to receipt supplie or intercommon with rebells, any manner of way, and particularie be the third act of the first parliament of king James the first, it is statute and ordained, that no man openlie nor notourlie rebell against the king's person under the paine of forfaiture, of lyffe, land, and goods. And by the fyft act of the first session of his majesties first parliament, it is declared that it is, and 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 rise or continue in armes, to make peace or warre, or to make any treaties or leagues with foreigne princes or estates or amongst themselves without his majesties special authoritie and approbation first interponed thereto. And all his majesties subjects are discharged to attempt any of these things under the paine of treason. Lykeas be the threttie seventh act of king James the first, his second parliament, It is statute and ordained that no man wilfullie receipt, maintaine or doe favour to oppine and manifest rebells, against the king's majesty and common lawe, under the paine of forfaiture; and be the twenty fourth act of the sixt parliament of king James second, intituled Anewt severall poynts of treason, It is statute, and ordained, that if any man commit or doe treason against the king's person or his majestie or rises in fear of wear against him, or receipts any that has committed treason or supplies them, they shall be punished as traitors. And be the hundreth and fourtie fourth act of king James the sixt, his twelt parliament, it is statute and ordained, that wherever any declared traitor repaires, in any part of this realm, none of his majesties subjects shall presume to receipt, supplie, or intercommon with them, or give them any relieff or comfort, and that immediately upon their repaireing in the bounds all his highnes good subjects doe their exact diligence in apprehending the saids rebells and traitors, and that with all speed they certifie his majestie, or some of his secret councill, or some persons of authority or credit, within the shyre, that such rebells are within the same,

under the paine, that the saids rebells and traitors ought to sustaine if they were apprehendit, and convict be justice. And be the fourtie nynt act of the twelt parliament of king James the second, it is statute and ordained, That if any person or persons be slandered, or suspect for treason, they shall be taken, and remaine in fermeance, and their goods under sure burrows, while the tyme they have thold; and an assyes whether they be quyit or foul, and be the fourteenth act of the sixt parliament of king James the second, it is declared, That all who shall receipt such as are justified for crymes, if the crymes be notor, or the trespasser convict, or declared guilty, they are ordained to be punished as the principal trespasser; and be the nyntie seventh act of the seventh parliament of king James the fyft, all sheriffs, bailzies, and others are ordained to doe diligence to apprehend all rebells who are at the horse for capital crymes, and that no man wilfullie nor wittinglie receipt supplie maintan defend or doe favours to any rebells, being at the king's horse within their houses bounds lands or bailzeries, under the paine of death, and confiscation of their moveables. As in the saids lawes and acts of parliament at more length is contained; Nevertheless it is of veritie that the said John Porterfield, of Duchill, shacking off all fear of God, respect and regard to his majesties authoritie and lawes, has presumed to committ, and is guilty of the saids crymes in sua far as in the year 1679, several distastid and disloyall persons having convocat and assembled themselves together in armes in the westerne shyres of this kingdome, formed themselves in ane army, rendivouzed and exercised themselves, committing many outrages and villanies, killing and murdering his majestie's subjects, riffling and robbing their horses [qu. houses] and goods, and had the confidence to oppose and fight against his majesties forces at Bothwellbridge, untill they wer defate by them in the moneth of June the said year 1679; and though the said John Porterfield, of Duchill, was not present himself with the saids rebells, yet he did or caused furnish or supplie them with armes, meat, drink, and other provisions, houndtrout,* or suffered severall of his tenents to goe out to the said rebellion, and after the saids rebells were defate, they returning home, the said John Porterfield, of Duchill, most unadvisidly and treasonable receipt, maintaned, supplied, harboured, intercommoned, or converted with them, or either of them, in his house or else-

* Hounded out, i. e. sent forth under his orders government and protection. Thus, A. D. 1737-8, Walter Buchanan, of Balquhan, was accused of, among other offences, 'the harbouring outounding and maintaining of thieves and robbers.' See Hume's Comment. chap. 7, vol. 1, pp. 283, 284, as cited in the case of Nairne and Ogilvy, A. D. 1765, *myr.* in a Note respecting the cumulation of heterogeneous charges in one ditty.

where, and upon the ground of his lands or some part thereof, and particularlie George Holme, son to George Holme, his officer, having been actualie with the saids rebels, at Bothwelbridge, and severall other places, in armes, and returning from them after the defeat, and being conveyed at Glasgow before the justices, was declared fugitive, and thereafter denounced and registral to the horse, the said John Porterfield, of Duchall, upon the first, second, or third dayes of the moneths of July, August, September, October, November, or December, 1679, and upon the first, second, or third dayes of the moneths of January, February, or remanent moneths of the years 1680, 1681, 1682, 1683, or 1684 years; did receit intercommon or converse with the said George Holme, a rebell and declared traitor, and printed fugitive, maintained and harboured him on his ground or lands, or some part thereof, or otherwayes supplied or did favours to him; nor did he acquaint the Lords of his majesties privie councill or other persons of authoritie, of the said rebell, his being in the shyre, but on the contrair he owned and maintained him, and severall other traitors and rebels to that hight and degree that he suffered and perritted the said rebell and traitor, countenanced and encouraged him to attend his courts with the rest of his tenants, he being present himself, spoke, conferred, and treated with him anent his being in the said rebellion, expressly contrair to the saids lawes and acts of parliament, and in high and manifest contempt of his majesties authoritie and lawes; Lykeas in the year 1665, a desperat and avowed rebellion having happened within this kingdom, in which Alexander Porterfield, his brother (designed in the proces of forfeiture led against him brother to Querrestoun) being involved and having accession thereto, and being arraigned before the justices for the samen, upon the sixteenth of August, 1667, and found guilty by ane inquest of the cryme of treason, sentence and doom of forfeiture was pronounced against him, and which doom and sentence is ratified and approved by the eleventh act of his majesties second parliament, notwithstanding thereof, and that his name is expressly insert in the said act, and the said forfeiture narrated and sua the samen known to the said John Porterfield of Duchall, and all the liegdes, the said John Porterfield of Duchall, most treasonable receit intercommoned and conversed with the said Alexander Porterfield his brother, * a forfait and declared

* "December 13, 1682.— At the Criminal Court, the Lords, in the case of Cairns, Ferguson, &c. found that the resetting of traitors and rebels, though it be his own son, (but I think, this should not extend to man and wife their mutual resetting one another, though rebel,) if they be either declared forfeit traitors, or denounced fugitive, or intercommoned, or holden and repute notorious known rebels, (though it should not be proven, that you knew

traitor in his own house and in the house possessed be him, and aidit, assisted and supplied him with meat, drink, money, or did other favours to him since his being forfait and declared traitor; and he so far owned and countenanced him; maintained, intercommoned and conversed with him, that William Porterfield, the said John, his eldest sone, having dyed in the moneth of 1680, 1681, 1682,

them to be such) the public notoriety being proven by witnesses; that such harbouring, resetting, and conversing, &c. was treason, and this guilt punishable with the pain of treason; because the 14th, 15th, and 25th acts of parliament 1449, and 97th act 1540, expressly declares such liable as traitors, and requires no more but that they be holden and repute such. This was determined against the opinion of Pitmedden and Harcous, two of the justices, with an eye to make a preparative in thair poor men's case, to reach Blackwood, and many others. For by this strange interlocutor may be endangered many innocent people, especially almost all the western shires, where such promiscuous converse has been frequent, and near inevitable; and it can be only just, to make this so odious a crime, where I wittingly and willingly, without compulsion, converse with one I know to be a rebel, whether he be declared to be a rebel or not, or at least, that he is notourly known to be a rebel in that part of the country where I stay; for they may be notour in one part, and yet not in that place where I dwell. And therefore, to mitigate it, the judges declared, they meant not by resetting an accidental encounter in an inn, or on the high-road, but a deliberate concealing them from the law, or assisting and maintaining them with meat drink and harbouring, and keeping them as domestics or servants, without informing ourselves anent their condition; for, if the 4th act of parliament 1681, require for putting me *in mala fide*, that the very nonconformist fanatic tenants living upon my ground, shall be intimated to me, for turning them away, then *multo magis* will law and reason require my knowledge of those who live elsewhere, or sculk and lurk a short while in my land, to be rebels, ere I can be concluded guilty of treasonable resett of them. And it may be alledged, that the foresaid 15th act 1449, as too severe, is in desuetude; see 1487, act 98, and 1592, act 144. Vide Blackwood's case, 31st January 1683. [See vol. 9, p. 1021.] "January 4, 1683. At Privy Council,— Herron of Herron in Galloway having reset his two sons, who were in the late rebellion at Bothwel-bridge, he came in the counsell's will and king's mercy; and they in regard of the nearness of relation, wrote to his majesty a recommendation that he might grant him a remission: otherwise they could not but have remitted him to the Criminal Court: though his case be most favourable, and excepted tit. *D. de receptor. latron.*" 1 Fountainhall's Decisions 200, 205.

or 1683 years, and he having invited his neighbours to come to him and be present, (within his dwelling house at the tyme). Att the said buriall the said Alexander Porterfield, a forfault and declared traitor, was present therat and within his dwelling house at the tyme, and behaved himself as a friend, by inviting and intertaining those that came to the buriall, and the said John Porterfield of Duchall, being present ther himself, the said Alexander his brother, was most treasonably receit intercommoned and conversed with by him. And upon the first, second and remanent dayes of the moneths of July, August, September, October, November or December, 1679, and upon the first, second and remanent dayes of the moneths of January, February, or remanent moneths of the year 1680, 1681, 1682, 1683 or 1684 years, or one or other of the saids dayes, moneths or years, the said Alexander Porterfield a forfault and declared traitor was receit, harboured, maintained, supplied, intercommoned and conversed with, done favours to by the said John Porterfield in his own house, or in the house belonging to the said Alexander, or some other part or place elsewhere. And sichlyke Archibald late earle of Argyle,* being a declared and forfaulted traitor, sir John Cochran,† lykeways being suspect and who is now declared fugitive for treasonable conspiring the destruction of the government and keeping correspondence with the said late earle of Argyle and designing to levie a warre; did sometye in the session, in the end of the year 1680, [Probably this should be 1682,] or beginning of the year 1683, (which was the tyme that the said damnable plott was to be entered into for raising the said warr) meet with the said John Porterfield in the burgh of Edinburgh, where he proposed to him to give fyftie pound sterline, for the relieff of the said late earle of Argyle, and — Cunningham of Craighends told him that the lyke proposall had hein made to him, which treasonable proposall and offer to collect money to the effect forsaid, the said John Porterfield concealed and did not reveale either to his majestie, his officers of state or any others employed in his majesties government. Throwe doing or committing therof, or one or other of the deeds above specified, he hade committed, and was guilty of the crymes of high treason, and others above mentioned, and was actor art and part‡ therof, which being found be ane assyse he ought to be punished with forfeiture of lyff, land and goods, to the terror and example of others to commit the lyke herefter.

Persewer.—Sir George M'Kenzie, of Rosehaugh, his Majesties Advocat.

Procurators in Defence.

Which criminal action and cause being for-

* See his Case, vol. 8, p. 845.

† See the next preceding Case.

‡ See a Note to the Case of Hackstoun of Rathillet, p. 807, of this Volume.

merly called at a justice court, bolden within the burgh of Glasgowe, upon the eighteenth day of October last by past, by ane noble and potent prince William duke of Hamilton, &c. John Drummond of Lundine secretary of state, and sir James Foulis of Collintoun, lord Justice Clerk, be vertue of a commission from the Lords of his majesties most honourable Privy Council, which Commission was then publiclie read, and ordained to be recorded in the Books of Adjournal, wherof the tenor follows:*

* This Commission I insert from Wodrow, vol. 3, 401. In substance it is the same as that in the Record, but there are occasional variations of phraseology between the two, and Wodrow is more correct as to orthography and punctuation. In Wodrow, next after the Commission, is the following article:

Follow Instructions upon the foresaid Commission:

“ C. R. 1. You shall disarm all heritors who have not taken the Test, and all the commons, excepting the militia; and if any shall conceal arms, or refuse to depon thereupon, when by you required, you shall fine the heritors in one year's rent, the tenants in one year's rent of their respective farms; the servants, and cottars, and tradesmen, are to be fined according to their substance.

2. “ You are to follow such instructions as we or our privy council shall give you, as to the value of horses, and the persons to whom they are to be allowed within the districts.

3. “ You shall seize all preachers, chaplains, or such as exercise as chaplains, who are not authorised by the bishops, and send them to our privy council to be disposed of as they think fit, and see cause.

4. “ You shall punish, according to law, all persons guilty of ecclesiastick disorders, either men or women, and you shall put our proclamations, especially that of the day of , in execution, against all who are guilty of conventicles, or concerned in them, as concealers and not discoverers, negligent heritors, sheriffs, bailies, and other magistrats or heritors of the place where they are kept, or otherwise concerned by our laws and proclamations, according to the tenor thereof; and the husbands of such wives as are guilty, and have not done their endeavours in terms of our letter bearing date the day of

5. “ You shall give account to our secret committee, of all persons who have fled from their habitations, whether by retiring out of the kingdom, or removing to other places to evite just sentences.

6. “ You shall examine the indulged ministers on their instructions, and remove such as have transgressed, and imprison them till they find security not to preach or exercise any part of the ministerial office, or otherwise to remove from our three kingdoms, under caution not to return without special allowance from us or our privy council; and such as re-

The Lords for severall causes moving them, continued the said criminal action, and cause till the twentie second of October, and the

use to find caution in manner foresaid, you shall send them in prisoners to our privy council, or their committee at Edinburgh.

7. " You shall diligently search for the heritors, incitors, promoters, or concourers to the late rebellions, the intercommuners with such, or reseters of them, and others, not heritors, guilty of the said crimes, since July 1, 1683.

8. " You shall stop and secure all pedlars who have not passes, according to the tenor of our last proclamation, and secure them till they find caution for their good behaviour.

9. " You shall stop all posts who carry letters, except such who are allowed by our postmaster general.

10. " You shall commune with rebels, to bring them to obedience, upon their address for pardon, and you shall acquaint our secret committee with their proposals, and what passes twixt you and them; and in order thereunto, you are allowed to give them safe conducts.

11. " You shall command the forces assigned to you by our privy council, according to the necessity of our service.

12. " You shall turn out all the wives and children of the forfeited persons and fugitives, from their habitations, if it shall appear that they have conversed with their parents or husbands, or if they shall refuse to vindicate themselves by their oaths.

13. " You shall enquire what quarters are unpaid by the soldiers in your several districts, and take care payment be made for bygoners, and in time to come.

14. " You are to examine what money has been collected by any body within your districts, and not counted for.

15. " You shall take care, that decreets for fines for ecclesiastic disorders, be put in execution, as shall be prescribed by our privy council.

16. " You shall be assisting to our regular clergy, in bringing people to obedience in settling church-sessions; and if any complaint be made of any of the regular clergy, you are to recommend the punishment and censure thereof, to our bishops, or judges competent.

17. " If you find any part of the country stubborn or contumacious, you shall impose such fines upon them as the law will allow; and in case of not payment thereof, and that you think it fit, you are immediately to quarter our forces on the stubborn and contumacious until the fines imposed shall be exhausted by them.

18. " You are to keep good and constant correspondence among yourselves; and if it shall happen that any man shall flee from one district to another, when you are advertised thereof, you shall immediately cause the fugitive to be apprehended, and you shall send him to the district from whence he fled, to be

examined being then called, and the pannall having given in a Petition craving that for the reasons therein mentioned, the Lords would be

judged by the commissioners there, or else sent by them to Edinburgh, as they shall think fit.

19. " You shall acquaint any of the neighbouring jurisdictions to which any of the rebels shall flee, to the end they may assist to apprehend them; and if, in pursuit of those, it shall be convenient for you to go out of your district, or to send parties out of the same, the magistrates are hereby required to obey and assist you, as they will be answerable.

20. " You shall suffer no man to travel with arms, excepting gentlemen of known loyalty, who have taken the Test; and no yeoman to travel three miles from his own house, without a pass from his minister, or a commissioner of the excise.

21. " You are to call for all or any part of the heritors, as often and where you shall find it needful for our service, who are hereby ordered to obey under the pains of being punished as absents from our host.

22. " You shall put in execution the power of judiciary to be granted unto you by our privy council, with all rigour, by using fire and sword, as is usual in such cases; and we do empower our privy council to insert an indemnity to you, or any employed by you, for what shall be done in the execution thereof.

23. " You are hereby empowered to give the oath of allegiance to such persons within your districts, as you shall have reason to suspect; and in case of refusal, you shall banish them to the plantations, whether men or women.

24. " If you shall be informed, that any within your district shall deny our authority or their bond of Allegiance to us, you shall enquire therein, apprehend the persons, and either judge them upon the place, or send them into Edinburgh, as you find most expedient.

25. " You shall call for, and dispose of the militia, as you find most fit for our service.

26. " You shall enquire how the ordinary magistrates have carried in our service, and inform the privy council thereof.

27. " You shall report to the secret committee of our privy council, such propositions as the shires within your district shall make to you for our service.

28. " You are to obey such orders as you shall receive from us, or our privy council, or secret committee thereof, from time to time; and you are also hereby authorised to forbear the execution of any of the articles of these instructions, if you shall see cause for the same.

" For doing of which, these presents shall be to you, and all others who may be respectively concerned, a sufficient warrant. Given under our royal hand and signet, at our court at Windsor castle, the 26 day of August 1684, and of our reign the thirty sixth year.

By his Majesty's command,
" MURRAY."

pleased to delay his tryall, and the sames being read and considered, the Lords continued the tryall of the pannall for the crymes mentioned

Wodrow then proceeds thus :

“ It was the month of October before this terrible circuit sat down in their different districts. Those ample powers, and a liberty to cut and carve in them as they saw good, let us see what an arbitrary and absolute government Scotland was now under. Life, liberty, and every thing is left in the managers hands. If they pleased to have mercy on the poor harassed country, the king allowed them, and if not, their instructions carry them even to fire and sword.

“ To pave the way for their work, or at least to prevent the poor sufferers getting off the kingdom, and to discover such as remained in it, two Proclamations are emitted in September; the first bears the date, September 15th, ordering the oaths of all the masters of ships, or vessels going off the kingdom, to be taken, as to their passengers. This needs no observation upon it. No question, it was levelled against the persecuted party principally; a new circuit was very justly frightsome to them from their experience of the severities of the former. They are not suffered to live at home, and now are stopped from retiring to foreign countries, where they might be free from being butchered in cold blood.

“ And September 16, another Proclamation is emitted, discharging all persons whatsoever, to travel from one shire to another without a pass. It is but short: All travellers must have a pass from some persons in the government. And the pretext is, to hinder persons from carrying false news from one part of the country to another. I am not so far master of the intrigues now on foot, as to make reflections that perhaps might be native enough here. As the former was a check and damp upon trade and commerce, so this is a plain encroachment upon the liberty of the subject, in going and coming from one place to another, and a kind of imprisoning the hedges at large, without any just reason given. That of spreading false news is evidently frivolous, and every body may see these might be spread by letters. The true design seems to have been, to be a preface to more general impositions on the subject, as we shall afterward hear, to prevent suffering people retiring from the fury of the circuits, to be a new colour to the soldiers, and to oppress poor people the more. I wonder the proclamation does not empower the bishops and orthodox clergy, to give passes. The instructions to the commissioners seem to suppose some such passes, but, it seems, the council do not find it needful to extract them.

“ Before the meeting of the circuit or judiciary, the council by their clerk order the shire of Stirling with its jurisdictions, *pro hac vice*, to be adjoined to the jurisdiction of Glasgow,

in his indytmēt, till the seventeenth of November, then next to come, and ordained him to be transported prisoner to the Tolmuth of

to save the lords the trouble, as I suppose, of leaving Glasgow. I observe nothing of this in the Records, but it appears by an original warrant, from the clerk of council to the sheriff-depute of Stirling to this effect, in my hands, which, because it gives us some view of the preparations and care taken to ripen matters for the circuit, and of the willing share the clergy were to have in this, I have insert here. Its date is not expressed, and is indorsed.

Warrant to the Sheriff-depute of the Shire of Stirling, 1684.

“ Sheriff-depute of Stirling ;

“ Forasmuch as his majesty, by a letter under his own royal hand, hath been pleased to adjoyn the shire of Stirling, and the jurisdiction thereunto belonging, whether of royalty, or regality, to the district of Glasgow, you are therefore ordered to cite and advertise all the king's vassals, and other considerable gentlemen holding of other superiors within the said shire, and jurisdictions and regalities within the same, to compare before the Lords of his majesty's privy council, at Glasgow the 14th day of October instant, by nine of the clock, and there to attend the said Lords, and receive such orders and directions for his majesty's service, as shall be thought expedient.

“ You are likewise to advertise all the ministers within your shire, that they attend the said Lords at Glasgow the foresaid day, and that they come prepared to give in to the said Lords, exact lists, upon which they are to make faith as to all irregular persons, withdrawers from the church-ordinances, and all suspect and disaffected persons to his majesty's government in church and state, so far as it consists with their knowledge, as also a list of all such persons, as they believe, can give best information anent the premises.

“ As likewise you are to cite the hail elders of Kirk sessions, their clerk and beadle, to depone upon the forementioned particulars the said day and place.

“ And particularly you are to cite the magistrates of the town of Stirling, to appear before the said Lords at the abovementioned time, and particularly to depone anent the forementioned particulars, and to bring along with them an exact list of the hail heritors who stand infett in lands within their burgh. And in this you nor any of the forementioned persons are not to fail, as you and they will be answerable. Extracted by me sir William Paterson, clerk to his majesty's most honourable privy council.

“ WILL. PATERSON, Cl. Secr. Code.”

“ From this and what goes before we may learn, that these courts had both a council and judiciary power, and had a vast compass of

Edinburgh, ther to byd his tryall for the crymes forsaid, at the day above specified, and likewise ordained the hail witnesses against him to find caution for their appearance at Edinburgh, the said seventeenth day of November next, to bear witness in the forsaid cause, under

affairs before them. We shall find afterwards, this shire came to Glasgow, and gave ample proofs of their loyalty and submission to the king's order's.

"What were the precise days upon which these courts, ordinarily called circuits, though different a little from these in the former years, met, I cannot say, further than the dates of some papers in the registers, and others come to my hand, shew. It would seem that court at Jedburgh met toward the beginning of October, for I find a letter directed to them, and the rest, from the committee of public affairs, October 9, which will give some more light about them. This I give from the registers of council.

"October 9, 1614. Sederunt the committee for public affairs, upon the report of the commission, at Jedburgh, and for the western districts the Lords did send the following letter, a copy whereof was ordered to be sent to the rest of the districts for the rule of their procedure :

"My Lords; The Committee of council being very frequent, I did propose to them your two queries; in answer to the first whereof, it is all our opinions, that if the defenders, called before you as counsellors, be personally cited, they may be holden as confest; but they cannot unless they be personally cited, and all that can be done in that case is to put them to the horn, which will be as great a punishment to them, as if they were declared fugitives; but it will not infer any danger to the country by resetting them, which is as much to be shunned as can be. And if it be thereafter found convenient to hold them as confest, to the end that the king may get a fine by holding them as confest, which may be more advisable than the taking of their escheat, which is all that can follow upon their being put to the horn, then I shall cause cite them upon sixty days, as being out of the country, but let not that stop your diligence; in which case they will be holden as confest, though not personally cited.

"It is likewise their opinion, you should proceed against all sheriff-deputes who have malversed, and that you should punish them exemplarily to the terror of others, and to the end that people may see that you are come there to protect honest men, as well as to punish knaves. I am, your lordships' humble servant,

"GEORGE M'KENZIE."

"This letter is a little dark to me, not having the queries; but it lets us in to see somewhat of the managers severe designs upon gentlemen and others.

"It is of more importance to give an account

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the paine of fyve hunder merks, or else to be committed prisoners to the Tolbuith of Glasgow, till they be transported to the Tolbuith of Edinburgh, to bear witness in the forsaid cause. The lords lykwayes ordained the assizers to attend at Edinburgh, the said seven-

of a letter from the king, read in council, or its committee, October 12, which was no doubt impetrate by our managers here, as the foundation of their imposing exorbitant fines upon many gentlemen we shall hear of in the next section. The letter follows :

"C. R.

"Right trusty, &c. Whereas we find that some of our unnatural and rebellious subjects in that our ancient kingdom, do enter into plots and conspiracies, the more willingly and secretly, that they think their guilt cannot be discovered by the depositions of witnesses, they, for concealing their guilt, industriously using to discourse of those matters only with one person alone; and it being easy to cause one or two, who might be proving witnesses, to withdraw for some time. And seeing it is the great interest of all government, as well as of all who desire to live peaceably under it, that all subjects should be obliged to fear all manner of accession to such horrid crimes, as tend to overthrow all society and government; and it being undeniable, that no man can complain when judged by his own oath, by which he is in less danger, than by any probation of any witness whatsoever.

"Therefore thought it necessary to impower, and we do hereby authorize and impower our advocate to raise process before you, or before those who are commissionate to represent us, as our privy council, in the Western and Southern shires, against any whom you or they shall order, for the said crimes of plotting and contriving to rise in rebellion, or for intercommuning with, or resetting any declared rebels; and to refer their guilt to the oath of the said defenders, in so far as may extend to a pecuniary mulct or fine alienarly.

"Declaring hereby, for their further security, that if they shall depone upon the guilt so referred to their oath, they shall be forever as secure upon the payment of their fine, as if they had a remission under our great seal: whereas, if they refuse to depone, we order you to hold them as confest, and to fine them in what sums you shall judge to be proportional to their respective guilt and accession. Which power so granted to you, shall only continue in force till the first day of April next to come, and is hereby ordained to be registerate and recorded in your books, to the end that extracts may be given to any who shall depone, as said is, this, and the decreets to follow thereupon, being to them in place of a remission. For all which this shall be to you a sufficient warrant. Given, &c. September 27, 1684.

"MURRAY."

Mr. Laing (vol. 4, p. 39, edition of 1804)

3 Y

teenth of November next, under the paine of two hundred merks each persone.

“The said criminall action and cause being then called, the Lords for severall causes moving them continued the same from tyme to tyme, till the twenty eight of this instant, and the same being then called and both parties compeirand, The querie and solution thereof under-written was produced in presence of the saids lords whereof the tenor followes:

“Edinburgh 28 November 1684. The said day anent ane querie proposed be his majesties advocat to the lords of counsell and session, be command to him from the lords of the secret comitie. It being treason by the common law and ours to supplie or comfort declared traitors, and it being treason by our law to conceal treason, queritur whither sir John Cochran having asked from Porterfield of Duchall who was not related to the late earl of Argyle, the soume of fifty pounds sterling for the said earle's use being a declared and notour traitor, and Duchall not having revealed the samen either to his majestie or his officers, wherby the prejudice that might have followed thereupon might have been prevented. Is not the forsaide concealing and not revealing treason?

Sic Subscribitur, GEO. MACKENZIE.

“The Lords of counsell and session having considered the *facti species* proposed in the forsaide querie, it is their judgement that the concealing and not revealing in the case forsaide is treason.—(*Sic Subscribitur,*) Perth Chancellor, Da. Falconer, Ja. Foulis, J. Lockhart, David Balfour, James Foulis, J. Beton, J. Murray, Roger Hog, J. Wauchope, H. Bernie, F. Stewart, L. Lyon, Geo. M'Kenzie, Patrick Ogilvy, George Nicholson*.”

The Lords having considered the lybell per-

noticing Hume's representation of king Charles the second, as endeavouring to mitigate or persuade his ministers to remit one half of the fines levied in the persecution in Scotland, in the early part of his reign, under the ecclesiastical commissions, observes, “The fact is, that they were levied entire for the king's own use,” which indeed is sufficiently shewn by Wodrow, to whom Mr. Laing refers. See also 1 Fount. 186.

* ‘In this answer’ says Wodrow, vol. 2, p. 421, ‘the whole of the lords of the justiciary, almost, three or four at least, deliberately give their judgement anent the chief part of the matter, in debate in Douchal's process; and it may be considered how far in equity persons who have already given judgment, can give it over again. It is certain they could not but condemn the gentleman, unless they should condemn what they themselves had signed under their hands.’

“I have not observed the debates of any advocates in the process, for indeed it was fruitless almost to reason upon a matter already concluded upon. However, I shall here set

sewed by his majesties advocat against John

down Douchal's own thoughts of his case, which he drew up at the time, and, if I mistake not, gave into the court and resumed it before the assize; and it is as follows:

John Porterfield of Douchal, is indicted for reset and converse with his own brother Alexander Porterfield of Quarreltoun, whereas the said Alexander being forfeited for his accession to the rebellion 1666, and his estate being sold, and disposed by the Exchequer, the said Alexander after some years did come and live peaceably within the shire of Renfrew, and, long before the time libelled, did go publickly to Kirk and market, behaving himself as one of his majesty's free lieges, by conversing with his majesty's subjects of all ranks, such as Privy Counsellors, the sheriff of the shire, and the officers and soldiers of his majesty's forces; so that private subjects could not but conclude, he was indemnified, and his own brother was not more to abstain from converse with him, than those above-mentioned, especially seeing he did compare before the ordinary Courts of Judicature, particularly the sheriff court of Renfrew, sometimes as pursuer, sometimes as defender in sundry actions; yea, did actually compound with the sheriff of the shire, for a fine of irregularities in not keeping his own parish church, and received his discharge for the same. Moreover, he did ordinarily frequent his own parish church, when there was a regular incumbent, and frequently conversed with the said minister; he was frequently invited, and present at most part of the burials within the shire, where he had access to converse with all ranks, and repaired to markets within and without the shire, and lastly, did assist and help to settle the soldiers in their quarters and localities, and did entertain them even at his own house.

“As to the harbouring of George Holms, the plain truth is, the said George went away without arms, and returned so without being noticed; but so soon as I was informed that his name was in the Porteous Roll of the court at Glasgow 1679, though he was neither cottar, tenant, or servant to me, yet I caused his father put him off my ground. Thereafter he compounded, first with Kennoway the donator for his moveables, and thereafter with the sheriff depute for his peaceable living, at which time he took the bond of regularity, and had a testificate thereupon. Notwithstanding I would not entertain him, so that he listed himself a soldier in the standing forces. All which is offered to be proven.

“As to the last point of the libel, the truth is, sir John Cochran did make a very overly [superficial] motion to me, for fifty pounds sterling by way of charity to the earl of Argyle, which I refused; and in regard the motion was proposed so trivially, I thought it not worthy to be communicate, nor could I prove it, had it been denied, neither in construction of law can it infer the things libelled.”

Porterfield of Duchall, they find the samen relevant as it is lybelled viz. That he harboured and receipt upon the ground of his lands, George Holme, a declared fugitive for treason, and conversed with and receipt and intercomend with Alexander Porterfield his brother a forfaulted traitor, and also that he concealed or not revealed the treasonable proposall made to him be sir John Cochran, for supplying the late earle of Argyle, a forfaulted traitor mentioned in his indytment, separatim, to inferre the cryme of treason and paine of treason, and remitts the samen to the knowledge of an inquest.

ASSISA.

Sir John Dalmahoy of that ilk.
James Baird of Sauchtonhall.
Sir James Fleeming of Rathobyres.
Henry Trotter of Mortounhall.
Henry Nisbet of Dean.
James Murray of Skirlin.
Robert Hepburn of Barefoord.
Sir George Skein of Fintray.
Lieutenant Collonell Rae.
David Edie of Newark.
Alexander Cruckshank, merchant.
James Nicholson, merchant.
James Boyd, merchand.
Henry Elphinstoun, collector at Aber.
William Menzies, merchant in Edinburgh.

The Assyse lawfully sworn, no objection in the contrair. His Majesties Advocat for Probation adduced the pannall's own judiciall Confession, wherto he adhered in presence of the justices and assizers, and wherof the tenor follows :

"Edinburgh, the 17th day of Nov. 1684. The which day John Porterfield of Duchall, confessed and acknowledged in presence of the saids lords, that sir John Cochran of Ochiltree, somtyme in the session, in the end of 1682, or beginning of 1683, having mett with him in the burgh of Edinburgh, the said sir John proposed to him to give fifty pound sterline, for the relieff of the late earle of Argyle, and that he refused to do the same. Confesses he told this proposition to Cuninghame of Craighends, and that Craighends told him the lyke proposall had been made to him.

Sic Subscritur, J. PORTERFIELD.
J. DRUMMOND. JA. FOULIS."

And the said John Porterfield of Duchall, being of new again interrogat in presence of the assyse after they were sworn, he of new again acknowledged and confessed, in manner following, viz. That he had conversed with, harboured, and receipt Alexander Porterfield his brother, a forfaulted person, and also that George Holme a fugitive, had dwelt and resided on his ground, and that sir John Cochran did make the proposall to him mentioned in his dittay, and that he had concealed the samen from, and not revealed it to his majesties privy council or others in authoritie under the king; and declared he submitted himself to the king's mercy, and intreated the lords to represent his

condition favourable, since he was most penitent.

Sic Subscritur, J. PORTERFIELD.
J. DRUMMOND JA. FOULIS.

Followes the Verdict of the Assyse.

"The Assyse having chosen sir John Dalmahoy their chancellor, all in one voice, finds the pannall John Porterfield of Douchall guilty, by his own confession, of conversing with, harbouring, and receipt Alexander Porterfield his brother, a forfaulted persone; as also in harbouring on his ground, George Holme a declared fugitive, and sicklyke of concealing the proposall made to him be sir John Cochran mentioned in his dittay for supplying the late earle of Argyle a forfaulted traitor.

Sic Subscritur, JO. DALMAHOY."

The Lords continue the pronouncing of sentence till to morrow, being the 29th instant, at twelve o'clock in the forenoon, and ordaines the pannall to be removed back to prison.

The Lords commissioners of justiciary therfor having considered the said verdict of assyse, they be the mouth of James Henryson Dempster of Court* decerned and adjudged the said John Porterfield to be execute to the death, demained as a traitor, and to underlye the paines of treason and utter punishment appointed by the lawes of this realme, at such a tyme and place, and such a manner as the king's most excellent majesty shall appoynt, and ordains his name, fame, memorie, 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 posteritie may never have place, nor be able to bruik or enjoy any honours, offices, titles or dignities within this realme in tyme coming; and to have forfaulted, amitted, and tint all and sundry his lands, heretages, taks, steddings, ronmes, possessions, goods and gear whatsoever pertaining to him, to our sovereigne lord's use, to remaine perpetuallie with his highnes, in proprietie: which was pronounced our doom.

"It seems" says Wodrow, "his sentence of death was preconcerted before the Justiciary sat, for; in the Council Registers, November 28, I find as follows: The Council recommends to the Lords of Justiciary to leave the day and place of Douchal's execution to his majesty."†

And he proceeds, "Douchal was most sedate and patient under his trial, and bore all with a christian spirit. His honour as a gentleman, and loyalty as a subject, stood full and entire; his conscience did not reproach him: all was peaceful within, and God smiled upon him. Thus nothing men could did ruffle him.

When he was to receive his sentence of forfeiture and death, he was asked as usual in

* See a note to the Case of Lord Loudon and others, p. 1008 of the present volume.

† See, too, in 2 Wodrow 142, the cruel order concerning the execution of Hackstoun of Rathillet, which the council made before his trial.

some cases, what he had to say why it should not be pronounced. His return was, My lords, I have little to say, I pray the Lord may save the king, whatever come of me! which shewed him to be a better Christian and subject than such who persecuted him.

His sentence drew compassion and tears from many of the onlookers, to see so good, old, and innocent a gentleman exposed to such hardships for imaginary crimes; yea, the hard measure he met with was regretted by some persons in the government after it was over; and I am well assured, that even sir George Mackenzie used to cast the blame of this procedure off himself, and term Douchal 'My lord Melford's martyr.'

And such was the equity of those times, that the very person who was his judge, had got a previous promise of his estate, which was in due time made good; and July 1686, by the king's gift the earl of Melford was made donator to his personal and heretable estate, so that he had more reason than every body to find him guilty.

1685, March 22d. John Porterfield, late of Douchal, and Alexander Porterfield his son, supplicate the council for liberty. The first is refused, because under a sentence of forfeiture. His son is let out, on bond for the sum in which he is fined. July 23d. Douchal is allowed the liberty of the town of Edinburgh upon his petition, but confined thereunto. And September 3d, the council transmit the following petition from him to the secretaries; 'That whereas the petitioner being desired by sir John Cochran to give some charity to the lord Argyle, did heartily refuse the same, and having concealed the design of the said sir John, and not timeously revealed the same, which he did out of ignorance, and not out of any evil design, but did freely confess the same, which otherwise could not be proven against him, wherefore your petitioner is forfeited, and hath a long time been prisoner; and seeing his life is near at an end, I being of the age of seventy two years, and under many infirmities contracted in the said prison, it is therefore humbly desired that your lordships would recommend your petitioner to his most sacred majesty, for a remission to be passed gratis, containing Rehabilitation, &c. And it is hoped his sacred majesty will be so gracious (considering that the petitioner's crime was not intentional, but in a manner ignorantly) out of that gracious benignity and goodness which princes have been in use always to bestow upon the worst of their subjects, being penitent, and allow your petitioner a competency to live upon, out of his own estate, and take some seen course with his debt, which is very grievous to his spirit, and your petitioner shall ever pray: John Porterfield.' And I find, says Wodrow, September 10th, an address to the council from Alexander Porterfield his son, shewing that he hath nothing to pay his fine with, seeing his father is forfeited, and begs his fine may be remitted, considering his long imprisonment. The council transmit this ad-

dress to the duke of Queensberry.—See 2 Wodrow, 420, 423, 478.

The following is Fountainhall's Report of this Case:

"November 27, and 28, 1684. Porterfield of Duchole was thir days pannelled before secretary Lundy, and the justice clerk, as commissioned by the king to hold the circuit for Clydesdale, and their power was to expire on the 1st of December, for these crimes of treason; 1mo. That he had harboured and reset one Holmes his officer, after he had come back from Bothwell-bridge; and also had oft harboured and entertained — Porterfield his brother, who was excepted out of the act of indemnity for being at Pentland-hills. 2do. That sir John Cochran had come to him, and desired that he might lend 1,000 merks to a poor distressed friend, and he asking if he meant my lord Argyle, he did not deny it; and though he had refused to contribute any thing towards his assistance, yet he treasonably concealed that design of raising money to my lord Argyle, then a declared traitor.—Though he confessed the matter of fact, except resetting the officer, yet he alledged that the resetting his brother could not import any thing against him; seeing resetting in law must be a concealing, abstracting, or hindering a rebel from being brought to justice or punishment; whereas his brother these eighteen years has conversed openly at kirk and market with all ranks of persons, even with the officers of the king's army, unquestioned by any, and went to London and composed the gift of his own forfeiture, and took it in another person's name (because he himself refused the declaration) but to his own behoof; so that Duchole was in *bona fide* to converse with him; and it was nothing but parsimony in not bestowing the expence that kept him from a remission; and this not being adverted to, he has infected all the gentry in the west by conversing with them. As to the second, answered, That he knew not certainly if sir John Cochran meant my lord Argyle, when he craved the subsistence and contribution. 3do. There was none present who heard sir John seek it but himself; so if he had revealed it, he could not have proven the same; and thus by the 49th act parl. 1587, succumbing in proving another guilty of treason he became guilty of the same treason himself.—Yet regent Morton was excused for concealing, though he could not have proven it. See sir George M'Kenaz. Criminals, page 48. who thinks this concealing to be no treason. It was great simplicity in Duchole to confess; for they having no way of proving, if they had referred it to his oath, it would have restricted the hazard to an arbitrary pain. But the reat would have forfeited him, unless he had purged and restricted it, by taking the test; which he would not do. Stio. He alledged what was given to strengthen a rebel to rise in arms were certainly treason; but here it was only charity towards alienating

him; and which is more, he absolutely denied to give any contribution at all. The privy council finding Duchole's qualified confession very narrow, they proposed the query to the lords of session, as the king's great council in law, and who by his letter were appointed to give the secret committee advice in dubious cases; and they, by their resolution under their hand, found that the very concealing the seeking of money towards the support of a declared traitor was treason. Yet this was thought very remote; for 1mo, There is the rebel himself who stands guilty of the treason. 2do, There is the interposed person who demands the contribution-money for the traitor's use; and this is also treason in him. 3tio, There is he who gives it. But the naked concealer who refused to give it, he is only in the fourth degree: so to reason at this rate, to conceal theft committed by another landed man shall be treason in the not revealer: only the difference is, aiding a rebel with money, is treason by the common law; but theft in a landed man is only treason by a special statute with us, and so *fictione juris* not to be extended *ultra suum casum*; or rather this example, if I know that another man harbours a rebel on his ground, I am as guilty as the resetter, if I don't reveal him. However, on this subscribed opinion of the session, the commissioners of justiciary found the ditty relevant; and the assize found it proven. So he was found guilty of treason. But the time and place of his execution was referred to the king, that he might apply for a remission; for it appeared that they only aimed at his estate, which will be 12,000 merks per annum.—All

this procedure, to prevent quarrelling, is ratified by the 7th act of parl. 1685."

The act of parliament is as follows:

Act anent Porterfield, of Duchall, and concealing of Supply given to Rebels, May 6, 1685.

Our sovereign lord, and estates of parliament, do ratifie, approve, and confirm the sentence of forfeiture pronounced by the commissioners of justiciary against John Porterfield, sometime of Duchall, and the interlocutors, and whole procedure of the saids commissioners in that process. And declares, that the same was conform to the laws of this kingdom. And in general, statutes and declares, that the concealing and not revealing of supplies given to, or demanded for traitors or faulted for treason against the king's person or government, is treason, and to be judged accordingly.

Wodrow, after observing upon "two other most iniquitous acts," says of this "their third act this day runs yet deeper, and was framed not only to look back to what was past, but to catch a great many gentlemen and others and to bring them to ruin in their bodies and estates. The illegal and harsh sentence passed by the Justiciary, at the direction of the Council, against that excellent gentleman and christian John Porterfield, of Douchal, made a terrible noise, and was plainly enough perceived to have been in order to gratify a particular manager with his estate. It was necessary then *ex post facto*, to confirm this sentence by a posterior law."

321. Case of WALTER EARL OF TARRAS, for Treason, and receiption of Traitors: 36 CHARLES II. A. D. 1685. [Now first printed from the Records of Justiciary in Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis tenta in Pretorio burgi de Edinburgh, Quinto die mensis, Januarii, millesimo sexcentesimo octuagesimo quinto, per Nobilem et Potentem Comitum, Georgium Comitum de Linlithgow, Justiciarium Generalem et Honorabiles viros Dominos Jacobum Foulis de Collingtown, Justiciarie Clericum, Johannem Lockhart de Castlehill, Davidem Balfour de Forret, Rogerum Hog de Harcars, Alexandrum Seton de Pitmedden, et Patricium Lyon de Cars. Commissioners Justiciarie dicti S. D. N. Regis.

Curia legitime affirmata.

Intron,

Walter earle of Tarras, prisoner.

INDYTED and accused, * that wher notwithstanding

standing by common law of this and all well governed nations, the conspiring to overturn the government of the nation, or to assist such as designe to invade the same, or the concealing, and not revealing of any treasonable discourse tending thereto, does infer the paine and punishment of treason, and by the third act of the first parliament of king James the first, and thretty seventh act of his second parliament, * and by the nyinth act, twelfth parliament of king James the second and one hundredth and forty fourth act, twelfth parliament of king James the sixth, † It is statute and ordained that no man openly nor notourlie rebel against the king's person or authority, or

the uncle of Tarras's second wife, an account appears in the Trial of Baillie of Jerviswood, p. 647, of this volume,

* See these two Acts in the Case of Lord Loudoun and others, p. 989, of this vol.

† See as to this, the Case of lord Loudoun and others, p. 992, of this vol.

* This earl of Tarras had married the duchess of Monmouth's eldest sister. Of his instrumentality to the destruction of Baillie,

make warr against the king's lieges, and that wher any traitors or rebels repairs in any part of this kingdom, none of his majesties liegges shall presume to receipt, supplie, or intercomune with them, or give them any meat, drink, hous, harbour, or any relieff, or comfort, under the same pain, for whilk they are forefaulted and put to the horn, and that immediately upon knowledge of their repairing in the bounds, all his majesties obedient subjects doe their exact diligence to the utmost of their power, in searching, seeking, taking, and apprehending the saids rebels and traitors, and presenting them to justice, or in following of them till they be taken, and expelled and put out of the shyre, and that immediately they make intimation to the magistrates and persons of power and authority in the nixt shyre, who shall be holden to doe the lyke diligence without delay, and sua from shyre to shyre, till they be apprehended, and brought to justice, or expelled and put out of this realme; and farder, when ever any manner of trators and rebels happens to repair in the countrey, all his majesties liegges knowing them, or amongst whom they resort, shall with all possible speed certifie his majesty, or some of his majesties privie councill, or some of the chief persons of authority, or credit, dwelling within the same shyre, that such persons (if they be known) are within the same, and if they be unknown, showing their tokens under the paines that the rebels and traitors ought to have sustained in their bodies or goods, themselves, in case they had bein apprehended, presented and convict be justice. And be the fourteenth act, sixt parliament, king James the second,* it is declared that all who shall receipt such as are justified by crymes, if the crime be bottour, and the tresspassor convict or declared guilty, are ordained to be punished as the principall tresspassor, and by the nyntie seventh act, seventh parliament, king James the fyfth, all sheriffs, bailzies, and others, are ordained to doe diligence to apprehend all rebels who are at the horn, for capitall crymes, and that no man willfully or willingly receipt, supplie, mantaine, defend, or doe favour to any of his majesties rebels, and being at the horne within their houses, bounds, lands, and bailziearies, under the paine of death, and confiscation of moveables. And by the fyfth act first session of his majesties first parliament, it is declared, that it shall be high treason for the subjects of this realme, or any number of them, less or more, upon any ground or pretext whatsoever to rise or continue in armes, to make peace or warr without his majesties speciall authority and approbation first interponed thereto. And be the first act eighteenth parliament, king James the sixt, the estates of parliament faithfully promise perpetually to obey, mantaine and defend the prerogative royal of his sacred majesty with his aires and successors, and privilegedes of his highnes crown with their lives, lands and goods.

* As to this, see the Case of lord Loudoun and others, as before referred to.

And be the second act, second session of his majesties first parliament, It is statute and ordained that if any person or persons shall, herefter, plot, contrive, or intend death, or destruction to his majesty, or any bodily harme tending to death of destruction, or any restraint upon his royall person, or to deprive depose or suspend him from the style honour or the kinglie name of the imperial crown of this realm, or any others his majesties dominions, or to suspend his majesty from the exercise of his royall government, or to levie warr or take up armes against his majesty or any commissionat by him, or shall intyse any strangers to invade any of his majesties dominions, and shall by wryting, printing, and other malicious and advysed, speaking, express and declare such their treasonable intentions, efter such person or persons being upon sufficient probation legallie convict therof, shall be deemed, declared and adjudged traitors, and shall suffer forefaulture of life, honours, lands and goods, as in the cases of treason. Lyk as, by the second act of his majesties third parliament, It is declared high treason in any of the subjects of this realm by wryting speaking or any other manner of way to endeavour the extirpation, suspension or diversion of the right of succession to the imperial crown of this realme, or the debarring the nixt lawfull successor from the immediat actual, full and free administration of the government conform to the lawes of this realm, and that all such attempts and designs shall inferr against them the pain of treason. Notwithstanding whereof ther being a treasonable design in England, for rising in arms against the king our soveraigne (whom God preserve) and for killing or at least seizing on his sacred person, and the person of his royall highness, and for forcing his majesty to condescend to such proposalls as they the said damnable conspirators should make, ther was a Juncto lykewayes of the Scottish nation called up by them, and who did meet and assemble themselves together at London, in the moneths of February, March, April or May 1683 years, at which meeting were present, The lord Melvill, Mr. Robert Baillie of Jarviswood, sir Hugh Campbell of Cessnock, and sir George Campbell his son, Montgomerie of Langshaw, sir John Cochran, Mr. Robert Martine, Mr. William Veitch, ane outlawed preacher, and declared and forfait traitor and others. Wher efter they had most treasonably and seditiously misrepresented his majesties government, especially in Scotland, and the administration of his royal highness his majesties commissioner, and his judicators there, therby to excite one another to the designed conspiracy and rising intended against him, and to serve as a pretext and blind to excuse their wicked and treasonable design of joyning with the conspirators in England, they did send master Robert Martine with a commission into Scotland, and he carried letters, particularly a letter from the said Jarviswood to the said Walter earle of Terras, and the said Mr. Ro-

bert having arrived here in Scotland, in the moneth of May, 1683 years, he did address himself to the laird of Torwoodlie, and they sent for the laird of Polwart, Philiphaugh, and the said Walter earle of Tarras, and before Polwart came the said Mr. Robert Martyne, and the said Walter earle of Tarras, or at least the said Walter earle of Tarras and the said Philiphaugh did talk of a rising in armes upon a supposition, if the cuntry party in England, should have thoughts of going to arms, and if it were not fit in that case to seize upon the officers of state, and other officers here, and to surprize Berwick, and his majesties garrisons of Sterling and others, and his troops of horse, and dragoons within this kingdom, after which the said Walter earle of Tarras went to Gallowshells, wher he did meet with the lairds of Gallowshells and Polwart, and after the said pannal had tryed if the laird of Gallowshells would be secret, he did at last formally talk of rysing in arms, and of concurring with the late earle of Argyle a declared traitor, who should land in the West, and of bringing the king by petitions or by force to abandon his royall brother, and of delyvering him up to a legal tryall as a sure remedy for setting all disorders, and repairing all disorders, and repairing all grievances both in England and here, and as a certane stepp for secluding him from the succession to the imperial crown, of this his majesties auncient kingdom. And if this was not done in the king's own lyfetye the opportunity would be lost, and that these overtures were concerted betwixt the pannal's friends at London, and the cuntry partie (for so he called the saids conspirators) and then it was positivie talked off, by one or other of them that upon the certane newes of England's being in the fields, those of the southern shyres should presently rise and get also as many as they could who should be able to deal with stragglers, and that officers should be trysted to command. And that then the late earle of Argyle was to come from beyond sea, and sir John Cochran from England to the west country, and ther was a sign and a word appoynted for thes they call honest men to know one another by. And that upon the newes the said pannal and they were to have from England, they were to meet upon mldsummer thereafter. Which overtures or one or other of them, the said Walter earle of Tarras himself made or heard and concealed the same or at least he did talk what was to be done, if England should rise, and did treat of giving them or the late earle of Argyle a declared traitor, some assistance here; or the said pannal being present wher these or some such overtures as thes wer treated he did conceal and not reveal the samen. Through the committing of the which crymes above written, or either of them, he was guilty of the committing High Treason, and is actor, art and part thereof; which being found he ane asysse he ought to be punished with forfealture of life, lands, and goods, to the terror

and example of others to commit the like herefter.

Persewer.—Sir George M'Kenzie of Rosehaugh, his Majesties Advocat.

His Majesties Advocat produced a Warrant of Privy Council, for persewing and insisting against the said earle, whereof the tenour follows :

“Edinburgh the day of November 1684, the Lords of his Majesties Privy Council doe heirby give order and warrant, to his Majesties Advocat to persew a proces of treason before the Lords Commissioners of Justiciary, against Walter earle of Tarras for the crymes of treason and rebellion; and others whereupon his Majesties Advocat shall indyt him. Extract by me,

Sic Subscribitur. WILLIAM PATERSON.”

The earle of Tarras produced a Petition under his hand direct to the king's most sacred Majesty, whereof the tenor follows :

“To his most sacred Majestie, the humble Submission and Petition of Walter earle of Tarras, humbly sheweth, That his Majesties petitioner having received ane indytmnt of High Treason, at the instance of his Majesties Advocat, for the crymes of treason therein mentioned, and the petitioner being concious to himself of his haynous guilt therein, he is resolved in place of all other defences to through himself at his Majesties feet, and submit to his Majesties mercy, his only hopes and trust being in his sacred Majesties clemency and goodness, that his Majestie would be graciously pleased to pardon the petitioner's crymes and by the sparing of his life, giving him opportunity for the tyme to come in some measure to expiat his former cryms and offences by his dutifull and loyall deportment to his Majesty and his successors, which by the grace of Almighty God, the petitioner will for ever herefter inviolable preserve. So he doth most humbly acknowledge his guilt conforme to his Confession given under his hand to the Lords of the Secret Committee the day of November last, to which he does adhere, and holds the same as here repeated, and freely confesses that by his crymes therein specified, his life and fortune are justlie at his sacred Majesties mercy, and seeing now his Majesties petitioner has a deep sense of the haynousness of his guilt, and a just abhorrence of all such treasonable principles and practices, into which he has been formerly grossly misled to his great regrate.—Therefore, humbly craving his sacred Majestie to take the petitioner's case to his commiseration and according to his Majesties inherent and usual goodness and clemency, to his penitent subjects, be graciously pleased to grant mercy and pardon to the petitioner, and he does faithfully promise as a Christian, and a gentleman, that he shall ever be a loyall and faithfull subject to his sacred Majestie and his royall successors.

Sic Subscribitur.

TARRAS.”

The Lords having considered the Indytment persewed be his Majesties Advocat, against the earl of Tarras, they find the same relevant as it is lybelled to inferre the cryme of treason,* and remitts the same to the knowledge of the inquisit.

ASSISA.†

The Earle of Strathmoir.
The Earle of Lauderdale.
The Earle of Panmuir.
The Earle of Belcarras.
The Lord Sinclair.
The Lord Bargany.
The Lord Rollo.
The Mr. of Balmirrispoch.
Sir William Douglas, of Cavers.
Sir William Drummond, of Halthornden.
Scott of Scotstarbat.
Sir James Richardson, of Smeitoun.
Sir Alexander Forbes, of Tolquhon.
Sir Robert Baird, of Saughtonhall.
Mr. John Bayne, of Delney.

The Assyse lawfully sworne, no objection of the law in the contrair.

* Concerning Interlocutor of Relevancy, see p. 1061, of this volume.

† We in some measure pay regard to the maxim of trying a man by his peers, or persons of a degree not inferior to his own. In this view, our practice seems once to have required, that the assize for the trial of a landed man should all be men of that condition; and if he were a baron, or immediate vassal of the crown, that at least half of the assize should be barons also. To which effect judgment was given after full debate, in the trial of Douglas of Spott, for the murder of Home of Eccles, May 9th, 1667. "The Justice findis the objectioun against the present assyze relevant, and ordeins the persewers to summond ane new assyze to the fourth day of June next to come, to which day they continue the tryall of this actione; the most part of which assyze to be of the laird of Spott his owne qualitie, vizt. Barouns holding of the King, and the rest landit gentlemen, holding either of the King, or of ane uther superior be chartir." In later times, without relinquishing the principle, our Judges have thus far conveniently modified the rule for such cases, that a majority only of the assize are landed men, and these, indifferently, vassals holding of the crown, or of a subject.

"According to certain old, but not very conclusive authorities, (Statuit Dominus Rex, quod nullus debet recipere iudicium, neque iudicari, a minori personâ quam a suo pari; scilicet, Comes per Comites, Baro per Barones, Vacassor per Vacassores, et Burgensis per Burgenses. Quoniam Attachiamenta, c. 67; also, Skene on Crimes, c. 4. sect. 3.) the same maxim was to be applied to the case of noblemen also, who were to be tried therefore by an assize consisting of persons of their own high

His Majesties Advocat for Probation adduces the pannall's judicial Confession in presence of the Justices and Assizers, wherof the tenor follows:

Walter earl of Tarras, after reading of his indytment in presence of the Justices and Assizers, confesses that about the tyme sir John Cochran and commissar Monro gott their commission for the Carolina business from London, Mr. Robert Baillie, of Jerviswood, desired the pannall to speak to Commissar Monro, to try if he could get him added to that commission, and that Jerviswood told the pannall that he was to goe to London, however upon his own expences, and that his and their going about the Carolina business was but a pretence, and a blind; but that the true designe was to press forward the people of England, (who would doe nothing but talk) to goe more effectuallie about the business and doe something. Confesses that Jerviswood did settle a correspondence with him the pannall, wherby he was

degree. But, although it often happened that noblemen were summoned to the assize on such occasions, as there was an obvious propriety in granting such an indulgence where it could conveniently be done; yet it does not appear that we ever came to acknowledge an absolute rule, of composing a nobleman's assize either entirely of noblemen, or even for the major part, but only of landed men. And indeed for long, and until the full establishment of parliamentary representation, the order of noblemen and other barons, or immediate vassals of the crown, were truly one and the same, and therefore peers to each other in the strict sense of law. Thus, on the trial of Janet Douglas, lady Glamys, July 14th, 16th, 18th, 1537, for treason, only five noblemen sat on the assize; on that of the earl of Orkney, February 1st, 1615, eleven noblemen sat, and four landed men; on that of lord Balmerino, February 11th, and March 30th, 1635, eight noblemen, six baronets, and one landed man; on that of the viscount Frendraught, July 4th, 1664, two noblemen only, lord Biantyre and lord Dunkeld; and on that of the earl of Argyle, December 13th, 1681, four landed men, along with eleven noblemen. What is more express; on November 14th, 1655, the earl of Traquair [see MS. abstract of the books of adjournal, in the advocates' library; for there is not now extant any original record of 1655], having claimed a jury of noblemen, the judges of that time found in substance, that the precedents which he appealed to were only in cases of treason, and therefore repelled his plea in law; but *ex gratiâ*, appointed three noblemen to sit on the assize along with the others, who were all of the degree of Baronet." Hume's Comment, chap. 11th, vol. 2, p. 97, et seq. See also in this Collection, the Protest of lord Linlithgow, in the Case of the earl of London, p. 1002, of this volume. See too p. 1043.

to give an account to the pannall, what should pass betwixt the country party in England, and the Scotsmen ther. And on the other hand, the pannall was to write to him what occurred here. Confesses that Jerviswood said to him, if the king would suffer the parliament of England to sitt, and pass the Bill of Seclusion, that, that was the only way to secure the Protestant religion. Confesses that Jerviswood said to him, that the king might be induced to do so if the parliament would take sharp, or brisk measures with him, or the lyke words. Confesses these words were spoken by Jerviswood to him, since the holding of the last session of this current parliament, and before Jerviswood and Commissar Monro went for London. Confesses that after Jerviswood went for London, he did give the pannall an account by letters, that things were in great disorder ther, and that he hoped ther would be effectual courses taken to remeid them. Confesses that Mr. Robert Martyne came to Torwoodlie's house, in May 1683, or thereby, and brought a letter to the pannall's lady unsubscribed, but the pannall knows it was Jerviswood's write, who was then at London, and that Mr. Martine told the pannall, that things in England wer in great disorder, and lyke to come to an height, and that the country party wer considering on methods for securing the Protestant religion; and that Archibald somtyme earl of Argyle, was to get ten thousand pounds sterling. Whereas threttie thousand pounds sterling was sought by the Scotsmen at London which was to be sent over to Holland, to provyd arms, and that the late Argyle was to land with these arms in the west highlands in Scotland, and that Jerviswood was to be sent over with the money. Confesses that Philiphaugh and he went to Gallowshiel's house, wher they met with Polwartand Gallowshiels, and that it was talked among them ther, that in case those in England should rise in armes, that it wer necessary in that case, that so many as could be gotten on the borders, should be in readieness to deal with straglers, and seize upon horses, that thereafter they should joine with those that were in arms on the borders of England. Confesses that in the case forsaid, it was said that it was convenient the castle of Stirling, Berwick, and some other strengils should be seized upon, and that the king's officers of state should be seized upon, and it was lykewayes spoke off amongst them, that some persons should be employed to enquire what armes was in that country. Confesses that it was spoke there, that the best tyme for Argyle, was to land in the west, when there was a sturre in England, or Scotland, or words to that purpose. Confesses that every one desired another to speak to such particular persons as they could trust to, by letting a word fall indirectlie upon supposition, in case of the rising in England, concerning the affaire for preparing of them; and that he was told by Philiphaugh, thereafter, that ther was a word and signe used amongst

them, viz. the signe was by loosing a button on the breast, and that the word was 'harmony.' Confesses that at the house of Gallowshiels he heard it spoke off, that the king by petitions or force, might be brought to abandon his royall brother, and to delyver him to a legall tryall, (or words to that purpose) as a sure remedy for settling all disorders, and repairing all grievances, both in England and Scotland, and a certane step for secluding the duke from the succession. And that he heard it talked ther, that sir John Cochran was to come to Scotland with the rest of the Scotsmen.

Sic Subscritur,

TARRAS.

LINLITHGOW I. P. D.

James Murray of Philiphaugh, aged thretty years, marryed, purged and sworne, and his former deposition emitted by him, and renewed before the justices in the tryall against Jerviswood, being now againe publictly read in presence of the justices and assyzers, he judicially adhered thereto in all poynts, and that the same is truth, as he shall answer to God.

Sic Subscritur,

J. A. MURRAY.

Hugh Scot of Gallowshiels, aged thretty six years, marryed, purged and sworne, and his former depositions emitted by him, and renewed before the justices in the tryall against Jerviswood, being now againe publictly read in presence of the justices and assyzers, he judicially adheres thereto in all poynts, and that the same is truth, as he shall answer to God.

Sic Subscritur,

HUGH SCOT.

LINLITHGOW I. P. D.

The Lords ordaine the Assyzers to inclose and returne their Verdict to morrow, at twelve o'clock.

CURIA JUSTICIARIE, S. D. N. Regis tenta in Pretorio Burgi de Edinburgh, sexto die mensis, January millesimo sexcentesimo octuagesimo quinto, per Nobilem et Potentem Comitem Georgium Comitem de Linlithgow, Justiciarium Generalem, et honorabiles viros, Dominos, Jacobum Foulls de Collingtoun, Justiciarie Clericum, Johannem Lockhart de Castlehill, Davidem Balfour de Forret, Rogerum Hog de Harcars, Alexandrum Seton de Pitmedden, et Patricium Lyon de Carss Commissionaris Justiciarie dicti S. D. N. Regis.

Curia legitime affirmata.

The said day the noblemen and gentlemen who past upon the Assyse of Walter earle of Tarras, returned their Verdict in presence of the saids lords, wherof the tenour followes :

"The Assyse by their unanimous voice find the crymes of art and part as being upon the contrivance of the conspiracy lybelled, and in concealing and not revealing the same, and of his accession to the designe of secluding his royall highness the duke from the succession. proven against Walter earle of Tarras the pan-

nal, in respect of the pannall's confession and petition, and the deposition of the witnesses adduced.

Sic Subscrib. LAUDERDALE, Chancellor.

After reading and producing of the whilk verdict of assyse, the lords justice general, justice clerk, and commissioners of justiciary therfor be the mouth of James Johnstoun, dempster of court, decerned and adjudged the said Walter earle of Tarras to be execute to the death, demained as a traitor, and to underlye the paines of treason, and utter punishment appointed by the lawes of this realme, at such a tyme, place, and in such manner as the king's most excellent majesty 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 of the books of armes, sua that his posterity may never have place, nor be able herefter to bruik or injoy any honours, offices, titles or dignities, within this realme in tyme coming, and to have forfault amitted, and tint all and sundry his lands, heretages, titles, offices, tacks, steddings, roomes, possessions, goods, and geir whatsoever pertaining to him, to our sovereign lord's use, to remaine perpetuallie with his highness in property, which is pronounced for Doom.

At a Meeting of the Council, apud Edinburgum, Quarto die Februarij, 1685.

The Letter under written, direct from the king to the counsell, giveing order for Walter Earle of Tarras liberty upon his giveing good and sufficient security in the termes mentioned in the said Letter, being read, was ordered to be recorded in the books of privie counsell, and the clerks wer appoynted to prepare the draught of a remissione to him for his lyfe only, in such termes as the counsell shall think reasonable; and upon this ryse, it was ordered, That all signatures for remissions hereafter shall bear, that the same are to passe in the ordinary forme, and not *per saltum*, as has been of late done, of which letter the tenor follows:

‘CHARLES R.

‘Right trusty and right well beloved cousins and counsellors, right trusty and well beloved cousins and counsellors, right trusty and well beloved counsellors, and trusty and well beloved counsellors, Wee greet you well. Whereas in compassione of the conditione of Walter Scott, late earle of Tarras (now a prisoner there under the sentence of condemnatione for high treason) and in consideratione of the great penitence shewed by him as well before and at as since his tryall, wee are now graciously resolved to grant him a remissione as to his life only, in such termes as you shall think reasonable to advise us. It is now our will and pleasure, and wee doe hereby authorize and requyre you to set

him at liberty, upon his giveing good and sufficient security for his appearance before you at whatsoever tyme or tymes he shall be by you thereunto requyred, and to cause such a remissione to be drawne there and sent up to our secretaries of state, for that our ancient kingdome as you shall judge reasonable to be granted unto him in the termes aforesaid, which shall be soon signed by us and returned, in order to the security of his life and personall freedome, with his restoratione to his name, fame and good reputation; for doing all which these presents shall be to you and all others respectively, who may be therein concerned, a sufficient warrant. And so wee bid you heartily farewell. Given at our court at Whytehall the twentieth and nyynth day of January, 1684-5, and of our reigne the 36th year, by his majesty's command.

Sic Subscribitur,

‘I. DRUMMOND.’

The Lords of his majesties privie counsell doe hereby recommend to the lord high chanceller, to give warrant for the said Walter late earle of Tarras liberty, upon his finding security in the termes of his majesty's letter, under such a penalty as his lordship shall think fit, and to give warrant to the clerks for receiving the security, and his lordship is to designe the penalty.

And upon March 10th, the earl was allowed by the Council to go to the country for his health, upon his bond to compear when called.

On the 16th of June, 1685, “All and whatsoever the lands, lordships, baronies; heretages, rooms, possessions, milns, woods, fishings, tacks, steddings, teinds, annuabrents, patronages, wodsets, expyred appryings and adjudications, castles, towers, fortalices, houses, biggings, yairds, orchyairds, annexis, connexis, tennents, goods and aikers, and all other heretages, lands and estates whatsoever pertaining and belonging to the earle of Tarras, and several other persons who had of late been forefaulted upon proceses of treason, intended at the instance of sir George Mackenzie his majesty's advocat against them, both before the high court of parliament and the commissioners of justiciary, were annexed to the crown,* by the 42nd act of the 1st session of king James the seventh's first parliament. However, in the following year was passed the following act (29th of the 2nd session of king James the seventh's 1st parliament:)

ACT OF DISSOLUTION IN FAVOURS OF THE LATE EARL OF TARRAS.—June 15th 1686.

Our Sovereign Lord and estates of parliament, taking into their consideration, That his majesties commissioner, as having special warrant and instruction from his majesty, having

* As to this see a Note p. 1009, of this volume.

proposed and expounded in plain parliament, the great benefite and advantage, that did arise to the crown and government of this kingdom, by the full and sincere confession made by Walter late earl of Tarras, of several matters and circumstances, relating to the late horrid conspiracy, the discovery whereof, did in a great measure contribute towards the preventing the fatal consequences and effects, which so apparently threatened the peace of his majesty's deminions. As also the promises and assurances given to him at the time of the said discovery of his prince's bounty and favour upon that account * : All which being proposed and laid open in plain parliament, to the end the three estates might give his majesty their judgment, advice and determination *re integrá*, whether the same were true, good, and reasonable causes for dissolving from the crown, the lands of Robertoun, Howcleuch, and Borthwick Mains, with the pertinents which formerly appertained to the said Walter, late earl of Tarras, and came in his majesties hands through the doom and sentence of forfeiture, given and pronounced against him before the Lords of his majesties justiciary, upon the

day of one thousand six hundred years, and were annexed to the crown, by the 4th act of the first session of this current parliament ; and the saids estates of parliament, after mature deliberation, and treating and consulting anent the premisses, being fully satisfied and convinced, that the particular services done and performed by the said Walter late earl of Tarras, in his confession and discovery foresaid, and the benefit and advantage thereby accruing to the crown and kingdom, and the promises and assurances given to him of his prince's bounty and favour the truth whereof is sufficiently known, and was made appear to them, are just, weighty and important causes, concerning both his majesties interest, and the public good and welfare of this kingdom, that they should advise and consent to his majesties giving and disposing of the saids lands of Robertoun, Howcleuch, and Borthwick-Mains, with the pertinents, to the said Walter late earl of Tarras, his heirs and assignes ; and for that effect, that the same should be dissolved from the crown, and from the foresaid Act of Annexation. Therefore, His majesty, with advice and constant of the estates of parliament, decerns, ordains, and declares that the saids lands of Robertoun, Howcleuch, and Borthwick Mains, with the pertinents, may be disposed to the said Walter, late earl of Tarras, and his foresaids ; and for that effect, has dissolved, and hereby dissolves the same from the crown and patrimony thereof, and from the foresaid Act of Annexation

* Upon the Trial of Baillie of Jerviswood sir George McKenzie the king's advocate, in maintaining the admissibility of Terras's testimony, said, that the earl had not, nor had he ever sought any security in order to his deponing. See p. 669 of this Volume.

made the sixteenth day of June one thousand six hundred eighty five, and from all other acts of annexation, and from all clauses, qualities, and conditions therein contained. And his majesty, with advice and consent foresaid, finds, decerns, and declares, That this present act of dissolution, having proceeded upon the advice and deliberation of the estates of parliament *re integrá*, and found by the saids estates, to be for great, weighty, and reasonable causes, concerning the good, welfare and public interest of the whole kingdom, first proposed and advised, and maturely pondered and considered before any previous grant or other right or deed given, made, or done by his majesty, in favours of the said Walter late earl of Tarras, and his foresaids, of the lands and others above mentioned, or any part or portion of the same, does fully satisfie the whole clauses, conditions, and qualifications contained in the forsaid act of annexation, and shall have the force, strength, and effect of a general law, or act of parliament, and shall be also valid and effectual to the said Walter late earl of Tarras, and his foresaids, for their security of the lands and others above-exprest, as any other act of dissolution, granted by his majesty, or his royal ancestors, with advice and consent of the estates of parliament, in favours of whatsoever person at any time heretofore. Likeas his majesty, with advice and consent foresaid, finds, decerns, and declares, That this present Act of Dissolution shall not be understood to fall under or be comprehended in any act *Salvo jure*,* to be past in this, or any other

* It was usual, at the end of a session of the parliament of Scotland, to pass an act saving the rights of persons who had not been heard previously to the passing of acts by which their interests might be affected. This was called "Act Salvo Jure Cujuslibet." Thus, the following was passed at the end of the session in which this act in favour of Lord Tarras had been enacted.

' *Act Salvo Jure Cujuslibet, June 15, 1686.*'

' Our sovereign Lord, taking to consideration, that there are several acts of ratification, and others past and made in this session of parliament, in favours of particular persons, without calling or hearing of such as may be thereby concerned or prejudged. Therefore his majesty, with advice and consent of the estates of parliament, statutes and ordains, That all such particular acts, and acts of ratification past in manner foresaid, shall not prejudice any third party of their lawful rights, nor of their actions and defences competent thereupon, before the making of the saids particular acts, and acts of ratifications ; and that the lords of session, and all other judges of this kingdom, shall be obliged to judge betwixt parties, according to their several rights, standing in their persons, before the making of the saids acts : all which are hereby expned, and declared to have been made *Salvo Jure Cujuslibet.*'

session of this current parliament, but is hereby excepted therefrom in all time coming.

It appears, that Tarras engaged in the Confederacy preparatory to the Revolution, (See 4 Laing, 186, 187.) And he is one of the subscribers to the "Act declaring the meeting of the estates to be a free and lawful meeting."

Fountainhall's Notices of this Case are as follows :

"October 1st, 1684. The earl of Tarras by a petition casts himself on the king's mercy

and will, acknowledges his guilt, and excuses it by his youth and ignorance; and hopes to obtain a pardon.

"Feb. 5, 1685. The earl of Tarras's remission is passed, and he was set at liberty out of castle, it only pardons him his life, but does not restore to him his title of honour, (which even before was only *ad vitam*;) and there was no account how his estate was to be disposed of, or how much thereof they would allow to himself. Nota. It was afterwards annexed to the crown, by the 42d act of parliament 1685."

322. The Trial of TITUS OATES, D.D.* at the King's-Bench, for Perjury: 1 JAMES II. A. D. 1685.

May 8, 1685.

THIS day being appointed for the trial of one of the causes between our sovereign lord the king, and Titus Oates, for Perjury; the same began between eight and nine in the morning, and proceeded in the manner following. First, Proclamation was made for silence, then the Defendant was called; who appeared in person, being brought up by rule from the King's-Bench prison, where he was in custody, and was advised to look to his Challenge to the Jury that were impanelled to try the cause.

Oates. My lord, I am to manage my own Defence, and have a great many Papers and things which I have brought in order to it; I

* See his Trial for Scandalum Magnatum, p. 125, of this Volume.

"But now the sitting of the parliament of England came on. And, as a preparation to it, Oates was convicted of perjury, upon the evidence of the witnesses from St. Omar's, who had been brought over before to discredit his testimony. Now juries were so prepared, as to believe more easily than formerly. So he was condemned to have his priestly habit taken from him, to be a prisoner for life, to be set on the pillory in all the public places of the city, and ever after that to be set on the pillory four times a year, and to be whipt by the common hangman from Aldgate to Newgate one day, and the next from Newgate to Tyburn; which was executed with so much rigour, that his back seemed to be all over bleed. This was thought too little if he was guilty, and too much if innocent, and was illegal in all the parts of it: for as the secular court could not order ecclesiastical habit to be taken from him, so to condemn a man to a perpetual imprisonment was not in the power of the court: and the extreme rigour of such whipping was without a precedent. Yet he, who was an original in all things, bore this with a constancy that amazed all those who saw it. So that this treatment did rather raise his reputation, than sink it." 1 Burnet, 687.

pray I may have some conveniency for the managing my own trial.

L. C. J. (Sir George Jefferies.) Ay, ay, let him sit down there within the Bar, and let him have conveniency for his papers.

Cl. of Cr. Cryer, swear sir William Dodson.

Oates. My lord, I except against sir William Dodson.

Att. Gen. (Sir Robert Sawyer.) What is the cause of exception, Mr. Oates?

L. C. J. Why do you challenge him?

Oates. My lord, I humbly conceive in these cases of criminal matters, the defendant has liberty of excepting against any of the Jurors, without shewing cause, provided there be a full Jury besides.

L. C. J. No, no, that is not so, you are mistaken in that, Mr. Oates.

Oates. My lord, I am advised so, I do not understand the law myself.

L. C. J. But we will tell you then, it cannot be allowed; if Mr. Attorney will consent to waive him, well and good.

Att. Gen. No, my lord, I know no reason for it, I cannot consent to any such thing.

L. C. J. Then, if you will not have him sworn, you must shew your cause presently.

Oates. My lord, I cannot assign any cause.

L. C. J. Then he must be sworn. *

* "In Criminal Cases, or at least in Capital ones," says sir William Blackstone, Comm. Book 4, chap. 27, "there is *in favorem vite* allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors without shewing any cause at all, which is called a peremptory challenge." The law respecting peremptory challenge is stated by the learned Commentator with some particularity, and very satisfactory reasons are assigned by him for the establishment of that provision. It is, perhaps, to be regretted, that he did not enter with equal particularity into the doctrine of Challenge for Cause in Criminal Trials. Mr. Christian, in his Notes on Blackstone, says that a peremptory challenge is not

Cl. of Cr. Swear him.

Cryer. Sir William Dodson, take the book; you shall well and truly try this issue between our sovereign lord the king and Titus Oates, and a true verdict give according to the evidence; so help you God.

Cl. of Cr. Swear sir Edmund Wiseman. [Which was done.] Richard Aley, esq.; [Who was sworn.] Benjamin Scutt.

Oates. My lord, I challenge him.

L. C. J. For what cause?

Oates. My lord, he was one of the Grand Jury that found the Bill.

L. C. J. Was he so? That is an exception indeed; what say you, Mr. Attorney?

Att. Gen. My lord, I believe he was upon one of the indictments, but I think it was not this.

L. C. J. But if he were in either of them, he cannot be so impartial.*

Att. Gen. My lord, we will not stand upon it, we'll wave him.

Cl. of Cr. Thomas Fowlis.

Oates. Pray let me see that gentleman. [Who was shown to him.] Are you not a goldsmith in Fleet-street, between the two Temples?—*Fowlis.* Yes, I am.

Oates. Very well, Sir, I do not except against you, only I desired to know whether it were you or not?

Cl. of Cr. Swear him. [Which was done.] Thomas Blackmore, Peter Pickering, Robert Beddingfield, Thomas Rawlinson, Roger Reeves, sworn. Edward Kempe, (sworn).

Oates. My lord, I challenge him.

L. C. J. You speak too late, he is sworn already.

Oates. My lord, they are so quick, I could not speak, but he was one of the Grand Jury too.

L. C. J. We cannot help it now.

Att. Gen. I did not know that he was so; but to shew that we mean nothing but fair, we are content to wave him.

L. C. J. You do very well, Mr. Attorney General; let him be withdrawn.

Cl. of Cr. Mr. Kempe, you may take your ease; swear Ambrose Isted. [Which was done.] Henry Collier, Richard Howard, sworn.

Cl. of Cr. Cryer, count these.

Cryer. One, &c. sir William Dodson.

Cl. of Cr. Richard Howard.

Cryer. Twelve good men and true, hearken

to the record, and stand together, and hear the evidence.

The Names of the Twelve sworn, were these. Sir William Dodson, sir Edmund Wiseman, Richard Aley, Thomas Fowlis, Thomas Blackmore, Peter Pickering, Robert Beddingfield, Thomas Rawlinson, Roger Reeves, Ambrose Isted, Henry Collier, and Richard Howard.

Oates. Before the counsel opens the cause, I desire to move one thing to your Lordship.

L. C. J. What is it you would have?

Oates. My lord, I have three witnesses that are very material ones to my defence, who are now prisoners in the King's-Bench, for whom I moved yesterday, that I might have a rule of court to bring them up to day, but it was objected, that they were in execution, and so not to be brought; I humbly move your Lordship now, that I may have a Habeas Corpus for them, to bring them immediately hither.

L. C. J. We cannot do it.

Oates. Pray, good my lord, they are very material witnesses for me, and I moved yesterday for them.

L. C. J. You did so, but we told your counsel then, and so we tell you now, we cannot do it by law, it will be an escape.

Oates. My Lord, I shall want their testimony.

L. C. J. Truly we cannot help it, the law will not allow it, and you must be satisfied.

Cl. of Cr. Gentlemen, you that are sworn of this jury, hearken to the record: By virtue of an inquisition taken at Justice-Hall in the Old-Bailey, in the parish of St. Sepulchre, in the ward of Farringdon without, London, upon Wednesday the 10th of December, in the 36th of the reign of our late sovereign lord Charles 2, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. before sir James Smith, knt., mayor of the city of London; sir George Jefferies, knt. and bart., lord chief justice of this honourable court; sir Thomas Jones, knt. lord chief justice of the Court of Common Pleas; William Montague, lord chief baron of the Exchequer; sir James Edwards, knight, sir John Moore, knight, aldermen of the said city; and sir Thomas Jenner, knight, one of his majesty's serjeants at law, and recorder of the same city, and others, their companions, justices of Oyer and Terminer, by the oaths of twelve jurors, honest and lawful men of the city of London aforesaid, who then and there being sworn and charged to enquire for our said lord the king, and the body of the city aforesaid, upon their oaths present, that at the session of our sovereign lord the king, holden for the county of Middlesex, at Hick's-Hall, in St. John's-Street, in the county aforesaid, on Monday, to wit, 16 December, in the year of the reign of our late sovereign lord Charles 2, of England, Scotland, France, and Ireland, king, defender of the faith, &c. the thirtieth, before sir Reginald

allowed in any trial for a misdemeanor; and he refers as to his authorities to the decision of Jefferies in this Case of Oates, and to the decision of Lord Chief Just. North in Reading's Case." (See vol. 7, p. 264, of this Collection). The particular phraseology of Blackstone, and his omission to cite those decisions, may seem to indicate that he was not altogether satisfied with these authorities.

* See Hawkins's Pleas of the Crown, Book 2, ch. 43, sect. 27, Leach's edit. See, too, in this Collection, vol. 8, p. 588.

Foster, bart.; sir Philip Matthews, bart.; sir William Bowls, kt.; sir Charles Pitfield, kt.; Thomas Robinson, Humphrey Wyrley, Thomas Hariot, and William Hempson, esquires, justices of our said sovereign lord the king, to enquire by the oath of honest and lawful men of the county of Middlesex aforesaid, and by other ways, manners, means, by which they might better know, as well within liberties as without, by whom the truth of the matter may be better known and enquired, of whatsoever treasons, misprisions of treasons, insurrections, rebellions, counterfeittings, clippings, washings, and false makings of the money of this kingdom of England, and of other kingdoms and dominions whatsoever; and of whatsoever murders, felonies, manslaughters, killings, burglaries, and other articles and offences in the letters patents of our said sovereign lord the king, to them, or any four or more of them therefore directed, specified; as also the accessories of the same within the county aforesaid, as well within liberties as without, by whomsoever, howsoever had, made, done or committed; and the said treasons, and other the premises, to hear and determine, according to the law and custom of this kingdom of England, being assigned by the oath of Ralph Wain, John Vaughan, Richard Foster, Thomas Paget, Robert Newington, Henry Tompkins, Robert Hays, John Greenwood, Peter Stimpson, Josias Crosly, Richard Richman, Augustin Bear, John King, Nathaniel Brett, Francis Fisher, and Samuel Lynn, honest and lawful men of the county aforesaid, sworn, and charged to enquire for our said sovereign lord the king, and the body of the county aforesaid, upon their oaths: it was presented, that Thomas White, otherwise Whitebread, late of the parish of St. Giles in the fields, in the county of Middlesex, clerk; William Ireland, late of the parish aforesaid, in the county aforesaid, clerk; John Fenwick, late of the parish aforesaid, in the county aforesaid, clerk; Thomas Pickering, of the parish aforesaid, in the county aforesaid, clerk; John Grove, of the parish aforesaid, in the county aforesaid, gent. as false traitors against the most illustrious, serene, and most excellent prince, our said late sovereign lord Charles 2, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. their supreme and natural lord, not having the fear of God in their hearts, nor weighing the duty of their allegiance, but being moved and seduced by the instigation of the devil: the cordial love, and true and natural obedience, which faithful subjects of our said sovereign lord the king towards him, should, and of right ought to bear, utterly withdrawing, and contriving, and with all their might intending the peace and tranquillity of this kingdom of England to disturb, and the true worship of God within this kingdom of England used, and by law established, to subvert; and rebellion within this kingdom of England to move, stir up, and procure, and the cordial love, and true and due obedience,

which faithful subjects of our said lord the king, towards him, the said sovereign lord the king, should, and of right ought to bear, utterly to withdraw, put out, and extinguish; and our said sovereign lord the king, to death and final destruction to bring and put, the four and twentieth day of April,* in the year of the reign of our late sovereign lord Charles 2, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. the thirtieth, at the parish of St. Giles in the fields, in the county aforesaid, falsely, maliciously, subtly, advisedly, and traitorously did purpose, compass, imagine, and intend, sedition and rebellion within this kingdom of England to move, stir up and procure; and a miserable slaughter among the subjects of our said lord the king to procure and cause; and our said late lord the king, from the regal state, title, power, and government of his kingdom of England, utterly to deprive, depose, cast down, and disinherit; and him our said late sovereign lord the king to death, and final destruction to bring and put, and the government of the said kingdom, and the sincere religion of God, rightly by the laws of the said kingdom established, at their will and pleasure to change and alter, and the state of this whole kingdom of England, throughout all its parts well instituted and ordained, wholly to subvert and destroy, and war against our said late sovereign lord the king, within this kingdom of England to levy: and those their most wicked treasons, and traitorous imaginations and purposes aforesaid to fulfil and perfect, they the aforesaid Thomas White alias Whitebread, William Ireland, John Fenwick, Thomas Pickering, and John Grove, with other false traitors to the Jurors not known, the said four and twentieth day of April, in the year of the reign of our late sovereign lord the king, the thirtieth, with force and arms, &c. at the parish of St. Giles in the fields, in the county of Middlesex aforesaid, falsely, maliciously, subtly, advisedly, devilishly, and traitorously, did assemble themselves, unite and meet together, and then, and there, falsly, maliciously, subtly, advisedly, devilishly, and traitorously, did consult, and agree our said late sovereign lord the king to death, and final destruction to bring and put, and the religion within this kingdom of England, rightly, and by the laws of the same kingdom established, to the superstition of the Romish church, to change and alter; and the sooner to fulfil and perfect their said most wicked treasons, and traitorous imaginations and purposes, they, the said Thomas White alias Whitebread, William Ireland, John Fenwick, Thomas Pickering and John Grove, and other false traitors of our said late sovereign lord the king, to the jurors unknown, afterwards, to wit, the same 24th day of April, in the said thirtieth year of our said late sovereign lord the king,

* See the Note to the Case of Ireland, Pickering, and Grove, A. D. 1678, ante, vol. 6, p. 91.

at the foresaid parish of St. Giles in the fields, in the county aforesaid, falsely, subtilty, advisedly, devilishly, and traitorously among themselves, did conclude and agree, that they the aforesaid Thomas Pickering, John Grove, him the said late sovereign lord the king should kill and murder: and that they the said Thomas White alias Whitebread, William Ireland, John Fenwick, and other false traitors to the jurors unknown, a certain number of masses between them, then and there agreed for the health of the soul of him the said Thomas Pickering, therefore should say, celebrate and perform, and therefore should pay unto the said John Grove, a certain sum of money, between them then and there agreed. And the jurors aforesaid, upon their oath aforesaid, did further present, that the said Thomas Pickering and John Grove, upon the agreement aforesaid, then and there falsely, subtilty, advisedly, maliciously, devilishly, and traitorously did take upon them, and did promise to the said Thomas White alias Whitebread, William Ireland, John Fenwick, and other false traitors of our late said sovereign lord the king, to the jurors aforesaid unknown, then and there, falsely, subtilty, advisedly, maliciously, devilishly, and traitorously did promise that they the said Thomas Pickering and John Grove would kill and murder our said late sovereign lord the king; and they, the said Thomas White alias Whitebread, William Ireland, John Fenwick, Thomas Pickering, John Grove, and other false traitors of our said late sovereign lord the king, afterwards to wit, the said four and twentieth day of April, in the thirtieth year aforesaid, at the aforesaid parish of St. Giles in the fields, in the county of Middlesex aforesaid, subtilty, advisedly, maliciously, devilishly, and traitorously, did severally every one of them give their faith each to the other, and upon the sacrament then and there traitorously did swear and promise, to conceal, and not to divulge their said most wicked treasons and traitorous compassings, consultations, and purposes so between them had, him, our said late sovereign lord the king, traitorously to kill and murder, and the Romish religion in this kingdom of England to be used, to introduce, and the true reformed religion in this kingdom of England rightly, and by the laws of the same kingdom established, to alter and change; and that the aforesaid Thomas Pickering and John Grove, in execution of their traitorous agreement aforesaid, afterwards, to wit, the same four and twentieth day of April, in the thirtieth year aforesaid, and divers other days and times after, at the aforesaid parish of St. Giles in the fields, in the county aforesaid, muskets, pistols, swords, daggers, and other offensive and cruel weapons, him, our said late sovereign lord the king, to kill and murder, falsely, subtilty, advisedly, maliciously, and traitorously did prepare, and obtain for themselves, and them had and kept; and that they, the aforesaid Thomas Pickering and John Grove, afterwards to wit,

the said four and twentieth day of April, in the thirtieth year aforesaid, and divers days and times afterwards, with force and arms, &c. at the parish aforesaid, in the county aforesaid, and in other places within the county of Middlesex aforesaid, falsely, subtilty, advisedly, maliciously, devilishly, and traitorously did lie in wait, and endeavour our said late sovereign lord the king to murder: and that the said Thomas White alias Whitebread, William Ireland, John Fenwick, and other false traitors to the jurors unknown, afterwards, to wit, the same four and twentieth day of April, in the thirtieth year aforesaid, at the parish aforesaid, in the county of Middlesex aforesaid, falsely, subtilty, advisedly, maliciously, devilishly, and traitorously did prepare, persuade, excite, abet, comfort and counsel four other persons, men to the jurors unknown, and subjects of our said late sovereign lord the king, him our said late sovereign lord the king traitorously to kill and murder, against the duty of their allegiance, against the peace of our said late sovereign lord the king, his crown and dignity, and against the form of the statute in that case made and provided; and thereupon it was so far proceeded, that afterwards to wit, at the court of gaol-delivery of our sovereign lord the king of Newgate, at Justice-hall in Old-Bailey, in the suburbs of the city of London, in the parish of St. Sepulchre, in the ward of Farringdon without, London aforesaid, the seventeenth day of December, in the thirtieth year aforesaid, before the justices of our said lord the king, then and there being present, held by adjournment for the county of Middlesex aforesaid, before whom the indictment aforesaid was then depending, came the aforesaid William Ireland, Thomas Pickering, and John Grove, under the custody of sir Richard How, knt. sir John Chapman, knt. sheriffs of the county of Middlesex aforesaid, into whose custody, for the cause aforesaid before that were committed, being there brought to the bar in their proper persons, and immediately being severally spoken unto concerning the premises above charged upon them, how they would acquit themselves thereof; the aforesaid William Ireland, Thomas Pickering, and John Grove, did say that they were not thereof guilty, and for the same, for good and bad, they severally put themselves upon the country; and by a certain jury of the country on that behalf, in due manner impannelled, sworn and charged, then and there, in the same court before the justices of gaol-delivery aforesaid were tried; and that upon that trial between our said late sovereign lord the king, and the aforesaid William Ireland, Thomas Pickering, and John Grove, at London aforesaid, to wit, at Justice-Hall, in the Old-Bailey aforesaid, in the parish and ward aforesaid, the defendant, Titus Oates, by the name of Titus Oates, late of the parish of St. Sepulchre aforesaid in the ward aforesaid, clerk, was a witness produced on the behalf of our late sovereign lord the king upon the trial aforesaid, and before the aforesaid justices of gaol-delivery in

the court aforesaid, then and there held upon the holy Evangelists of God, to speak and testify the truth, the whole truth, and nothing but the truth of, and in the premisses between our said late sovereign lord the king, and the aforesaid William Ireland, Thomas Pickering, and John Grove, put in issue, was duely sworn; and that he the aforesaid Titus Oates, then and there in the court of gaol-delivery aforesaid, upon his oath aforesaid, upon the indictment aforesaid, at the parish and ward aforesaid, by his own proper act and consent, of his most wicked mind, falsely, voluntarily, and corruptly did say, depose, swear, and to the jurors of the jury aforesaid, then and there sworn, and impanelled to try the issue aforesaid, between our said late sovereign lord the king, and the aforesaid William Ireland, Thomas Pickering, and John Grove, did give in evidence, that there was a traitorous consult of Jesuits that were assembled at a certain tavern, called the White Horse tavern in the Strand, (in the White Horse tavern in the Strand, in the county of Middlesex aforesaid, meaning) upon the four and twentieth day of April, in the year of our Lord 1678, at which consult, Whitebread, Fenwick, Ireland, (the aforesaid Thomas White alias Whitebread, John Fenwick, and William Ireland, meaning) and he the said Titus Oates, were present; and that the Jesuits aforesaid did separate themselves into several lesser companies, and that the Jesuits aforesaid came to a resolution to murder the said our late lord the king, and that he the said Titus Oates did carry the resolution aforesaid from chamber to chamber, and did see that resolution signed by them (the aforesaid Jesuits meaning)*: whereas in truth and in deed, the aforesaid Titus Oates was not present at any consult of the Jesuits at the White Horse tavern aforesaid in the Strand, in the county of Middlesex aforesaid, upon the 24th of April, in the year of our Lord 1678, nor did carry any resolution to murder our said late lord the king from chamber to chamber by any persons to be signed. And so he, the aforesaid Titus Oates, on the 17th day of December, in the thirtieth year aforesaid, at the Justice-Hall aforesaid, in the court aforesaid, upon the trial aforesaid, upon the indictment aforesaid, between our said late lord the king, and the aforesaid William Ireland, Thomas Pickering, and John Grove, so as aforesaid had, by his own proper act and consent, and of his most wicked mind, falsely, voluntarily and corruptly in manner and form aforesaid, did commit voluntary and corrupt perjury, to the great displeasure of Almighty God, in manifest contempt of the laws of this kingdom of England, to the evil and pernicious example of all others in like case offending, and against the peace of our said late sovereign lord the king, his crown and dignity. Upon this indictment he has been arraigned, and thereunto hath pleaded

* See vol. 7, pp. 91, 92.

not guilty, and for his trial hath put himself upon the country, and his Majesty's Attorney-General likewise; which country you are. Your charge is to enquire, whether the defendant be guilty of this perjury and offence whereof he is now indicted, or whether not guilty? if you find him guilty, you are to say so, if you find him not guilty, you are to say so, and no more, and hear your evidence. Cryer, make proclamation.

Oates. Hold, Sir, I beg one favour of your lordship, to give me leave to have that part of the record, wherein I am said to have sworn such and such things, read distinctly in Latin.

L. C. J. Let it be read in Latin.
Cl. of Cr. 'Juravit et jur' jurat' predict' ad tunc et ibidem jurat' et impanelat' ad triend' exitum predict' inter dict' D'num nostrum Regem et prefat' Will'm Ireland Thomam Pickering, et Johannem Grove in Evidentia dedit quod fuit proditoria Consultatio, Anglice, Consult' Jesuit' qui Assesblat' fuer' apud quandam Tabernam vocat' the White Horse Tavern in le Strand, (le White Horse Tavern in le Strand, in Com' Mid' predict' inuendo) super viciesimum quartum diem April' Ann. Dom. millesimo sexcentesimo septuagesimo octavo, ad quam quidam Consultationem, Whitebread, Fenwick, Ireland, (predict' Thomam White alias Whitebread, Johannem Fenwick, et Will'm Ireland inuendo) et prefat' Titus Oates fuer' present' et quod Jesuitas predict' sese separaver' in separales minores Conventus quodque Jesuitas predict' venerunt ad Resolutionem ad murdrand' dictum D'num Regem et quod ipse idem Titus Oates portavit Resolutionem predict' a Camera ad Cameram et videbat Resolutionem illam signat' per ipsos (prefat' Jesuitas inuendo). That is the Perjury that you are said to have sworn.

Oates. Pray go on, Sir, 'Ubi revera'—
Cl. of Cr. 'Ubi revera et in predict' Titus Oates non presens fuit ad aliquam Consultationem Jesuit', apud le White Horse Tavern predict', in le Strand, in Com' Mid' predict', super viciesimum quartum diem Aprilis Anno Domini millesimo sexcentesimo septuagesimo octavo, nec portavit aliquam Resolutionem ad dict' D'num Regem murdrand' a Camera ad Cameram per aliquas Personas signand'.

Mr. Just. Withins. Now, you have read it, go on, Sir, to make your proclamation.

Cl. of Cr. Cryer, make an O. yes.

Cryer. O. yes! If any one can inform our Sovereign Lord the King, the King's Serjeant, the King's Attorney-General, or this Inquest now taken, concerning the perjury and offence, whereof the defendant Titus Oates stands indicted; let them come forth, and they shall be heard, for now he stands upon his discharge.

* See vol. 6, pp. 132, 133, 135, 143, 169, sir Henry Vane's Case. See, too, in this Collection, Sidney's Case, vol. 9, p. 817, and Charnock's Case, A. D. 1696.

Mr. Phipps. May it please your lordship, and you gentlemen of the jury—

Oates. My lord, I desire your lordship and the court would be of counsel for me in one thing, which I take to be a fault and error in my indictment.

L. C. J. Look you, Mr. Oates, whatever you have to say of that nature, you must not speak to it now; you will have your time as to that hereafter, in case you be convicted.

Oates. My Lord, I have but one small exception to open to you.

L. C. J. We are now upon the fact only.

Oates. My lord, I beg you would give me leave only to tell you of a mistake in the Indictment, which I hope, when I have opened, will satisfy your lordship, that it ought not to be put upon me or the court to try this cause; or, to be sure, if there should be a conviction, I hope I may move an arrest of the judgment.

L. C. J. So I tell you you may, but not now.

Oates. Good my lord, hear me but a few words; the Indictment charges me to have given such and such evidence, that there was such a consult of the Jesuits at the White Horse tavern in the Strand, the 24th of April 1678. That the Jesuits did afterwards divide themselves into several lesser companies; that they came there to a resolution to murder the late king; and that I swore that I carried that resolution from chamber to chamber; and saw the resolution signed by them, so the word is, 'Signat': now the perjury assigned is, that I was not present at that consult, nor did carry the resolution from chamber to chamber to be signed, and there the word is 'Signand': now I conceive, if 'Signat' be the word, that is used in setting forth the oath that I made, the assignment of the perjury ought to follow that form, and the word there ought to be 'Signat' too; being 'Signand', I take that to be an error.

L. C. J. Look, that is not proper at this time, as I told you at first; but withal I do not think there is any great matter in what you say.

Att. Gen. Either I do not understand Mr. Oates what he means by the objection, or he will find himself much mistaken in it.

L. C. J. Well, well, we have nothing to do with that now; go on with the cause.

Mr. Phipps. May it please your lordship, and you gentlemen of the jury, this is an Indictment against Titus Oates for perjury, which indictment sets forth, that Thomas White alias Whitebread, William Ireland, John Fenwick, Thomas Pickering, and John Grove, the 16th of December, in the 30th year of the late king, at the Old Bailey, were indicted of High-Treason for conspiring the death of the King, and that Ireland, Pickering and Grove, were tried the 17th of December in that year, and upon that indictment Titus Oates was produced as a witness on the behalf of the King, against the said Ireland, Pickering and Grove: Being sworn to give evidence to the Jury that were impanelled and sworn to try that cause; he

did swear and give in evidence that there was a treasonable Consult* of the Jesuits at the White Horse tavern in the Strand, (meaning the White Horse tavern in the Strand, in the county of Middlesex) the 24th of April 1678, at which consult, Whitebread, Fenwick, and Ireland, and the said Titus Oates were present, and that they separated themselves into several lesser clubs, and came to a resolution to murder the king, and that he, the said Titus Oates, carried the said resolution from chamber to chamber, to be signed by them, meaning the Jesuits: whereas in truth and in fact, he, the said Titus Oates, was not present at any such consult, the 24th of April 1678, nor carried any such resolution from chamber to chamber to be signed; and he, the said Titus Oates, the 17th day of December, in the 30th year aforesaid, at the Old-Bailey aforesaid, upon the trial aforesaid, on the indictment above-said, between the king, and the said Ireland, Pickering, and Grove, so as aforesaid had, by his own proper act and consent of his most wicked mind, falsely, voluntarily and corruptly in manner and form aforesaid, did commit wilful and corrupt perjury; and this is laid to be to the dishonour of God, in contempt of the law, to the evil example of others in the like case offending against the king's peace, crown and dignity. To this he has pleaded Not Guilty, and that is the issue that you are to try; if we prove him guilty, we question not but you will find him so.

Att. Gen. May it please your lordship, and you gentlemen that are sworn, I am of counsel in this cause for the king, and our case stands thus: The defendant stands indicted for corrupt and wilful perjury, for what he swore at the trial of Ireland; and that which he swore was this, in order to convict the prisoners then at the bar, of the High-Treason they were accused of; Oates did swear, that upon the 24th of April, 1678, there was a consult of Jesuits held at the White Horse tavern in the Strand, where Ireland and several other Jesuits were present, and their business was to consult how they might murder and destroy the king, and subvert the government, and there they came to a resolution, that Pickering and Grove should kill the king: and he was present at the debate, and he carried the resolution from chamber to chamber, where they had separated themselves in lesser numbers, and there he saw the resolution signed: and this is the matter that he swore, upon which this indictment is founded. And, gentlemen, we do charge that this was a false oath, and in a point expressly to the matter then in controversy before that court, for we shall prove he was beyond sea at that time, and on that day; and in order to his conviction we shall make out by clear evidence to you as full and plain as ever was given, that from Christmas before, which was in December 1677, till Midsummer after, which was the latter end of

* See vol. 7, A. D. 1678, of this Collection.
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June 1678, Oates, that swears this consult in April, was at St. Omers, and in all that time was not absent from the college there above 24 hours, and that but once only, which was in January when he played truant, and went to Watton, which is about two miles from St. Omers, but otherwise he was all along in the college. And my lord, that we may give such a satisfactory evidence as may make it undeniably plain to the Jury, I desire your lordship, and you gentlemen of the Jury, would please to observe some particular periods of time, that I shall open for the better clearing our evidence methodically. And the first period of time is from Mr. Hilsley's leaving St. Omers; now he left St. Omers the 14th of April Old Style, which is the 24th of April New Style, and then when he came away, he left Oates there at St. Omers. Mr. Hilsley, when he came into England in Kent, in his journey to London, meets one Mr. Burnaby; this was, I say, in Mr. Hilsley's return into England from St. Omers, which he left ten days before the time assigned by Oates for this consult, at the White Horse tavern in the Strand. And the next period is, Mr. Burnaby was going to St. Omers, and there he arrives in time, the 21st of April Old Style, and there he finds Mr. Oates, who swore he was then in London: and by the evidence you will hear that Mr. Oates, according to his usual custom, and according to that virtue he is endowed with, very holdly insinuates himself into this gentleman's company, as he uses to do with all new-comers; and you will hear from Mr. Burnaby himself, and many others, that from the time of his coming to St. Omers, which was the 21st of April, he conversed with Mr. Oates several days, every day till after the 24th of April Old Style at St. Omers. Then, my lord, another period of time that I would desire you to observe, is, from Mr. Pool's coming from St. Omers, which was in time the 25th of April Old Style, the very day after the day that this consult was sworn to be on; and when he came from St. Omers, you will hear from many witnesses that he left Oates there, and there he stayed. For my lord, we shall, besides these particular times of these gentlemen's coming over who left him there, prove the very day when he left St. Omers, and that was the end of Midsummer-day following, which was the 23rd of June; then was the time when Oates first came from St. Omers to England; and we shall prove he took his leave of them then. My lord, we have many other circumstances that will unanswerably strengthen this evidence, and shew that our witnesses testify nothing but the truth; one particularly is this: This gentleman being a novice of the house, was Reader in the Sodality, as they call it, we shall prove that; for every Sunday and Holiday throughout all April and May, he did officiate in that place, and did read to the society, according as the custom there is: and we shall prove another particular thing, that upon this 24th of April he was in the col-

lege, by a particular circumstance, and that by several witnesses: so that, gentlemen, not to detain you with any long opening of the matter, if we prove this that I have opened, as we shall with a cloud of witnesses, it will make an end of the question. We shall first call our witnesses to prove that he swore at that Trial, that such a consult was, and he was at it; and then, if we prove, that he was at another place beyond the sea, at such distance that it is impossible for him to be here; I do not doubt but the court and the jury will conclude, he hath wilfully and corruptly forswore himself; the sad effects of which we are all witnesses of; it was to take away the lives of his fellow-subjects wrongfully; and it will appear to the world, he has been one of the greatest impostors that ever did appear upon the stage, either in this kingdom, or in any other nation.

Sol. Gen. (Mr. Finch) We will now go on with our evidence, and prove all the parts of the indictment, and first produce the Record of the Trial of Ireland, and then by witnesses, *vis* *voce*, that were present at that Trial, we shall prove what he swore, and then prove that oath of his to be false. Swear Mr. Swift. [Which was done.] Where is the Record of Ireland's Trial?—*Swift.* Here it is, my lord.

Recorder. Is that a true copy, Sir?

Swift. Yes, I examined this from the Record, it is a true copy.

L. C. J. Read it.

Att. Gen. If Dr. Oates does desire the whole may be read, let it be so; otherwise a word of it may serve, it being only an inducement.

Oates. Yes, I desire it may be all read.

L. C. J. It must be read, if he will have it.

Sol. Gen. Well, I submit it; I did only offer it to save the time of the court.

Oates. I would save the time of the court too, all that I can; but I think it may be material for me to have the whole read.

L. C. J. In God's name let it be read; we will not hinder you in any thing that may be for your defence.

Cl. of Cr. 'Memorandum quod'—

Att. Gen. Now this long Record in Latin is read, I would fain know whether it be to any great purpose, but only to spend time?

L. C. J. Nay, I think it has not been very edifying to a great many; do you think, Mr. Oates, that the Jury, who are judges of this fact, do understand it?

Oates. I cannot tell; may be they may, my lord.

Just. Withins. Do you understand it yourself, Mr. Oates?

Oates. That is not any question here; but to oblige the court and the Jury, I desire it may be read in English too.

L. C. J. No, the court understands it well enough, and they can tell the jury what it is; it is only the copy of a record, to prove that Ireland was tried for high treason at the Old-Bailey, the 17th of December 1678.

Sol. Gen. Now, my lord, we will call our witnesses, to swear what Oates did at that trial

swear: pray swear Mr. Foster. [Which was done.]

Att. Gen. Pray, Mr. Foster, will you acquaint the court and the jury, whether Dr. Oates was produced as a witness at Ireland's Trial, and what he did there depose about a consult in April, 1678.

Foster. My lord, I was so unhappy as to be one of that Jury, by whom Mr. Ireland, Mr. Pickering, and Mr. Grove were tried.

Juryman. My lord, we desire that Mr. Foster would lift up his voice, for we cannot hear him.

Foster. Truly, my lord, I have been very sick of late, and am not now very well, and therefore cannot speak louder than I do.

L. C. J. Go nearer the Jury, and speak as loud as you can.

Foster. My lord, I say, I did see Mr. Oates produced as an evidence at the sessions in the Old-Bailey, where I was so unhappy as to be a jurymen, when Mr. Pickering, Mr. Ireland, Mr. Grove, and Mr. Whitebread were tried.

Att. Gen. When was that?

Foster. It was in December 1678.

Att. Gen. And what did Oates then swear?

Foster. I did see Mr. Oates sworn as an evidence there, in behalf of the king, against the prisoners; and he did then swear, that there was a meeting of several Jesuits at the White-horse tavern, in the Strand, upon the 24th of April 1678, and that Mr. Whitebread, Mr. Ireland, and Mr. Fenwick were present at the meeting, and there they did consult the death of the king, and the altering of the religion; and some went away, and others came: at last they reduced themselves into several smaller companies or clubs, and they came to a resolution, that Pickering and Grove should go on to assassinate the king, for which the was to have 1,500*l.*, and the other 30,000 masses, and that this resolution was drawn up by one Mico (if I am not mistaken in his name) I have it in my Notes I then took of the evidence; and he swore further, that he himself went with this resolution to several of their chambers; he went to Whitebread's chamber, and saw Whitebread sign it; he went to Fenwick's chamber, and saw Fenwick sign it; and went to Ireland's chamber and saw Ireland sign it: and this was upon the 24th of April 1678. My lord, I am positive in this, for I had the good hap to take the Notes at the trial for my own help, being a Jury-man, and I never looked upon these notes afterwards, till the printed Trial came out, and then I compared my notes with the print and found them to agree, and I have kept them ever since by me, and this is all under my own hand as I have testified.

Oates. My lord, may I ask this gentleman a question?

L. C. J. Ay, if the king's counsel have done with him.

Att. Gen. Yes, my lord, we have done with him.

Foster. Pray, my lord, give me leave to sit down, for I am not able to stand.

Oates. My lord, I desire you to ask that gentleman, Whether in the oath that I took, I called it a consult, or I called it a traiterous consult?

Foster. Truly I think you called it both, if I am not mistaken; but if your lordship please, I will look upon my notes.

L. C. J. You may look upon your notes to refresh your memory, if you will.

Just. Withins. Truly I think if it were a consult to murder the king, it must be a traiterous one without doubt.

Oates. Sir, that is not to the purpose; my question is what I swore it was.

L. C. J. He tells you, he believes you did swear both ways.

Foster. At that consult he said that such a resolution was taken, and I think he called it a traiterous consult.

Oates. If you please, I will tell your lordship the reason why I asked that question.

L. C. J. No, you may save yourself the trouble of that, you best know the reason of your own questions; he has given you a satisfactory answer.

Oates. Then if your lordship please ask him this question, Whether I swore that all these three Jesuits were present at one time, or how many of them?

L. C. J. You hear the question, what say you to it?

Foster. Sir, you swore that Ireland, Fenwick, and Whitebread were at that consult, but whether they were all three of them there at one time, I cannot tell, or which of them were together; but this you did swear, that they were there, and came to such a resolution, and you carried it to all their chambers, and did see them sign it.

Just. Withins. He gives you a plain account of what you did swear, I think, Mr. Oates.

Oates. Very well, my lord, I would ask him a third question, if you please.

L. C. J. Ay, in God's name ask him as many questions as you will.

Oates. Whether did I swear that it was resolved to kill the king at the White-horse tavern, or whether that resolution was made after they separated themselves into lesser clubs?

L. C. J. Mr. Foster, this is his question, Whether you did apprehend, by what he swore, that he affirmed, the resolution to kill the king was made at the White-horse tavern, or afterwards when they were divided?

Foster. They came to a resolution, you said, at the White-horse Tavern, and the resolution was there drawn up by one Mico, I think, and it was carried by you, for every one to sign it from chamber to chamber; for I remember you were asked the question, whether you saw them sign it, and you answered that you did carry it, and saw them sign it.

Just. Withins. He speaks very plain, Mr. Oates.

L. C. J. He answers your questions very fully.

Oates. Ay, my lord, as he does, I am glad of it.

L. C. J. Have you any more questions to ask him?

Oates. I would ask him another question. Whether I did swear, that I did carry this resolution from chamber to chamber to be signed, or that I carried it from chamber to chamber and saw them sign it?

Foster. You did swear that you carried the resolution from chamber to chamber, and saw them sign it.

Oates. But did you remember it so particularly, as to say, which you swore, whether I did carry it to be signed, or carried it, and saw them sign it?

Foster. You said you carried it to be signed, and you saw it signed.

L. C. J. He tells you for satisfaction in that point, that he does remember you did swear it both ways.

Oates. He does say so indeed, but whether it was so or no is a doubt.

L. C. J. That will be a question by and by, it may be; if he be in the wrong, I suppose you can rectify him.

Oates. We are now, my lord, upon my oath, and therefore it concerns me to enquire whether I swore as is laid in the indictment.

L. C. J. You say right, it does so.

Oates. And I the rather ask these questions, my lord, because it is six years ago since that trial.

L. C. J. I hope you have not forgot what you swore, have you?

Oates. My lord, I think it is fair for me to ask the witnesses what they remember after so long a time.

L. C. J. It is very fair, nobody says any thing to the contrary.

Oates. Then, my lord, I hope I may ask this gentleman how he comes to remember all this after so long a time?

L. C. J. He has told you already; but tell it him again, Mr. Foster.

Foster. Truly it is so long ago, that had I not taken all these notes at the trial, I had not been able to have given so good an account.

L. C. J. It is a very good reason.

Oates. It is so, my lord, I have subpoenaed others of the Jury, and they will, I suppose, give you as good an account.

L. C. J. Have you done with him then?

Oates. I have one question more to ask Mr. Foster, and that is, Whether I swore they met all in one room, at the White Horse tavern, or in more than one?

Foster. You swore they were in several rooms.

Oates. Then I would ask him this question, my lord, Whether he were then satisfied that Ireland was guilty of the high-treason he was then indicted of?

L. C. J. The meaning of the question is, I suppose, Whether you did believe Mr. Oates at that time?

Foster. Yes, my lord, I had no reason to the contrary.

L. C. J. But I would ask you a question

then, Mr. Foster. Do you believe him now? Do you think, Mr. Oates, he would have found him guilty, if he had not believed the evidence against him?

Oates. We know how juries have gone a late.

L. C. J. Ay, very strangely indeed, Mr. Oates, and I hope so as we shall never see them go again.

Foster. My lord, I have lived so long in the city of London without any blemish, that I hope it will not be thought I would give corruptly a verdict against my conscience.

Oates. My lord, I speak of later times than Ireland's Trial:

L. C. J. He is an honest man, I know him!

Oates. Good my lord, be pleased to hear me.

L. C. J. Nay, you shall hear me, as well as I shall hear you, I'll assure you that, Mr. Oates, in plain English: ask as many questions of the witnesses as you will, that are proper to be asked; but I'll have no descants, nor reflections: I know him, and he is very well known in the city of London, he is a man of very considerable quality, and very good repute.

Oates. I beseech your lordship to forgive me, if I mistake in my questions, I do assure you, I design no reflections on Mr. Foster.

L. C. J. Ask what questions you will, but do not reflect.

Oates. I desire to ask Mr. Foster one question more, and that is, that he would be pleased to tell the reason why at the beginning of his evidence he said, it was his unhappiness to be a juryman at that time?

Foster. Really, Sir, I think it is not a happiness for any man to be of a jury, where the life of a man is in question. I assure you, for myself, I never accounted it so, and if I could have avoided it, I should have been very glad to have been excused.

Oates. I have done with Mr. Foster.

Att. Gen. My lord, thus we prove what Mr. Oates swore at the trial, which Mr. Oates himself will not deny; for the fact, Mr. Oates has printed in his Narrative, as we have now proved it.

Oates. I intend to produce some others of the jury-men by and by.

Sol. Gen. Now we shall call our witnesses to prove, that what he then swore was false.

Att. Gen. We call no more to the point, what he did swear; but go on to disprove what he did then swear.

Oates. My lord, I would put this question to the court, Whether this be a proof sufficient for this point?

L. C. J. I leave that to the jury, it is a point of fact that they are to try.

Oates. I beseech your lordship, that the court would be pleased to give me an answer.

L. C. J. If you ask impertinent questions, the court is not obliged to answer them. Go on, Mr. Attorney.

Att. Gen. Call Martin Hilsley, esq. and Henry Thoroton, esq. Swear Mr. Hilsley.

[Which was done.] Come, Mr. Hilsley, pray acquaint my lord and the jury, what time you came from St. Omers, in the year 1678.

Hilsley. My lord, I came from St. Omers the 24th of April, New Stile, where I left the prisoner, Mr. Oates.

L. C. J. From whence did you come, say you?

Hilsley. From St. Omers, the 24th of April, New Stile.

L. C. J. What year?

Hilsley. In the year 1678, that is, the 14th of April here; and the 23d of April New Stile, I saw the prisoner at St. Omers, and went to school with him, and on the 24th I came from St. Omers, and went to Calais, and from thence into England; but he was never in my company all the while I was coming for England, though he swore he came over with me.

L. C. J. The 23d of April you say you saw him?

Hilsley. Yes, I was with him, that was the day before I came from St. Omers.

L. C. J. You left him there the day before you came away, you say?

Hilsley. I did not see him that morning that I came away, but here are others that did.

Att. Gen. Was he a scholar there?

Hilsley. Yes, my lord, he was.

Att. Gen. Did you know him very well?

Hilsley. Yes, my lord, I did.

Att. Gen. Did he come over into England with you?

Hilsley. My lord, I came from St. Omers to Calais, and never saw him; from Calais to Dover; I never saw him from Dover to London, I never saw him all the way; and I am confident he was not in the same ship I came over in, for I should have seen him if he had.

Att. Gen. Was he for some time before that constantly at St. Omers?

Hilsley. We went perpetually to school together.

L. C. J. What time did you take shipping after you went from St. Omers?

Hilsley. The very next day; the day I went from St. Omers was on the Sunday morning: On Monday I took shipping from Calais to Dover, and I arrived in England at ten of the clock the same night.

Oates. When does he say he arrived in England?

L. C. J. He says, he went from St. Omers on the Sunday, he came that night to Calais, and the next day went on board from Calais, and came that night to Dover, that was Monday night.

Hilsley. Yes, I came that night to Dover, and I lay there that Monday night, the next day was the 26th of April New Stile.

Att. Gen. Where came you then from thence?

Hilsley. I came as far as Bockton-street, and there I lay four or five days, and then I came to Sittingbourn, and by long sea from thence to London.

Att. Gen. Where did you meet Mr. Burnaby?

Hilsley. I met him hard by there, at a relation's of mine.

Att. Gen. Do you remember what day you met him?

Hilsley. I think it was a day or two before I came away from thence to London.

Just. Wishins. Had you any discourse with Mr. Oates, about your coming into England?

Hilsley. Nothing—at all, sir Francis, that I remember.

L. C. J. What time did you come to London?

Hilsley. I came within a few days to London. I staid four or five days there by the way; and I saw Mr. Burnaby within four days, I think, after I came into England. It was about Monday seve-night after I came from St. Omers, that I came to London.

Att. Gen. That was May New Stile.

Hilsley. That is their Stile. It was so.

Sol. Gen. In our Stile it was the 21st of April.

Mr. Hanseys. Pray did you give an account to any body, after you came to London, that you left Oates at St. Omers when you came away?

Hilsley. What say you, Mr. Hanseys? I did not well understand your question.

L. C. J. Then mind me, Sir: It was asked of you, whether you had any discourse with any body after you came hither, that you had left Mr. Oates behind you at St. Omers?

Hilsley. I did tell some persons I left an English parson there, at the same time I came away.

L. C. J. Did you not name him, who it was?

Hilsley. Yes, I named him by the name he went by there, and that was Sampson Lucy.

Att. Gen. To whom did you tell it?

Hilsley. To one Mr. Osbourn.

Sol. Gen. Did he go by that name of Sampson Lucy in the college?

Hilsley. Yes, he did sometimes, he had three or four names, he was called sometimes Titus Ambrosius.

Oates. Now, my lord, I desire I may ask that gentleman a question or two.

L. C. J. Ay, if they have done with him.

Att. Gen. We have, my lord.

L. C. J. Then ask him what you will.

Oates. I desire, my lord, that you will be pleased to ask that gentleman what religion he is of; for it is a fair question, and an equitable one, and that which very nearly concerns me; and I desire to know where he lives.

L. C. J. What religion are you of, Sir?

Hilsley. I am a Roman Catholic.

L. C. J. Where do you live?

Hilsley. I live in London, I am of the Inner-Temple.

L. C. J. He says that he is a Roman Catholic, and lives in London.

Oates. Pray be pleased, my lord, to ask him when he went to St. Omers first, and how long he stayed there?

Hilsley. My lord, I was there about six years, I presume it was about the year 1672, when I went there first.

Oates. Pray ask him what he did there, what was his business?

Att. Gen. That is not a pertinent question at all, with submission, my lord.

Oates. I beseech you, Mr. Attorney, give me leave to ask my own questions.

L. C. J. Ay, but you must ask fair and pertinent questions.

Oates. My lord, I would know what was his employment there at St. Omers?

Hilsley. I know not myself of any particular employment I had, any more than any of the rest that were there.

L. C. J. But, Mr. Oates, you must not ask any such questions; what know I, but by asking him the question, you may make him obnoxious to some penalty, but you must not ask any questions to ensnare him.

Oates. My lord, it tends very much to my defence to have that question truly answered.

L. C. J. But if it tends to your defence never so much, you must not subject him to a penalty by your questions.

Oates. The nature of my defence requires an answer to that question.

L. C. J. But shall you make a man liable to punishment, by ensnaring questions? If a man should ask you what religion you are of,—

Oates. My lord, I will tell you by and by my reason, and I hope a good one, why I ask it.

L. C. J. I do not believe you can have any reason; but to be sure we must not suffer any such entangling questions to be asked.

Oates. Pray ask him, my lord, when I came to St. Omers.

L. C. J. When did Oates come to St. Omers?

Hilsley. As well as I remember, he came to St. Omers either the latter end of November, or the beginning of December, in the year 1677, I think it was that year.

Oates. I desire you would ask him, Whether they were not priests and jesuits that governed that house?

L. C. J. What a question is that! I tell you it is not fit to be asked.

Oates. I demand an answer to it, upon the oath he has taken.

L. C. J. And I tell you, upon the oath you have taken, you are not bound to answer any such question.

Oates. Good, my lord, let my questions be answered.

L. C. J. No, Sir, they shall not: how now, do not think to put irregularities upon us; if you will behave yourself as you ought to do, and keep to that which is proper, well and good.

Oates. If your lordship pleases, I think this very proper for me.

L. C. J. What, to ask such improper questions as these are?

Oates. Truly, my lord, I think they are fit questions to be asked.

L. C. J. But we are all of another opinion.

Oates. My lord, I desire to know, whether they are not set on by their superiors to do this?

L. C. J. That is not a fair question neither.

Oates. Give me leave to make my defence, my lord; I beseech you.

L. C. J. Ay, in God's name; but I pray you then make it in a regular and becoming way; for I know of no privilege you have more than other people, to use witnesses as you do.

Oates. My lord, I look upon myself as hardly used in the case.

L. C. J. I care not what you look upon yourself to be; if you will ask questions, ask none but fair questions, and while you keep within bounds, you shall be heard as well as any of the king's subjects; but if you will break out into questions that are impertinent, extravagant, or ensnaring, we must correct you, and keep you within proper limits.

Oates. Then, my lord, I ask, Whether he was not a witness at the Trial of the Five Jesuits, and at Langhorn's Trial?

L. C. J. Ay, that is a proper question, what say you to it, Sir?

Hilsley. I was so, Sir.

Oates. Pray, my lord, ask him what credit he received at those trials?

L. C. J. What a question is that, to ask any man!

Oates. My lord, I think it is a fair question.

L. C. J. No, indeed, it is not a fair one at all.

Oates. My lord, I desire to know what induces him to come here as a witness now, since it appears that now he comes to give an evidence that he gave six years ago, and was not believed?

Hilsley. My lord, I am subpoenaed.

L. C. J. He has given you an answer to the question, though I think it was an idle question, and not at all to the purpose.

Oates. It may be, he may have some particular reason to induce him to it now.

L. C. J. Well, he tells you he came because he was subpoenaed, and that is sufficient: he is not compellable to be a witness, unless he be subpoenaed; but if a man will come without a subpoena, and give evidence in a cause, that is no objection to his testimony.

Oates. My lord, I desire to know of him, whether he is to have any reward for swearing in this cause?

L. C. J. What say you, Sir, are you to have any reward for your evidence?

Hilsley. None at all as I know of, my lord, I assure you.

Just. Withins. He is not paid for his evidence, Mr. Oates.

Oates. If he be or be not, I cannot tell, nor do I know who ever was paid for it.

L. C. J. Have you any more questions to ask him?

Oates. Pray, my lord, I desire to know, what was the occasion of his coming away from St. Omers?

Hilsley. I had finished my studies.

Oates. Pray, my lord, be pleased to ask him, if he never heard of any councils of the jesuits

here in England, in the month of April 1678, and from whom he did hear of it?

Hilsley. I did hear of it among the rest of the students of the college.

L. C. J. What did you hear of?

Hilsley. I did hear of a consult of the fathers in April 1678.

Att. Gen. Yes, there was, but not such an one as Mr. Oates speaks of, nor was he at it.

Just. Holloway. For what was that consult, I pray you?

Hilsley. It was nothing but a triennial congregation about the affairs of the society.

L. C. J. What were they to do there?

Hilsley. My lord, I was informed among them there, that it was only what they used to have once in three years for ordinary affairs.

Oates. My lord, he pretends to tell when I came thither; I desire to know of him from what time it was he saw me there, and how often?

Hilsley. Generally every day, as near as I can remember, I think, Mr. Oates; you and I, Mr. Oates, went to school in the same place.

Oates. Pray, how many days was I absent from thence in that time you were there?

Hilsley. You were there generally as often as I; I do not know whether ever you missed a day or no.

Oates. Pray, my lord, will you ask the gentleman one question more, Whether he can particularly tell that he did see me every day at St. Omers? For it is not enough for him to swear that he saw me there; but he ought to give an account how he comes to know it by some particular circumstances.

L. C. J. He has given you several circumstances of his knowledge; for he says he was there all the while from your coming, till the 23d of April New Stile, that he came for England; he says he was a scholar in the same form and class with you, and because he does not remember himself to have been absent, he does not remember you to be absent neither.

Att. Gen. And he swears particularly to the very time he came over, which was April the 14th Old Stile.

Oates. Well, I have no more questions to ask this gentleman.

L. C. J. Then call another.

Sol. Gen. Cryer, call Mr. John Dorrel. [Who was sworn.]

L. C. J. Look ye, Mr. Attorney, you did open things at the first for method's sake by periods of time; the first was Hilsley's coming over, the next was the meeting with Burnaby; how pray observe that method, and call that Burnaby next.

Att. Gen. My lord, we shall call him by and by; but we have not done with this business about Hilsley, we have some witnesses that will give an evidence to strengthen and back his testimony. Come, Mr. Dorrel, what have you to say to this matter?

Dorrel. My lord, in April 1678, I came from Brussels to England, where presently after I came, I was with one Mr. Osbourn and

my mother; and there was a discourse between my mother and him about religion.

L. C. J. Where was that?

Dorrel. It was here in England.

Att. Gen. Now tell the time when that was.

Dorrel. As near as I can guess, it was the 15th or 16th of April Old Stile, in the year 1678.

Att. Gen. Well, Sir, go on with your story.

Dorrel. My mother was laughing at his religion, and telling him some ridiculous stories, and he replied, There are a great many that are so ignorant, that are bred up in the religion of the Church of England, that they are forced to be sent to the colleges abroad to be taught, even some of the clergy of that church, and particularized in one Sampson Lucy, alias Oates, as he was assured by a gentleman that was newly come from thence. My mother is now sick, or else she would have been here, and would have testified the same I now do.

Sol. Gen. This gentleman is a Protestant, Mr. Oates.

Oates. What is your name, Sir, I pray?

Dorrel. My name is John Dorrel, Sir.

Oates. Were you never at St. Omers a student there?

Dorrel. I was there, but before your time, Doctor; I had not the happiness to be there while you were there.

Oates. I pray, Sir, what religion are you of?

Dorrel. I am a Papist now.

Oates. I desire, my lord, the Court would be pleased to take notice of it; he owns he was reconciled to the Church of Rome.

Dorrel. Mr. Oates, to satisfy you, I went over when I was a child of 12 or 13 years old, and so was bred in that persuasion.

L. C. J. Well, well, we all observe what he says.

Sol. Gen. Pray swear Mr. Osbourn. [Which was done.]

Att. Gen. My lord, we call this person only to this matter. Pray, Sir, will you give the court and the jury an account what discourse you had with Mr. Hilsley about Oates, and pray, Sir, tell the time when it was?

Osbourn. My lord, I went out of town the 30th of April, the year before the pretended Plot was discovered by Mr. Oates, and I met with Mr. Hilsley two or three days before, and enquiring of him about the affairs of St. Omers, he told me of a minister of the Church of England that was come thither to be a student there, who went under the name of Sampson Lucy, but his right name was Oates; I asked him what he pretended to; did he intend to be of that order? He told me, he did believe that he would not be admitted for his irregular and childish behaviour, and that he had left him in the college; and this I afterwards in discourse told to madam Dorrel, who is a Protestant; and to my mother, who is since dead.

Att. Gen. Will Mr. Oates ask this gentleman any questions?

Oates. I only ask him what religion he is of?

L. C. J. What religion are you of, Sir?

Osbourne. I am a Roman Catholic, my lord.

Sol. Gen. Now, my lord, we come to call Mr. Burnaby. Pray swear him. [Which was done.]

Att. Gen. Mr. Burnaby, pray will you acquaint my lord and the jury, of the time when you came from St. Omers, to England, and when you met with Mr. Hilsley?

Burnaby. I met with Hilsley on the 18th of April Old Stile, in the year 78; then I pursued my journey the following day to St. Omers.

L. C. J. Where did you meet him?

Burnaby. Between Sittenbourn and Canterbury, and afterwards I pursued my journey from Canterbury to Dover, from thence to Calais, and from thence to St. Omers, I arrived at St. Omers the 21st of April Old Stile, which was the 1st of May New Stile; upon the 2d of May Mr. Oates was in my company; I was walking in the garden, and he came into my company.

L. C. J. When was it?

Burnaby. The 2d of May New Stile, and the 3d of May again I went into the garden, and there he was with me again; and the 5th of May I saw him again.

L. C. J. Where?

Burnaby. In the rhetorick form.

L. C. J. But where? In what place?

Burnaby. At St. Omers.

L. C. J. You speak of your own knowledge, you are sure you saw him there at those times?

Burnaby. Yes in the Rhetorick school, and in the garden.

Att. Gen. What more do you know of him?

Burnaby. I saw him again the 8th of May New Stile, that is the 28th of April Old Stile; I mean by New Stile, that stile which was used in the place where I was then.

Att. Gen. How long was he there before he went away?

Burnaby. I know he was there from the 2d of May, the day after I came thither, to the 20th of June, and then I went away, or thereabouts.

L. C. J. Did you see him daily all that time.

Burnaby. Yes, from day to day he was not out of the house.

L. C. J. Were you a scholar there with him?—*Burnaby.* Yes, I was.

L. C. J. What year was that?

Burnaby. In the year 78.

Att. Gen. Mr. Oates may ask him what questions he will.

Oates. My lord, he says he went away; I desire to know whither he did go.

Burnaby. I went away the 20th of June from St. Omers, it is no matter whither I went.

Oates. I desire he may give an account what religion he is of.

Burnaby. I am a Roman Catholic.

Oates. My lord, I desire to know whether he be not of that order.

L. C. J. That I will not ask him, I'll assure you.

Oates. Truly, my lord, I think it is a very hard matter for me to have Jesuits admitted as witnesses in such a cause against me.

L. C. J. I have told you already, you are not to ask any questions of any witnesses that may subject them to any penalty, or make them accuse themselves of any crime.

Oates. My lord, I humbly desire he would give an account, whether he were not admitted into the society.

L. C. J. I tell you, he is not to be asked that question.

Oates. He has owned it before.

L. C. J. Do you take your advantage of it, if you can prove it.

Oates. Then, my lord, I desire to ask him, whether or no he did appear as a witness at the Trial of the five Jesuits.

Burnaby. No, my lord, I did not.

Oates. Pray, my lord, ask him whether he was not summoned to appear there.

Burnaby. No, I was not.

Oates. Pray, my lord, ask him, what reward he is to have for coming and giving this evidence.

L. C. J. Are you to have any reward for being a witness in this cause?

Burnaby. None, my lord, that I know of.

L. C. J. That was a proper question to be asked, and you have a fair answer to it.

Oates. Pray, Mr. Burnaby, by what name did you go at St. Omers?

Burnaby. By the name of Blunt.

Att. Gen. And what name did he go by there?

Burnaby. Who, Sir?

Att. Gen. Mr. Oates?

Burnaby. By the name of Sampson Lucy.

Oates. My lord, I desire you to ask him, whether he did know of any Consult that was to be held here in London, in April 1678, and by whom he knew it?

L. C. J. What say you, Sir, did you know of any consult?

Burnaby. No, I neither heard of it, nor knew any thing of it.

Att. Gen. Now, my lord, we shall go on to another period of time, and that is concerning Pool. Swear Mr. Pool. [Which was done.]

Sol. Gen. Pray will you acquaint my lord and the jury, whether you knew Mr. Burnaby at St. Omers?

Pool. Yes, I did, Sir.

Sol. Gen. Do you know the time when he came to St. Omers?

Pool. No, I do not remember it.

Att. Gen. When did you come over from St. Omers?

Pool. The 25th of April.

Att. Gen. What Stile?—*Pool.* Old Stile.

Att. Gen. In what year?

Pool. In the year 1678.

Att. Gen. Did you know Mr. Oates at St. Omers?

Pool. Yes, I did know that gentleman there.

Att. Gen. Was he at St. Omers that time you was there?—*Pool.* Yes, he was.

Sol. Gen. Did you leave him there when you came away?

Pool. Yes, I did leave him there when I came away.

Sol. Gen. Pray tell the court some particular thing why you remember it, and upon what account you came away.

Pool. Upon the occasion of my brother's death I came over, and I can tell several particulars of my journey; I came away upon the Thursday, and I came to London upon the Sunday following.

Att. Gen. You are sure you left Mr. Oates there then?

Pool. Yes, I am sure I did leave Mr. Oates there when I came away, and I came away thence the 5th of May New Style, the 25th of April Old Style.

Sol. Gen. Pray how long did you know Mr. Oates there?

Pool. I knew him there from Christmas before that.

L. C. J. You were of the college, were you not?—*Pool.* Yes, I was a student there,

L. C. J. You are sure he was there all the while.

Pool. I do not remember he was a day absent, and if he had gone away, particular notice would have been taken of it.

L. C. J. Did you see him there two or three days before you came away?

Pool. I saw him that morning I came away.

L. C. J. And what time before?

Pool. I saw him two or three days before that.

L. C. J. Can you name any particular days?

Pool. I saw him the 1st of May, and the 2d of May, and the 5th of May, which was the 25th of April Old Style, and then I came away.

L. C. J. Are you sure you left him there then?

Pool. I am sure I left him there, I can swear it without any difficulty at all.

L. C. J. What do you ask him, Mr. Oates?

Oates. I desire to know what religion he is of.

L. C. J. What religion are you of?

Pool. I am a Roman Catholic.

Oates. I desire your lordship would ask him, whether he was a witness at the Trial of the five Jesuits, or at Langhorn's Trial.

Pool. No, I was never an evidence before in my life.

Oates. Pray, my lord, ask him, whether he was not admitted into the Sodality of the Virgin Mary.

L. C. J. No, indeed, I shall ask him no such question.

Oates. Pray, my lord, let him answer it.

L. C. J. Prove what you can when it comes to your turn, but ask him no entangling questions.

Oates. He has made himself liable to a penalty by being in that seminary.

L. C. J. I hope a man may be at St. Omers and yet not be punished for it, Mr. Oates.

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Oates. It is my defence to disable the witnesses against me.

L. C. J. But they must not be asked what may make them accuse themselves.

Oates. My lord, it is hard that the witnesses shall not be made to answer my questions.

L. C. J. Pray, Sir, be quiet; we have told you often enough already, you must not think to govern us, it must not be allowed.

Oates. My lord, I desire he may be asked then, what reward he has to come and swear in this cause.

Pool. My lord, I do not know that I am so much as to have my charges borne.

L. C. J. Are you to have any reward?

Pool. No, my lord, that I know of.

Oates. Pray, my lord, I desire he may be asked, what was the occasion of Mr. Hilsley's coming away from St. Omers.

Pool. Indeed I did not examine into the occasion at all, for I was never a man that meddled or made on any side, but lived quietly in the college, and minded my studies.

Oates. My lord, I desire your lordship to ask him, whether he did know of any consult of the Jesuits in April 1678, and from whom he knew it.

Pool. I know not of any particular consult, I heard something in general of a Triennial Congregation, but I cannot speak any thing of my own knowledge.

Oates. My lord, I desire to know of him, if he can tell when I came to St. Omers?

L. C. J. Do you know when Oates came to St. Omers.

Pool. About Christmas, as near as I can remember, it was the latter end of November.

Oates. How much before or after Christmas was it?

Pool. I cannot tell exactly.

Oates. What year was it in?—*Pool.* In 1677.

Oates. I desire to know of him, my lord, whether he saw me every day at St. Omers at dinner.

Pool. I cannot say that ever I knew he was absent any one day, never three days I think I may affirm, but only when he was in the Infirmary.

Att. Gen. That's the place where they go when they are sick.

Oates. Pray, my lord, ask him by what name he went, when he was there in the college.—*Pool.* By the name of Killingbeck.

Sol. Gen. By what name did he go, I pray you?—*Pool.* By the name of Sampson Lucy.

Sol. Gen. Swear Mr. Henry Thornton.— [Which was done.]

Att. Gen. Mr. Thornton, pray where were you in the year 1678?

Thornton. At St. Omers, my lord.

Att. Gen. Do you remember Mr. Oates there, do you know him?

Thornton. Yes, I know him very well.

Att. Gen. When did he come thither?

Thornton. He came there about Christmas 1677.

Att. Gen. How long did he continue there?

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Thornton. He staid there till St. John Baptist's Eve, in June 1678.

Att. Gen. Midsummer you mean?

Thornton. Yes, the Eve of St. John Baptist.

Att. Gen. What Stile?

Thornton. New Stile.

Sol. Gen. Did you see him there all the while?

Thornton. Yes, I did see him every day, I believe, in the refectory at dinner-time, and at night in the dormitory, where all the collegians have their beds: I lay over against him every night, I saw him particularly upon the day of Hilsley's departure, which was the 24th of April New Stile, and I saw him the 1st of May New Stile, upon the coming of Mr. Burnaby to the college; and particularly again I remember him there the 2d of May, when my school-fellows exhibited an action, or play.

Att. Gen. Was Mr. Oates there then?

Thornton. Yes, I saw him present at it, and I know it by this particular circumstance, there was a scuffle between him and another about a place to see the play.

Mr. Jones. Did you see him the 23d of April Old Stile, that is the 3d of May New Stile, which was the day after your play, that you remember?

Thornton. I do not remember that I did see him that day, by any particular circumstance, though I believe I did.

Mr. Jones. Do you remember when Mr. Pool came away from St. Omers?

Thornton. Yes, I do.

Mr. Jones. When was that?

Thornton. The 5th of May New Stile.

Mr. Jones. Was Oates at St. Omers at that time?

Thornton. Yes, he was there then, I am sure.

Att. Gen. Was not he Reader there in the college?

Thornton. He was Reader in the Sodality, and to my knowledge, he did not miss once from the 24th of April New Stile, to the 24th of May New Stile, from being there, and reading in the sodality.

L. C. J. What did he use to read?

Thornton. Some spiritual book, or piece of divinity, or the like, as it was usual to have read every Sunday and Holiday.

L. C. J. And that is one reason why you conclude he was there all that while, because every Sunday and Holiday he was to read, and did read?—*Thornton.* Yes, my lord.

Oates. Pray, my lord, be pleased to ask this gentleman what religion he is of.

Thornton. A Roman Catholic.

Oates. Where does he live?

L. C. J. Where do you live, Mr. Thornton?

Thornton. I am a Northumberland man, that's my country.

Oates. My lord, I desire to know of him, when he did come from St. Omers.

Thornton. I came from St. Omers, my lord, about two years after that Oates went away from thence.

Oates. Pray, my lord, be pleased to ask him,

who it was that was rector or governor of that house or college.

Thornton. It was one Mr. Richard Ashby.

Oates. Pray, my lord be pleased to ask him what school he was in there.

Thornton. I was in Syntax, my lord.

Oates. Then, my lord, I would ask him another question, and that is this, Whether he was not a witness in behalf of the five jesuits and Mr. Langhorn?

Thornton. No, I was not, my lord.

Oates. My lord, I desire to know if he can tell the occasion of Mr. Hilsley's coming away from St. Omers.

Thornton. It never concerned me at all, and I never enquired into it.

Oates. Then, my lord, I would ask him this question, Why he is so precise as to his remembrance of what was done in April and May, when he does not give an account of any other time, nor did the other witnesses?

L. C. J. Yes, but they do; they give you a particular account from the time of your coming thither, which was about Christmas, some say the latter end of November or the beginning of December, they are not positive to any particular time, but thereabouts, and so from that time all along till June.

Oates. I beg your lordship's pardon, I did not hear that he said any such thing.

L. C. J. If you will, I'll ask him that question again for your satisfaction.

Oates. If you please, my lord.

L. C. J. Then mind what is said; do you remember that Oates was there in March before, and in February before?

Thornton. Yes, I particularly remember in March before, he did read a ridiculous book in the Sodality, and he was remarkable in the house by twenty ridiculous passages.

Oates. I do acknowledge I did in March read a pleasant book, called, 'The Contempt of the Clergy.'

L. C. J. By whose order did he read that book in the Sodality?

Thornton. I do not know whether it was by his own election that he was Reader there, or by the command of the Prefect of the Studies, that has the care of the students, and appoints them their business.

Oates. Pray, my lord, be pleased to ask him, how long he was resident at St. Omers.

Thornton. I was there seven years.

L. C. J. You said he was there in June, till Midsummer Eve.

Thornton. Yes, he was so.

Oates. I own that I was there in June, but that was after I returned from England.

L. C. J. When do you say he left the college first?

Thornton. He never left the college from the time of his coming thither first till Midsummer eve, only one time that he was at Watton, and that was but a day or two at most, which is not a league out of town.

L. C. J. Do you remember him there about Christmas time?

Thornton. Yes, my lord, very well.

L. C. J. When was it he went to Watton ?

Thornton. About the latter end of January, as I do remember, and in February above Shrovetide, I remember him particularly to be there.

L. C. J. Now, Mr. Oates, you see he speaks at other times besides April and May, and he brings, upon my word, very notable circumstances.

Oates. He says he went to school with me there, I think, my lord ?

Thornton. No, I say he was in the same college.

L. C. J. But not in the same Classis, for it seems you were in the Rhetorick form, and he in the Syntax.

Thornton. My lord, he went there by reason of his age, and upon no other account ; he might have gone elsewhere with us who were of a lower form, for any great store of learning he had.

L. C. J. You hear him, I suppose, Mr. Oates ; he gives no great commendation of your scholarship.

Oates. That is nothing to this question ; but pray, my lord, be pleased to ask him, Whether he did not hear of a Consult of the Jesuits held here in England in April 1678 ?

L. C. J. What say you, Sir ? Did you hear of any such consult ?

Thornton. Yes, my lord, I did hear of a triennial congregation, such as used to be held by them, but that did not belong to me to enquire into it.

Oates. My lord, I desire to know of whom he did hear it ?

L. C. J. How do you know there was such a consult ? Who told you of it ?

Thornton. I heard of it in the house, and I had read that it was the custom of that society of people, to have such a meeting once in three years.

Att. Gen. Pray for what purpose did they so meet ?

Thornton. As I have been told, it was to send a procurator to Rome, and for their managing their other affairs, which concerned their society.

Sol. Gen. Have the Jesuits usually such a consult once in three years, Sir ?

Thornton. I was never present at any such congregation, I was not capable of it.

L. C. J. But was it used to be said so ?

Thornton. Yes, my lord, I have heard it said so, and read of it.

L. C. J. Mr. Oates, will you ask him any more questions ?—*Oates.* No, my lord.

L. C. J. Well then, go on, Mr. Attorney, and call another witness.

Att. Gen. Swear Mr. William Conway. [Which was done.]

Sol. Gen. Mr. Conway, pray will you give my lord and the jury an account where you were in the year 1677, and in the year 1678 ?

Conway. I was then at St. Omers, my lord.

Sol. Gen. Do you remember Mr. Oates there at any time ?

Conway. Yes, my lord, I do.

Sol. Gen. Pray, at what time was he there, as you remember ?

Conway. He came in December before Christmas 1677, and did not go away till June 1678.

Sol. Gen. What time in June did he go away ?

Conway. About the 30th of June, I think.

Sol. Gen. Were you there all that year ?

Conway. Yes, I was there a scholar in the college.

Mr. Jones. Was he all the time you speak of in the college ?—*Conway.* He lay out one night.

Sol. Gen. What time was that ?

Conway. In January, to the best of my remembrance.

Sol. Gen. Could he be out of the college any time and not be miss'd ?

Conway. No, my lord, he could not.

Sol. Gen. Did you miss him at any time ?

Conway. No, my lord.

Sol. Gen. Was he there in April 1678 ?

Conway. Yes, my lord.

Sol. Gen. Can you tell any particular passages that can make you remember it ?

Conway. Yes, my lord, I can.

Sol. Gen. Tell my lord and the jury how you can remember it.

Conway. I remember Mr. Hilsley's departure, which was the 24th of April New Style, and soon after Mr. Burnaby came, but I do not know the time exactly ; I was desirous to know of Mr. Burnaby, whether he met Mr. Hilsley upon the way ? And he told me he did meet him ; and the next day I saw Mr. Oates and Mr. Burnaby walking together very familiarly, and I took particular notice of it at that time, Mr. Burnaby being but newly come, so that I took him to have known Mr. Burnaby before, or else I concluded him to be a little impudent by his intruding into his company.

Sol. Gen. Do you remember him in March before ?—*Conway.* Yes, Sir.

Sol. Gen. What particulars do you remember of his being there then ?

Conway. I remember him to be there on the Thursday in Mid-Lent, the scholars in the college had a peculiar recreation, which they call, 'Sawing of the witch,' and Mr. Oates was among them ; and I was one of them that broke a pan about his head for recreation.

Sol. Gen. Do you remember the 1st of May, that there was in your college a play acted ?

Conway. As for the play, I remember what part esquire Pool acted in it, but I remember not any particulars that can make me so sure as to swear that Oates was there.

Att. Gen. Do you remember any scuffling for a place there ?

Conway. I do not remember it of my own knowledge ; I heard of it afterwards.

Sol. Gen. You say that you saw Mr. Burnaby and him walking together the next day after he came ?—*Conway.* Yes, I did so, Sir.

Sol. Gen. Did Oates use to read in the So-
dality?

Conway. My lord, there was another chosen
according to the custom to read; but Mr. Oates
took the book, and did read.

Sol. Gen. Did he read constantly?

Conway. I did never miss him any Sunday
or Holiday all the time.

L. C. J. From what time to what time did
he read?

Conway. From a little after Easter till he
went away.

Att. Gen. Is it usually taken notice of in
the college when any person who is a student
goes away from the college?

Conway. There is nothing more discour's'd
of among the scholars than that, when it hap-
pens any one goes out of the college.

L. C. J. And pray when did he go away?

Conway. In June, about the twentieth, as
near as I can remember.

Sol. Gen. Did you observe him at dinner
there constantly?

Conway. Yes, he sat by himself.

Sol. Gen. How came that to pass?

Conway. He sat at a little table in the hall
by himself, for he pretended, being a man in
years, he could not diet as the rest of the young
students did, and therefore obtained leave to sit
alone at a little table by himself, and he sat
next to the table of the Fathers, to which all
the students were to make their reverence be-
fore they sat down.

L. C. J. He was a very remarkable man by
his sitting by himself; did he sit there always?

Conway. He changed his table once, and I
took notice that he sat on the other side of the
refectory.

Sol. Gen. When was that, I pray, can you
remember?

Conway. That was a little after Easter.

Att. Gen. Will Mr. Oates ask him any
questions?

Oates. Pray, my lord, will you ask this gen-
tleman what religion he is of?

Conway. I am a Roman Catholic.

Oates. Pray, ask him where he lives?

L. C. J. Where do you live, Sir?

Conway. Where, now at present, my lord?

L. C. J. Where do you usually live?

Conway. I am a Flintshire man, my lord.

Oates. Pray ask him what name he did go
by at St. Omers?

Conway. By the name of William Parry.

Oates. Pray ask him by what name he gave
his evidence in at the five Jesuits Trial?

L. C. J. Were you a witness at the Trial of
the five Jesuits?—*Conway.* Yes, I was.

L. C. J. By what name did you give your
evidence there?

Conway. By the name of Parry.

Oates. Then I desire the court to take notice
he represented himself by a feigned name in a
court of record.

Conway. I went by both names, my lord.

L. C. J. Well, make what advantage you
can of it by and by.

Oates. Pray, my lord, ask him, if ever he
heard of any consult of the Jesuits held here
in England in April 1678.

Conway. Yes, I did.

Oates. Pray, my lord, ask him, who inform-
ed him of that consult?

Conway. I heard it among the rest of the
scholars; and seeing some of the fathers go
over to it, I was told so.

Att. Gen. Is it an usual thing for them to
have such meetings?

Conway. They have a congregation ordi-
narily once in three years.

Sol. Gen. Does it go by the name of a con-
sult, or what name has it?

Conway. Some call it a congregation, and
some a consult.

Sol. Gen. What is the end of such meeting,
as you have heard?

Conway. They say it was to chase a pre-
curator to send to Rome, and give an account
of the province.

Oates. My lord, I would ask him another
question, whether he is to have any reward
for giving this evidence here?

Conway. No, not that I know of, but what
I expect from Almighty God.

Oates. Pray ask him, how long he lived at
St. Omers?—*Conway.* Five years.

Oates. My lord, I have done with him.

Sol. Gen. Then call Mr. Haggerstone, and
swear him. [Which was done.]

Att. Gen. Mr. Haggerstone, pray will you
acquaint my lord and the jury, were you
at St. Omers in the year 1678, with Mr.
Oates?

Haggerstone. Yes, I was, my lord, I had
the honour to be of the same bench with the
doctor of Salamanca.

L. C. J. You mean you were of the same
class with him?

Haggerstone. Yes, my lord, of the same
class.

L. C. J. In what year was it?

Haggerstone. In the year 1678.

Att. Gen. In what form were you?

Haggerstone. In the same bench with Dr.
Oates, in the rhetoric form.

Att. Gen. Do you remember Mr. Oates in
April 1678?—*Haggerstone.* Yes.

Att. Gen. What time?

Haggerstone. He spoke unto me on the 25th
of April.

Att. Gen. What stile do you mean?

Haggerstone. New Stile, Sir; to avoid con-
fusion, I speak of the stile of the place where
I was; he asked me concerning our school-
fellow Mr. Hilsley, who was then gone from
the college, whether I had heard any thing
from him since he went away; and he spoke
of an indisposition he had, for which he pre-
scribed him a medicine of poppy, and he
thought it would do his business effectually.

L. C. J. Who said so?

Haggerstone. The doctor of Salamanca; he
was called Sampson Lucy in the college; and
likewise he forbid him to chew tobacco, which

be used to do very much: he was called Titus Ambrosius, he had twenty names.

Att. Gen. Was he there all April, Sir?

Haggerstone. Yes, he was, Sir.

Att. Gen. Did you know him in March before?

Haggerstone. Yes, he was there all March before.

Att. Gen. Was he there in February?

Haggerstone. Yes, as near as I can remember, he was absent but one day, and then he went to Watton in February, or else in January.

L. C. J. Do you remember when he came thither first?

Haggerstone. Yes, my lord, he came in December near Christmas, as I remember.

L. C. J. Was it about that time, upon your oath?

Haggerstone. I speak it upon my oath, it was.

L. C. J. When did he go away?

Haggerstone. About the latter end of June.

L. C. J. Was he absent any time between December and June?

Haggerstone. I do not remember that he was absent, save only in January or February, and that was not for above a night, when he went to Watton.

L. C. J. Might not he be absent, and you not mind it, or know it?

Haggerstone. Sure if he had been absent, we could not but have known it.

L. C. J. How so, pray you?

Haggerstone. If any goes away, it is so public, that it cannot be without notice being taken of it.

Att. Gen. Can you remember by any particular token he was there in April or May?

Haggerstone. He spoke to me on the 29th of April New Style, and told me, that there was a craving Englishman had been there to beg an alms, and there was a collection made for him among the scholars; but he said he would give him nothing, for he told me he had been cheated by such an one of some pieces of eight in Spain; this I remember was the 28th or 29th of April New Style. I saw him there the 1st of May; upon the 2nd of May there was an action of the scholars, and he was present at it; the 5th of May I was at school with him, when Mr. Pool went away for England, and I heard him about that time preach a pleasant sermon, for he would undertake sometimes to preach, and he said in it, that the late king Charles 2, halted betwixt two opinions, and a stream of Popery went between his legs.

L. C. J. Was this in May?

Haggerstone. Yes, just after Mr. Pool went away for England, and he had some pretty reflections in his sermon about Toby's dog wagging his tail.

L. C. J. Well, do you ask this witness any question, Mr. Oates?

Oates. Pray be pleased to ask him, my lord, what religion he is of?

Haggerstone. I am a papist, my lord, I am not ashamed of it.

Oates. Pray, my lord, ask where he lives?

Haggerstone. At London.

Oates. Pray ask him what countryman he is?

Haggerstone. I am a Northumberland-man; my father is sir Thomas Haggerstone, a man better known than your father, Dr. Oates.

L. C. J. Nay, say, do not be in a passion, man.

Oates. Pray ask him how long I was with him at St. Omers?

Haggerstone. For half a year at least.

Oates. My lord, I desire to know how long he staid there himself?

Haggerstone. I studied my whole course of humanity there.

L. C. J. How long were you there in all?

Haggerstone. Seven years.

Oates. Pray, my lord, ask him, whether he knows of any consult held, or to be held here in England in April 1678?

Haggerstone. Yes, my lord, I saw two of the fathers go from St. Omers to the congregation, and was there at their return; but all that time I frequented Dr. Oates's company, and he remained in the college.

Oates. Pray, who were these two fathers?

Haggerstone. Mr. Williams and Mr. Marsh; and when they returned, Oates asked me about it, whether they had been to the consult? and I told him there was such a thing, but he never knew it till afterwards; but this I am sure of, he was never missing all the while; I sat on the same bench with him.

Oates. Pray, my lord, ask him, what name he went by at St. Omers?

Haggerstone. I went by the name of Harry Howard; my mother was a Howard, doctor.

Oates. Pray ask him, whether he came into England when he went away from thence?

Haggerstone. No, I went and studied my philosophy at Doway.

Oates. I desire to ask him one question more.

Haggerstone. Twenty, if you please, Doctor.

Oates. I desire to know of him the occasion of Mr. Hilsley's coming away?

Haggerstone. I do know it, but truly I cannot tell whether it be fit for me to speak of it, it was upon some unhandsome account, but I must not blemish any gentleman, I think.

Oates. My lord, I will ask him one question more, whether ever he was admitted into the society?

L. C. J. I will not ask him that question; how often have I told you no such questions are to be asked? Must I make him liable to penalty? No, ask questions that are fair, and you shall have a fair answer.

Oates. My lord, I have done then with him.

Sol. Gen. Then swear Mr. Robert Beeston. [Which was done.]

Att. Gen. Pray, Sir, were you at St. Omers in the year 1677 and 1678?

Beeston. Yes, my lord, I was.

Att. Gen. Did you see Mr. Oates there then? Do you know him?

Beeston. Yes, I know him very well, I did see him there.

Att. Gen. What months did you see him there?

Beeston. He came there in December, the beginning as I remember, and he staid there to June the latter end.

Att. Gen. What year was that in?

Beeston. He came in 1677, and went away in 1678.

Att. Gen. Did you observe him to be there in April and May 1678?

Beeston. The latter end of April, and the beginning of May, I did.

Att. Gen. Tell the court particularly how you remember it.

Beeston. My lord, I saw him the 1st of May at St. Omers, where he played at nine-pins, and I laid a wager upon the same side that he did, and lost my money as well as he.

L. C. J. Do you remember any other time?

Beeston. I saw him the 2nd of May, by the same token that I met him in the college that day, when our school exhibited an action in the hall, and I met him after supper; now in this action I had both acted and sung, and they came and congratulated me for my singing. Mr. Oates said, if I had paid for learning to sing, I had been basely cheated: and then in the morning I was chosen Reader in the Sodality, the 25th of April, or thereabouts, for a fortnight, and Mr. Oates by his own submission was admitted to read, only with this condition, that if ever he were wanting, I was to read again: but this I say, I never supplied the place; therefore I am sure he did continue there all the while, and if he had been out, I must have been called upon to read.

L. C. J. Were you in the college all the time he was there?

Beeston. Yes, my lord, I was.

L. C. J. Did you miss him at any time?

Beeston. No, I never missed him.

L. C. J. Are you sure he was not away all that time?

Beeston. I am sure, as much as a man can be certain of one that is of the same family with himself; nay, I am as sure of it, as that I was there myself.

L. C. J. Can you speak any thing particularly of his reading?

Beeston. My lord, I was to have read, if he was absent; but I was never called upon to read, and therefore I may well conclude he was there all the while.

L. C. J. He gives a material evidence.

Sol. Gen. Was Mr. Oates such a remarkable man that he must be missed?

Beeston. He was very particular, both for age, and that he had a particular table to eat at.

Sol. Gen. Can you remember any thing else?

Beeston. I remember too, that when Mr. Burnaby came first, he was often with him; the 2nd, 3rd, and 4th of May, I saw him there with Mr. Burnaby, and I took particular notice of the friendship between them, which I thought strange between persons that I supposed never saw one another before.

L. C. J. Have you any questions to ask this man, Mr. Oates?

Oates. My lord, I desire to ask this gentleman what religion he is of?

Beeston. I am a Roman Catholic.

Oates. Pray, my lord, be pleased to ask him, when he went to St. Omers, and when he came away from thence, and how long he was resident there.

Beeston. I know not exactly what year it was I came, but I staid the greatest part of seven years there.

Oates. Pray, my lord, ask him, what Jesuits went from St. Omers to the consult of April 1678?

Beeston. There was some that passed by, I did not take much notice of them.

Oates. Pray, my lord, ask him, who it was informed him of that consult?

Beeston. I do not know who particularly, I only heard of such a rumour.

Att. Gen. Was it an extraordinary thing?

Beeston. No, it was but an ordinary thing as they used to have once in three years.

Oates. You say you saw me every day there?

L. C. J. He says he believes he might, because you were reader in his stead; and if you had been absent he must have been called upon to read, which he was not, he says.

Oates. Very well, my lord, I desire you would ask him, whether he does not remember such a thing as an eight-days exercise, wherein those that perform the exercise, are separated from all company during that time?

Beeston. Yes, my lord, I do remember that he was once in that eight-days exercise, and during the eight days I saw him walk in the garden several times.

Oates. Pray, my lord, ask him, if he were an evidence at the Trial of the five jesuits, or Langhorn, and whether he gave this evidence long ago?

Beeston. No, I did not, I was not there.

Oates. Pray, my lord, ask him what reward he is to have?

L. C. J. Are you to have any reward for your testimony, Mr. Beeston?

Beeston. No, my lord.

Oates. My lord, I desire to know of him, how he comes to be picked out among the rest of the students there, to come here and be an evidence in this cause.

Beeston. My lord, I was subpoenaed by his majesty, if I knew any thing of this matter, that I should come here and testify my knowledge.

Oates. Pray, by what name did he go at St. Omers?

Beeston. By the name of Beeston, as I do now.

Oates. And is that his own name?

Beeston. Yes, my lord.

L. C. J. Pray, go on, Mr. Attorney.

Att. Gen. Swear Clement Smith. [Which was done.]

Sol. Gen. Pray, Sir, was you at St. Omers in the year 1677 and 1678?

Smith. Yes, I was.

Sol. Gen. Do you remember Mr. Oates there at that time?

Smith. Yes, I was in the same class with him.

Att. Gen. Pray, when came he thither, and how long did he stay there?

Smith. He came a little before Christmas, and staid till June.

Att. Gen. Was he not absent at any time all that while?

Smith. No, he was not, except one day.

Att. Gen. Do you remember Watson's business, his going thither in January?

Smith. He told me of it, and that he designed to ask the rector leave to go.

L. C. J. Was he absent any other time till June?

Smith. No, my lord, for I will tell you, I every day dined with him, eat a collation with him in the afternoon, and breakfasted and supped in the same refectory, during all that time, except when he or I was in the infirmary.

L. C. J. Whenever he was absent, he was in the infirmary, was he?

Smith. Yes, my lord.

L. C. J. Did not he miss his breakfast any time all that while?

Smith. If he did, we used to enquire after him.

Att. Gen. Pray when were you in the infirmary?

Smith. The 21st of April, New Stile, I fell sick, and remained sick till May the 7th, and was in the infirmary, and then he visited me almost daily, or every other day in the infirmary; and on the 2d of May I saw him and one Mr. Burnaby together, and on the day Mr. Pool departed, which I take to be the 5th of May, Mr. Oates came to me as soon as he was gone out of the house, and told me of it; and he did the same too that day that Mr. Hilsley went away, which was the 24th of April, New Stile.

Att. Gen. Was not he in the infirmary himself?

Smith. Yes, during this time he came into the infirmary, and was sick there.

Att. Gen. When was that?

Smith. A day or two after Mr. Hilsley went away, and continued there two or three days, and I remember it particularly by this circumstance that he proposed a question to the physician about himself in Latin, and spoke a solacism, which was this, he said, 'Si placet, Dominatio vestra.'

Oates. Who did say so?

L. C. J. You did, he says, speak that false Latin to the doctor.

Oates. That's false Latin, indeed!

L. C. J. We know that; but it seems it was your Latin.

Att. Gen. When came he away from St. Omers?

Smith. About the 20th of June; something after the 20th of June, as I remember.

L. C. J. Are you sure he was not out of the college so long as to make a journey to London, and back again?

Smith. No, I am sure he could not without being missed; and going to school with him, and eating dinner and supper with constantly always at the same place, I must needs know if he had gone.

Oates. When went I from St. Omers, does he say?

Smith. After the 20th of June 1678.

L. C. J. He is your old acquaintance and schoolfellow, Mr. Oates; you visited him when he was sick.

Oates. What religion is this gentleman of, my lord, I would know?

Smith. I am a Roman Catholic.

Oates. I desire your lordship to ask him how long he lived at St. Omers?

Smith. Above six years.

Oates. Pray ask him when he came away?

Smith. A little after Dr. Oates came away.

Oates. Did he come directly for England?

Smith. No, I did not.

Oates. Whither did he go then?

Smith. I went about a little.

Oates. Where, my lord.

Smith. I went about to take some turns in the Low-Countries; I went to Watton, and up and down.

Oates. He is a Jesuit, my lord, and that the world knows and must know.

L. C. J. I know nothing of it, I do assure you.

Oates. Pray, my lord, be pleased to ask him, whether he did not hear of a Consult of Jesuits in April 1678, and what Jesuits went from St. Omers to it.

Smith. I heard it was a rumour in the college, that there was to be a congregation at that time, but I know not where particularly it was to be kept; but I know that then there passed by St. Omers two fathers, Mr. Marsh and Mr. Williams.

Oates. What were they?

Smith. Jesuits.

L. C. J. He told you they were fathers.

Att. Gen. Pray, was it an extraordinary, or an ordinary meeting that?

Smith. They used to say in the college, that it was an ordinary thing to have such a congregation every three years.

Sol. Gen. Pray, swear Mr. Edward Price. [Which was done.]

Att. Gen. Pray, Mr. Price, will you give my lord and the gentlemen of the jury an account, whether you were at St. Omers in the year 1677, and 1678?

Price. I was there both these years.

Att. Gen. Do you remember Mr. Oates there?

Price. Yes, my lord, I do.

Att. Gen. When did he come, and when did he go away?

Price. He came there about December 1677, and he continued there till June 1678.

Att. Gen. Was he absent from St. Omers, at any time all that while?

Price. Never that I know of, but one night at Watton, when he came back the following day, and that was in January.

Att. Gen. Do you remember particularly that he was there in April and May 1678.

Price. I remember Mr. Hilsley, according to the foreign Stile, left St. Omers upon the 24th of April 1678. I was told the following day that Mr. Oates went into the infirmary, which was Monday the 25th, and staid there a day or two, and upon Wednesday the 27th I saw him going to mass; then upon the Sunday following, which was the 1st of May New Stile, came Mr. Burnaby to St. Omers, and I saw him in Oates's company that day, and I saw him on Monday again the 2d of May in his company; I saw him the 3d of May at the table, which I particularly remember, because it was the feast of the Invention of the Holy Cross: the 4th of May I have no circumstance to remember him by; but the 5th of May I saw him take his leave of Mr. Pool, and I likewise saw him the 10th or 11th of May at another of our actions, wherein Mr. Watson had a quarrel with him, and beat him. I should have missed him above any other man, because he was so noted a man.

Att. Gen. What was he noted for? for any thing else but his distinct place in the refectory?

Price. Yes, he was very absurd, and always quarrelling with the students there.

L. C. J. Do you remember him read in the Sodality?

Price. I was not of that bench that he was of.

Oates. My lord, I desire to know what this gentleman's religion is?

L. C. J. What religion are you of, Sir?

Price. If your lordship please to know, I am a Roman Catholic.

Oates. My lord, I desire to ask him, when he went first to St. Omers, and when he came away?

Price. I was six years at St. Omers; I was there a twelve-month before Mr. Oates came thither, and came from thence about three years ago.

Oates. Did you come directly to England when you came away?

Price. My lord, I went to Liege to study philosophy, and I live now with my father at home.

Oates. My lord, I desire to ask him, whether he did not hear of a consult to be held in April 1678.

Price. I did hear there was a congregation which was their usual triennial meeting, and particularly I remember about that time there came Mr. Williams, and Mr. Marsh, and it was reported that they were going to the congregation.

Oates. I desire to ask him, if he was not a witness at the Trial of the five Jesuits, or at the Trial of Langhorn?

Price. No, I was not.

Oates. Pray, what name did he go by at St. Omers?

Price. By my own name, which is Edward Price.

Sol. Gen. Then swear the next, that is Mr. James Doddington.

Att. Gen. Pray, Sir, were you at St. Omers in the year 1677, and 1678?

Doddington. Yes, Sir, I was.

Att. Gen. Did you know that gentleman, Mr. Oates, there?

Doddington. I know him very well.

Att. Gen. What time did he come from St. Omers, and how long did he stay there?

Doddington. He came about Christmas, and staid about the latter end of June.

Att. Gen. How do you remember he staid there so long? What circumstances have you to make you remember it?

Doddington. In general his conversation and canting stories after dinner and supper, and times of recreation, made him so remarkable, that nobody could miss him all the time he was there.

Att. Gen. Did you observe him to be in the hall, or at the exercises?

Doddington. Yes, I saw him several times.

Sol. Gen. Do you remember the time Mr. Hilsley went away?

Doddington. Yes, it was a little after Easter, and I do remember that two or three days after I went into the infirmary, and saw Mr. Oates there, and had discourses with him.

Att. Gen. Do you remember Mr. Burnaby's coming to St. Omers, and when was it?

Doddington. Yes, the first of May Mr. Burnaby came to St. Omers, and the next day I saw Oates with him, and for ten or twelve days successively they were in one another's company; and then of a sudden the correspondence broke off, but I know not upon what account.

L. C. J. Was he a reader there, as you remember?

Doddington. I do remember he did read in the Sodality.

L. C. J. When was that?

Doddington. I remember he read at Shrew-tide.

Oates. Did you hear me read there?

Doddington. Yes, that I did, Sir.

Oates. Were you of the Sodality?

Doddington. Yes, I was, Sir.

Att. Gen. Do you remember the time he came away from St. Omers?

Doddington. It was about Midsummer, my lord.

Att. Gen. Were you out of the college yourself at any time when he was there?

Doddington. No, I was not.

L. C. J. Come, I will ask you a plain question; was he so long at any time out of the college as to come to London and stay here two or three days, and come back again?

Doddington. My lord, he was so remarkable by his stories and ridiculous actions, and falling out with every one of the college, that if he had been absent, we must needs have missed him.

L. C. J. Did you miss him at any time?

Doddington. My lord, I never missed him but one day.

L. C. J. When was that?
Doddington. They said he was gone to Watton.

L. C. J. What time was that?
Doddington. In January, about six weeks after he came first.

Oates. Pray, my lord, ask him what religion he is of?

Doddington. I am a Roman Catholic.

Oates. And a scholar of St. Omers?

L. C. J. Make your remarks by and by.

Oates. Pray, my lord, ask him what name he went by at St. Omers?

Doddington. By the name of Hollis, my lord.

Oates. Pray, my lord, ask him how long he was resident there?

Doddington. Near upon five years.

Oates. Pray, my lord, ask him the occasion of his coming over at first?

Doddington. I had business in England, and I had a mind to see my friends.

Oates. Pray, my lord, ask him, whether he did not pretend at the five Jesuits Trial, that he came over upon the king's proclamation, to call home those that were in the seminaries?

L. C. J. Were you at the Trial of the five Jesuits?

Doddington. Yes, I was; but if I came over upon the king's proclamation, what hurt is there in that?

L. C. J. None at all, as I know of.

Oates. Pray, my lord, ask him, whether he did return again to St. Omers, or no?

Doddington. My lord, I passed by St. Omers once, but I never staid a day in the college since.

Oates. Pray, my lord, be pleased to ask him, whether he ever heard of a consult of the Jesuits in April 1678?

Doddington. I did hear of a congregation.

Oates. Call it a consult or a congregation, it is all one.

L. C. J. He says he did hear of it.

Oates. Ask him, by whom he did hear of it?

Doddington. I saw the provincial when he came back from England.

Oates. Who was that provincial? what was his name?

Doddington. Mr. Whitebread.

Oates. Was not Mr. Whitebread resident some time at St. Omers?

Doddington. Yes, a while he was.

Oates. Pray, was not that house under his government?

Doddington. My lord, I can give no account of that, but it is generally under the government of the rector of St. Omers.

Mr. Hansys. Pray, Sir, give me leave to ask you one question: Mr. Oates speaks of Mr. Whitebread; pray, how did Mr. Whitebread use Oates, when he came back from England?

Doddington. I heard say, he did check him very severely for his many miscarriages.

L. C. J. He heard it, he says, but he does not know it of his own knowledge; that is no evidence.

Sol. Gen. Pray swear Mr. William Gerrard. [Which was done.]

Att. Gen. Were you at St. Omers, Mr. Gerrard, in the years 1677, and 1678?

Gerrard. Yes, I was.

Att. Gen. Did you know Mr. Oates there?

Gerrard. Where is he, Sir?

Att. Gen. There he is in that corner, do you know him?—*Gerrard.* Yes.

Att. Gen. When came he to St. Omers?

Gerrard. He came to St. Omers in the year of our Lord 1677, and he went away in June 1678?

Att. Gen. Was he there all the time?

Gerrard. I never remember to have missed him, but only once, when he went to Watton for a night.

Att. Gen. By what tokens do you remember him at any time there in April or May?

Gerrard. The 2d of May we had a play, and he was there then; and I remember the 26th of May he was confirmed, and so was I, it being St. Augustin's day, and in the refectory he had a table by himself, and I used always at meal-times to pass by that table, and make a bow to the fathers above before I sat down at table; and I do not remember that ever he was absent, and if he had, I should surely have missed him.

L. C. J. When was St. Augustin's day, that you say you and he were confirmed?

Gerrard. It was the 26th of May.

Att. Gen. Do you remember him in April there?

Gerrard. I cannot tell any particular circumstance in April, but I do not remember to have missed him at all in April.

Sol. Gen. But you saw him there the 2d of May, you say?

Gerrard. Yes, I did so, and the 26th of May.

Oates. The 26th of May, Old Stile, I was there, my lord.

L. C. J. Ay, but he says the 26th of May, New Stile.

Oates. I was not there then, my lord.

L. C. J. He swears you were.

Sol. Gen. Pray, between the 2d and 27th of May New Stile, was he absent from St. Omers at any time?

Gerrard. I never remember to have missed him at all in that time.

Att. Gen. Do you remember Mr. Pool's and Mr. Hilsley's going away?

Gerrard. I do remember Mr. Hilsley's and Mr. Pool's going away, but I cannot speak particularly and exactly what time that was.

L. C. J. Is it usual to have scholars go away without being missed?

Gerrard. No, my lord, and he had a particular place by himself.

Oates. Pray, ask him, my lord, how he came to know that I went away in June?

Gerrard. We missed him in his place then, and it was discoursed of all over the town, that when the provincial came he was to be dismissed.

Oates. I desire to know what religion this gentleman is of?

Gerrard. My lord, I am a Roman Catholic.

Oates. Pray, my lord, ask him what name he went by at St. Omers?

Gerrard. By the name of William Clovel.

Oates. Pray, my lord, ask him, when he went to St. Omers, and how long he was resident there?

Gerrard. I came there about two years before he came, and was there about two years after he went away.

Oates. Pray my lord, ask him, Whether he came directly for England when he left St. Omers?

Gerrard. No, my lord, I was four years in Low-Germany and France, and came into England the last year.

Oates. Pray, Sir, were you a witness at the five Jesuits' trial, or at Langhorn's trial?

Gerrard. No, I was not; I came but last year to England, I tell you.

Oates. Pray, my lord, ask this gentleman, Whether he did not know or hear of a consult of Jesuits, that was to be in April 1678, and from whom he heard it?

Gerrard. My lord, I know it is the custom of the Fathers of that order to have a congregation once in three years, about the affairs of their society, but then no person is admitted to be one of that congregation, but them that have been 18 years Jesuits; and he not having been so much as a novice, I know not how, if he had been here, he could have been present at it.

L. C. J. He says, that there used to be a triennial congregation for the business of the society, but you could not be present at it, because you had not been 18 years a Jesuit.

Gerrard. 'Ann. decimo octavo currente,' is the word of the Rule.

Oates. Pray, my lord, ask him this question, How he knows that to be the Rule?

Gerrard. You or any man may read them in their books.

L. C. J. It seems he has read them, and he says you must pass through 18 years before you be admitted of the congregation; and he believes you were not there, for you were not capable of so much as a noviceship.

Oates. I desire your lordship to ask him, Whether or no he heard me read in the Sodality?

Gerrard. Yes, I did.

Oates. Were you of the Sodality?

Gerrard. Yes, I was.

Oates. Pray, my lord, ask him, what oaths are there taken before they be admitted into the Sodality?

L. C. J. No, by no means, I will not do it.

Oates. Why, my lord, may not I ask it, to shew what kind of men these are?

L. C. J. No, indeed, it is but the same question again, that I told you before is not to be asked, for it may make him liable to a penalty; if you come to be a witness, no man should ask you a question that might make you obnoxious to a penalty; no more must you ask them any such questions.

Oates. I have done with him, my lord.

Sol. Gen. Where is my lord Gerrard of Bromley?—*Lord Gerrard.* Here I am, Sir.

Att. Gen. Pray, my lord, do you remember Mr. Oates at St. Omers in the year 1677 and 1678?

Lord Gerrard. He was disguised in another habit, and another coloured perriwig, the hair was blacker than that he has on now; but I remember his face very well, and know him again by the tone of his voice, which was very remarkable; but I never remember that he was absent from St. Omers after he came thither. I remember his coming exactly, which was about Christmas; nor did I ever hear that he was absent till June 1678, New Stile, when he went away.

Sol. Gen. Do you remember, my lord, when Mr. Burnaby came?

Lord Gerrard. I do remember Mr. Burnaby's coming, but what time it was, I cannot exactly tell.

L. C. J. Is my lord Gerrard sworn?

Sol. Gen. I think so.

Lord Gerrard. No, my lord, I am not sworn.

L. C. J. You must be sworn, my lord. [Which was done.] Now if you be pleased to ask my lord any questions, do.

Att. Gen. My lord, we desire to know of my lord Gerrard of Bromley, whether he knew Mr. Oates at St. Omers?

Lord Gerrard. My lord, I remember he came in 1677, as I take it, it was the beginning of December; and never heard he was absent or missed till June 1678. I remember particularly upon the 25th of March, there was a new Lector to be reader of the Sodality; and Mr. Oates desiring it, he was appointed to read. I was there myself, and I never missed him; I heard him read, that I do remember, several Sundays and Holidays, and never knew him absent any one: however for five or six weeks he was constant at reading; and I can the better remember it, because he had a particular cant in his tone, which all men may know, who ever conversed with him.

Sol. Gen. If Oates please to ask my lord Gerrard any questions, he may.

Lord Gerrard. Pray, my lord, let me speak a word or two more.

L. C. J. Ay, my lord, pray go on.

Lord Gerrard. I remember I heard Mr. Oates was at the confirmation, which was upon St. Augustin's day; there was a confirmation by a Catholic bishop, about the 26th of May, New Stile; I remember I heard Mr. Oates was there, and the bishop did particularly note him as a person of elder years than the rest of the students.

L. C. J. Do you know this, my lord, of your own knowledge?

Lord Gerrard. I do, my lord.

L. C. J. Because you say you heard it.

Lord Gerrard. My lord, further I remember this, when the news of the Plot being discovered by Oates, came to St. Omers, where he went by the name of Sampson Lucy, and sometimes Titus Ambrosius; it was wondered

by all the scholars that knew him there, how he came to be so impudent to pretend he was at such a consult the 24th of April 1678, when all the college saw him every day in April and May at St. Omers, as much as a man can be seen in a family, and was never known to be absent so much as one day; besides, my lord, it is a thing as generally noted as a thing can be, that no scholar goes away from, or comes to the college of St. Omers, but it is particularly known to the whole house; it is the common news and discourse as much as any new occurrences are here about the town.

Sol. Gen. If Oates be pleased to ask him any questions, he may.

Oates. My lord, I desire this noble lord may be asked a question or two; I do not remember his lordship there.

Lord Gerrard. I do very well remember the man by particular remarks.

Oates. Yes, my lord, you have occasion to remember me, and so have your whole party. Pray, my lord, let my lord Gerrard be asked, What name his lordship went by at St. Omers?

Lord Gerrard. Mr. Oates, I am not difficult in telling the name I went by there. It was Clovel.

Oates. Pray, my lord, I desire to know what religion his lordship is of?

Lord Gerrard. Neither am I ashamed to own my religion, Mr. Oates; I am a Catholic.

Oates. Pray, my lord, if you please, because this noble lord pretends he heard me read, I desire to know of him, Whether he was of the Sodality?

Lord Gerrard. I remember you particularly by your voice, and that is one thing that particularly brings you to my remembrance now.

Oates. Pray ask this noble lord, if he was a witness at the Jesuits Trial?

Lord Gerrard. No, I was never a witness in my life before: by the oath that I have taken.

L. C. J. It is very well, my lord.

Oates. Pray my lord, ask this nobleman, Whether he did not know of a consult in April 1678, and from whom he knew it?

Lord Gerrard. No, I know of none, nor heard of any but by rumour, after that you pretended to discover such a thing.

Oates. Did his lordship see me every day, does he say?

Lord Gerrard. I cannot say every day: but I saw him at the Refectory generally, and I remember it particularly, because he sat at a table by himself; I believe he could not be absent without being missed, because we knew every person that came in and went out.

Sol. Gen. Then swear Mr. Samuel Morgan.

[Which was done.]

Att. Gen. Mr. Morgan, were you at St. Omers in 1677, and 1678?

Morgan. I was, my lord.

Att. Gen. Did you observe Mr. Oates to be there at that time?—*Morgan.* Yes, I did.

Att. Gen. Pray give an account when he came and when he went away?

Morgan. He came 14 or 15 days before Christmas, as I remember, and went away in June.

Att. Gen. What Christmas do you mean, Mr. Morgan?

Morgan. Christmas 1677.

Att. Gen. And when did he go away?

Morgan. In June 1678, he went away.

Att. Gen. Was he absent any time during that space?

Morgan. My lord, I know not that he was ever absent above one night in all that time.

Att. Gen. What time was that one night?

Morgan. Truly, my lord, I cannot tell, what month it was very exactly.

Att. Gen. Whither was he gone that night?

Morgan. He went to Watton, three miles off from St. Omers.

Att. Gen. Do you remember the time when Mr. Hilsley came away, and when Mr. Burnaby came to St. Omers?

Morgan. Yes, I do, my lord, very well.

Sol. Gen. Was Mr. Oates there when Hilsley went away?

Morgan. He was there then.

Sol. Gen. Was he there when Mr. Burnaby came?

Morgan. He was there when Mr. Burnaby came thither.

Sol. Gen. Was he there when Mr. Pool came away?

Morgan. Yes, my lord, he was so.

Sol. Gen. I will ask you this short question, do you believe in your conscience that he was absent any particular time all that while?

Morgan. No, my lord, I have no reason to believe so.

Oates. Pray, my lord, ask him what religion he is of?

Morgan. I am of the church of England.

Oates. When were you reconciled to the church of England?

Morgan. Five years since.

Oates. I desire to know of him, what induced him to be reconciled to the Church of England?

L. C. J. This is not a pertinent question, nor fit to be asked. Is he to give account of his faith here?

Just. Withins. It seems Mr. Oates is angry when the witnesses are Papists and when they are Protestants too.

Oates. When was it that I came to St. Omers, do you say?

Morgan. You came thither in December 1677.

L. C. J. So he told you before; why do you repeat things over and over again?

Oates. When was it I went away from thence, say you?—*Morgan.* In June 1678.

Sol. Gen. Do you remember the 24th of April Old Stile that year?

Morgan. Yes, my lord, I do remember it very well.

Sol. Gen. Do you remember him to be at St. Omers that day?

Morgan. Yes, I do, by this circumstance,

Sol. Gen. Ay, pray tell my lord and the jury that circumstance, how you come to remember it.

Morgan. We had the Trial of Ireland brought over to us soon after it was printed, and there we found mentioned, that Mr. Oates had deposed, that the 24th of April 1678, there was a consult of the Jesuits, and they met at the White Horse tavern, where they resolved to kill the king, and he carried that Resolution from chamber to chamber, and he did nominate the day; and having it then fresh in my memory, though he swore that he was the 24th of April Old Stile in London at that Consult, yet I found him to be at St. Omers by a particular circumstance. My lord, I was playing at ball that day, and struck it over into a court, into which I could not get over myself, but I saw Mr. Oates then walking in the court, and I came and borrowed his key, and so went in, and there passed between us words of friendship.

L. C. J. When was this, do you say?

Morgan. The 24th of April 1678, Old Stile.

Oates. I desire to let his orders be seen.

L. C. J. No, he shall not be put to shew any such thing.

Oates. He is a minister of the church of England, my lord.

L. C. J. Sir, we tell you we will not do it; what ado is here with your impertinent questions? Have not I told you, you shall not ensnare the witnesses?

Oates. He was going to pull out his orders himself.

Att. Gen. My lord, Mr. Oates may see them if he will, he is a beneficed minister of the church of England.

L. C. J. Does he mean those orders?

Att. Gen. Yes, he does, and here they are.

L. C. J. Let him see them. [Which was done.]

Oates. My lord, I desire to know of this gentleman, what name he went by at St. Omers?

Morgan. By the name of Morgan.

Sol. Gen. Swear Mr. Arundel, [Which was done.]

Att. Gen. Pray, Sir, will you give an account in short, whether you were at St. Omers in 1677 and 1678, and the time when Oates came thither, and when he went away?

Arundel. I was there when Dr. Oates came, and when he went away.

Att. Gen. When was that?

Arundel. Sir, I cannot be positive to the time exactly, but I think it was about January 1677, that he came there, and he went away about June 1678. I cannot be positive to the time exactly.

L. C. J. He does not particularly remember the time, but he thinks it was about January 1677, he came thither.

Arundel. I beg your lordship's pardon, he came there about December.

Att. Gen. Do you remember any particular circumstances, that you saw him there any particular time?

Arundel. Upon St. Augustin's day I saw him confirmed.

Sol. Gen. What day is that?

Arundel. The 26th of May, according to the foreign account.

L. C. J. Did you know him there then?

Arundel. Yes, my lord, I say I saw him confirmed.

Sol. Gen. Do you remember Mr. Hilsley's going away?

Arundel. I do not remember the time particularly, but I do remember Mr. Oates was actually there then.

Sol. Gen. Do you remember when Mr. Barnaby came to St. Omers?

Arundel. No, I do not remember the time, but he was there then too.

Sol. Gen. Do you remember when Mr. Pool went away?

Arundel. No, I cannot tell what day it was, but he was there at the time of his going away, upon my oath.

Sol. Gen. Can you tell any other particular time?

Arundel. The 11th of May New Stile, there was an action exhibited in the college.

L. C. J. Was Oates there then?

Arundel. To the best of my remembrance he was.

L. C. J. He does not affirm any particular, but only speaks in general.

Oates. Are you a Protestant too, Sir?

Arundel. No, doctor, I am not.

Oates. Pray, my lord, I desire to know what religion he is of?

Arundel. I am a Papist, my lord.

Oates. Pray ask him, by what name he went at St. Omers?

Arundel. I believe you know that as well as I, Dr. Oates.

L. C. J. You must answer his question.

Arundel. I went by the name of Spencer, my lord,

Oates. I do remember him, my lord, to have been there.

Arundel. Sir, your humble servant.

Oates. It is almost seven years ago, my lord, and I may not so well remember them as they do me; but I desire to know when he went to St. Omers first, and how long he was there?

Arundel. I was there seven years.

Oates. Pray, my lord, ask him, whether he was of the Sodality?

Arundel. Yes, my lord, I was.

L. C. J. Was he reader of the Sodality?

Arundel. Yes, my lord, in my time he was reader.

Oates. Then, my lord, I desire to ask him, whether he ever heard of a consult of the Jesuits, that was to be held in England, in April 1678, and from whom he heard it?

Arundel. Yes, my lord, I did hear in the college of a congregation.

Sol. Gen. Was that an extraordinary one, or of course?

Arundel. It was only of course, as they told us; once in three years they have one.

Oates. Pray, my lord, be pleased to ask this gentleman, what studies he followed at St. Omers?

L. C. J. He was of the Sodality, he says.

Arundel. My lord, I studied to the end of rhetoric.

Oates. My lord, I desire to know whether when he came from St. Omers, he did come directly for England?

Arundel. No, I went from thence to Paris, my lord.

Sol. Gen. Swear Mr. Christopher Turberville. [Which was done.]

Att. Gen. Pray, Mr. Turberville, will you acquaint my lord and the Jury whether you were with Mr. Oates at St. Omers, and when?

Turberville. Yes, my lord; he went by the name of Sampson Lucy there, and there I saw him, and there I was with him all the time; I was there before him, and I remained there after he went away.

Att. Gen. What time did he come to St. Omers, I pray you?

Turberville. Before Christmas.

L. C. J. What year?

Turberville. In the year 1677.

Att. Gen. What time was it he went away?

Turberville. In June 1678.

L. C. J. Were you there all that while at St. Omers?—*Turberville*. Yes, I was.

L. C. J. And to the best of your apprehension, you think he was there all that while?

Turberville. Yes, I do so, my lord.

Sol. Gen. Can you speak of any particular days you can remember?

Turberville. Yes, I do remember him upon the fourth, fifth, and sixth of May, for two or three days together; for, my lord, I do remember this circumstance: Mr. Pool about that time went away, and that very day Mr. Pool went from the college, I changed my lodging and went into his lodging, and that day I saw Dr. Oates in the chamber, and by the chamber-door.

Att. Gen. Did he continue in the college from the time he came about Christmas, to the time he went away in June?

Turberville. Yes, he did all the while, except it were one night in January, when he went to Watton.

L. C. J. What time in June did he go away?

Turberville. I am not positive, but I am morally sure he went away the 23d of June, as near as I can remember.

Oates. I was there in June, that is very well known.

L. C. J. What do you remember of his reading in the college?

Turberville. I do remember he was reader there on Sundays and holidays for a great while; I cannot swear upon what Sunday he began, but he left off the Sunday before he went away.

L. C. J. As near as you can remember, when did he begin to read?

Turberville. It was the beginning of April,

or latter end of March; I cannot justly swear which it was.

Mr. Molloy. Did he read on Holidays as well as Sundays?—*Turberville*. Yes, he did.

Oates. I must ask this gentleman one question, if your lordship please, and that is this, what name he went by at St. Omers?

Turberville. I went there by the name of Farmer.

Oates. Pray you, my lord, ask him what religion he is of?

Turberville. It is a hard question to answer that.

Oates. Nay, my lord, I desire to know what is his religion?

Turberville. I am, my lord, a Roman Catholic.

Oates. Ask him when he went to St. Omers first, and how long he staid there?

Turberville. I was there seven years very near.

Oates. I desire to know whether he did come away directly to England, when he came from St. Omers?

Turberville. No, my lord, I went into Italy.

Oates. Pray you, my lord, I desire to know whether he did go to Rome?

L. C. J. What if he did, what then? that is not all to the purpose, he went into Italy.

Oates. Pray, my lord, be pleased to ask him this question further, was he a witness on the behalf of the five Jesuits, or of Langborn at their Trials?

Turberville. No, my lord, I was not.

Oates. Pray, my lord, be pleased to ask him then, what reward he has been promised, or is to have for giving this evidence?

Turberville. None at all, my lord.

Oates. Pray, my lord, ask him, whether or no he heard of any consult of the Jesuits in April 1678, and from whom?

Turberville. There was a congregation, as I heard, but I do not remember that any of the fathers went from the college to it; several came by there, and lodged there as they went, and as they came back.

Oates. Pray, my lord, ask him how he came here to be a witness in this cause?

Turberville. I was subpoenaed.

Oates. Who served the subpoena upon him?

Turberville. The managers; it was sent to me by the king's counsel, I suppose; a man brought it to me.

L. C. J. It is no matter who brought it you, you were subpoenaed, that is enough.

Sol. Gen. Swear Mr. Anthony Turberville, [Which was done.]

Att. Gen. Were you at St. Omers in 1677 and 1678?

A. Turberville. Yes, my lord, I was.

Att. Gen. Did you observe the defendant Mr. Oates there at that time?

A. Turberville. Yes, I observed him all the while he was there.

Att. Gen. When did he come to St. Omers?

A. Turberville. In the year 1677, about Christmas.

Att. Gen. When went he away?

A. Turberville. A gentleman who was formerly sworn, (Mr. Thornton) and I were at breakfast with him the self-same time when he went away.

L. C. J. When was that?

A. Turberville. I suppose about the latter end of June 1678.

Att. Gen. Did you observe him to be there in April or May 1678?

A. Turberville. He was not absent above one night in January that I can remember from his first coming thither, for it was impossible he should be absent and not miss'd, he sitting at a distinct table by himself, and his conversation being so remarkable for a great many ridiculous actions, and great many pretty jests that he used; so that he was like a silly person, as I may call him, that used to make sport, and nobody could be miss'd so soon as he: And I saw a little boy in the college beat him up and down with a fox's tail. Indeed, my lord, all his actions were very remarkable: I saw him very much abusive to persons that liv'd with him in the college; and Mr. Oates could not be a person of this note, but all the world must take notice of him, and all that knew him must miss him, if he were away.

L. C. J. You hear him, Mr. Oates; he gives you a particular character; he says you were a very notorious person in many instances.

A. Turberville. My lord, I was a person then the youngest in the whole company, and Mr. Oates being very abusive to me, I did what became me to right myself upon him.

Oates. Pray, my lord, be pleased to ask this gentleman what the name was he went by at St. Omers?

A. Turberville. By my grandmother's name, which was Farmer.

L. C. J. Do you remember the time when Mr. Hilsley went away from St. Omers.

A. Turberville. He went away upon a Sunday. Mr. Oates remained afterwards there: I am positive I saw him several days after.

L. C. J. Do you remember when Mr. Burnaby came thither.

A. Turberville. Yes, my lord, and Mr. Oates was there then.

L. C. J. Will you ask him any questions? If you are not ready, I will ask him some for you. Come, what religion are you of?

A. Turberville. I am a Roman Catholick, my lord.

L. C. J. Well, and how long were you at St. Omers?

A. Turberville. Six years and upward, my lord.

L. C. J. When you came away from thence, did you come directly for England?

A. Turberville. I took a circumference round.

Oates. My lord, I do find my defence is under a very great prejudice.

L. C. J. Why so? Because we won't let you ask impertinent questions, or such as may render the witnesses obnoxious to a penalty.

Oates. No, my lord, it is not fit they should, for there is a turn to be served.

L. C. J. What do you mean by that? Ay, and a good turn too, if these witnesses swear true: It is to bring truth to light, and perjured villains to condign punishment.

Oates. Good my lord, be pleased to hear me.

L. C. J. If you behave not yourself with that respect to the court as you ought, pray get you gone. Do you think you shall give such language as this in a court of justice?

Oates. My lord, I did not design—

L. C. J. If you behave yourself as you should, you shall have all due regard; but if you fly out into such abusive extravagancies, we'll calm you as you ought to be calmed.

Oates. I would vindicate myself, I meant it not of the court.

L. C. J. So you had need. Don't think we sit here to let you asperse the justice of the court and of the nation, as if the judges sat here to serve a turn.

Oates. I say, these men do come to serve a turn; but I laid no aspersion upon the court, nor meant it of them.

L. C. J. Behave yourself as you ought, and you shall be heard with all the fairness can be desired.

Oates. I did perceive your lordship and the court made yourselves pleasant with my questions.

L. C. J. I did not make myself pleasant with your questions, but when you ask impertinent ones you must be corrected: You see we do the same thing with them; I find fault with nothing but what is not to the purpose.

Oates. My lord, I desire it may be observed, that these men that come now, are the same witnesses that appeared at the Old Bailey, and were not believed there.

L. C. J. Observe what you will by and by.

Att. Gen. No, they are other men, but they bear the same testimony indeed.

Sol. Gen. Swear Mr. Clavering. [Which was done.]

Att. Gen. Come, Sir, I'll ask you a short question; were you at St. Omers with Mr. Oates, and when?

Clavering. Yes, I was; I came the 10th of December 1677, to St. Omers; he told me he came thither that day too, and I lived there all the time that he was there, which was till towards the middle of summer: I do not remember that he ever was absent, but once at Watton.

Att. Gen. Do you remember Mr. Burnaby's coming thither?

Clavering. Mr. Oates was there when Mr. Burnaby came there.

Sol. Gen. Was he there when Pool came away?

Clavering. He was there when Mr. Pool went away, and likewise I remember his being there at the time of the congregation.

Att. Gen. Pray, tell the circumstance how you know he was there then?

Clavering. There came a gentleman there

that desired a charity of the students, and I was the person that made the collection for him in the house; and I remember he did ask, if there was any one that was a student there that had been in Spain? We told him there was one, and described him; upon which he knew the gentleman in Spain. Upon that I told Mr. Oates, that there was one there that knew him, but he deny'd to come and speak with him. Now I remember that it was the time of the congregation, for some made enquiry why he got so little money at Watton, and it was said it was because the fathers were gone to the congregation in England. And he asked me particularly, what was done at the congregation in England?

L. C. J. Did Oates ask that question?

Clavering. Yes, my lord, he did.

L. C. J. Whom did he ask it of?

Clavering. Of me.

L. C. J. When was that?

Clavering. I think it was about the time of the congregation.

L. C. J. How came he to enquire after it?

Clavering. I was talking with him, and said he to me, 'Know you nothing what the business is that they are to do at the congregation?' Said I, 'Mr. Lucy, I know not what they do; I think not much: for I hear at those meetings many times they stay an hour or two, and have done when they have chosen their procurator.'

Sol. Gen. And you believe he was there all the time?

Clavering. Yes, my lord, I do believe it.

Oates. Pray, my lord, let me ask him a question or two.

L. C. J. Ay, what you will.

Oates. What religion is this gentleman of?

Clavering. I am a Catholic.

Oates. A Roman Catholic you mean, I suppose?

Clavering. Yes, I always understood it so, Mr. Oates.

Oates. My lord, I desire to know how he came not to be produced at the Jesuits Trial, to give this evidence he gives now?

Clavering. I can give a very good reason perhaps: I was then, my lord, in Germany.

L. C. J. That is reason good enough of all conscience.

Just. Withins. That was a new question, and you have a satisfactory answer, I think.

Sol. Gen. Swear Mr. John Copley. [Which was done.]

Att. Gen. Were you at St. Omers in 1677 and 1678?—*Copley.* Yes, I was.

Att. Gen. Was Oates there then?

Copley. I saw him all the time he was there.

Sol. Gen. When did he come thither?

Copley. He came a little before Christmas, to the best of my remembrance.

Sol. Gen. When went he away?

Copley. In 1678.

Sol. Gen. In what month in 1678?

Copley. In June 1678.

Sol. Gen. Was he absent any part of that time?

Copley. I was there, and he was there too.

Sol. Gen. Was he absent any part of the time from Christmas to June?

Copley. Nay, I am sure he was there all the time, except that night he was absent at Watton, and that was in January.

Oates. Pray, my lord, ask him what religion he is of?

Copley. Does your lordship ask me that question?

L. C. J. Yes, I do ask you; Mr. Oates would know it.

Copley. I am a Roman Catholic, my lord.

Sol. Gen. Swear Mr. Cook. [Which was done.]

Att. Gen. Did you know Mr. Oates at St. Omers, and when?

Cook. He came there a little before Christmas, 1677.

Att. Gen. How came you to know him there?—*Cook.* I lived in the house then.

Att. Gen. Was he there all April and May?

Cook. Yes, he was there till the latter end of June.

Att. Gen. Did you see him every day?

Cook. Yes, I did.

Att. Gen. Can you tell any particular time?

Cook. I am positive he was there the 30th of April.

Att. Gen. What Stile?—*Cook.* New Stile.

L. C. J. How do you know he was there then?

Cook. It is a remarkable time; there is a procession that they keep there on that day from the Sodality to the church, and I saw him go among the rest at the latter end among the rhetoricians.

L. C. J. What say you, was he there on that day Mr. Hilsley went away?

Cook. I do not remember that.

L. C. J. Do you remember Burnaby?

Cook. I was there when Mr. Burnaby went away.

L. C. J. But when he came was Oates there?

Cook. I cannot speak particularly to that.

Att. Gen. What was your place in the College?

Sol. Gen. My lord, he is a Lay-man, be sure.

Cook. I was a servant in the house.

Oates. In what place do you serve?

Cook. I was a taylor.

Oates. I do not remember him.

Cook. But I remember you.

Sol. Gen. Swear Jo. Wright, esq. [Which was done.]

Att. Gen. Do you remember Oates at St. Omers?—*Wright.* Yes, I do.

Att. Gen. When was it?

Wright. The winter before the notice of the plot was.

Att. Gen. What year was it in?

Wright. In the year 1677.

Att. Gen. What month in that year did he come thither?

Wright. I cannot tell, it was winter time.

Att. Gen. When did he go away?

Wright. He went away in summer, I cannot tell just the time.

Att. Gen. Was he absent at any time, from his coming in winter to his going away in summer?

Wright. The scholars said he was once at a place called Watton.

L. C. J. Come, this says nothing to the purpose.

Sol. Gen. My lord, we leave it here.

L. C. J. What say you to it then, Mr. Oates?

Oates. Has Mr. Attorney done?

Att. Gen. Yes, we have done for the present.

L. C. J. Then are you to make your defence.

Oates. My lord, here is an Indictment brought against me for Perjury; and this Indictment sets forth, 'That I should, upon the 17th of December, appear at the Old Bailey, and there swear, That there was a treasonable consult of the Jesuits met at the White-Horse Tavern in the Strand, and that this treasonable consult did divide itself into lesser companies and meetings, and that I carried about a certain resolution, which the Jesuits came to, concerning killing the king, from chamber to chamber to be signed.' My lord, I have a great exception to make to this Indictment, and that is, my lord, as to the form. For, by your lordship's favour, I think the perjury is not well assigned, and according as I am advised, I offer this to your lordship's consideration. It says in the assignment of the perjury, 'Ubi revera et in facto predictus Titus Oates non præsens fuit ad aliquam Consultationem Jesuitarum apud le White-Horse Tavern prædict' in le Strand, in Com' Midd' prædict', 'super vicesimum quartum diem April', anno 'Dom' Millicesimo.'

L. C. J. How, 'Millicesimo'?

Oates. My lord, it is Law Latin: I suppose it may serve in a court?

L. C. J. No, it is true Latin there.

Oates. I cannot tell how to read it better.

L. C. J. I do believe that.

Oates. It is written in such a hand, I cannot read it; but the substance of it is, it says here, That I did not carry any resolution from chamber to chamber *signed*. Now the evidence charged upon me to be given, is, that I did not see it *signed*: so that the assignment of the perjury does not pursue the Oath, as it is set forth; for if it be *signed* in the evidence that was given, it ought to be *signed* in the perjury that is assigned; and I humbly crave the opinion of your lordship and the court upon this point.

L. C. J. Look you, Mr. Oates, that you offered before, and I gave this answer, which I must now repeat, That now we are upon the fact, and this exception will be saved to you for its proper time, if you be convicted. It is not proper now; but suppose there were that thing which you say is an objection, yet you must know, that there are two perjuries that are assigned; the one is upon the first part of your

oath, which was, that you were present at a consult of the Jesuits the 24th of April, 1678, at the White-Horse Tavern in the Strand; 'Ubi revera,' you were not there. Now, do you admit in the first place, that you were sworn in that particular?

Oates. No, my lord, I do not.

L. C. J. If the Jury find that you were sworn in that first point, that you were not there, it will be easily believed you swore false in the other point, that you did not carry the resolution from chamber to chamber.

Oates. But, my lord, it is not well assigned, I think.

L. C. J. That will be saved to you after the verdict, I tell you, if there be occasion for it.

Oates. My lord, I suppose the proof ought to be according to the record, and the record makes the perjury differ from the oath.

L. C. J. I tell you, that is to the form, and that will be saved to you after the verdict one way or the other.

Oates. Then will your lordship be pleased to consider there was a record brought in, which is almost the same with that I am to offer to be read, on my behalf, and which is the first proof that I have to offer of the consult that was held in London, in April 1678. And I desire Mr. Percivile may be called, I forget his christian name, and Mr. Vaughan who is my solicitor; but pray, my lord, let me first have the opinion of the court, whether they did prove the words that I am said to swear, as they are laid in the indictment.

L. C. J. Yes, very fully, we think so; but the Jury are to try that; that is a point of fact: but if you will, you shall have our thoughts about it; we think they are fully proved.

Cryer. Here is Mr. Percivile.

Oates. Pray swear him. [Which was done.]

L. C. J. What do you ask him?

Oates. Mr. Percivile, you examined the conviction of Mr. Ireland, pray put it in: is it a true copy?—*Percivile.* Yes, it is.

Oates. My lord, I desire that a Conviction and Attainder of Mr. Ireland may be read.

Att. Gen. It has been read already.

Oates. My lord, I will not take up the court's time any more than is necessary for my defence.

L. C. J. Nay, do as you will, as long as you offer things pertinent and decent, the court will hear you with all patience, and you may take what time is necessary for you.

Oates. I thank your lordship: I designed nothing at all of reflection upon the court, but a reflection on the witnesses that came in against me.

Cl. of Cr. This is a copy of the same record that was before read.

Oates. Well, if that be allowed for evidence for me, I am contented to spare the time of the court, not to read it again; but, my lord, I offer this, and desire to have counsel assigned me to argue this point in law; that is, whether or no the Convictions and Attainders of Ireland,

Whitebread, and the rest of them, of a treasonable consult of the 24th of April 1678, where it was resolved to murder the late king, ought not to be taken as a sufficient legal proof of the fact, so long as those attainders remain of force? and whether the averment of that being false, is to be received against those records?

L. C. J. There is no difficulty in that at all in the world, Mr. Oates.

Oates. My lord, I do not know the law, and therefore I pray I may have counsel assigned to argue that point.

L. C. J. There is no question in it. God forbid, if a verdict be obtained by perjury, that that verdict should protect the perjured party from being prosecuted for his false oath. There were no justice in that; nor is it an averment against a record, for this is not a writ of error in fact that will reverse it, but the record remains a good record and unimpeached still: but though it be a good record, yet it is lawful to say this verdict was obtained upon the testimony of such an one, that for-wore himself in that testimony, and for that particular perjury he may surely be prosecuted.

Oates. Is not that attainer an uncontrollable evidence of the fact, till it be reversed?

L. C. J. Yes, it is against the party attainted; but if that attainer was founded upon a verdict that was obtained by perjury, God forbid but he should be told so that did perjure himself.

Oates. Well, my lord, if your lordship rules that for law, then I will go on; and I must now observe to the jury in the opening the evidence two things. First, That the indictment upon which Ireland was tried, was found the 16th of December 1678, and on the 17th of December, the next day, Ireland was tried at the Old Bailey; and then I find this indictment brought against me for perjury, is found at the Old-Bailey six years after the fact, by special commission. Now, I submit it to your lordship's and the jury's consideration, why the presentment and the finding of this bill for perjury has been so long delayed, since it appears by the evidence, that the witnesses that have been produced to prove the perjury, were either at the trial of the five Jesuits, or might have been produced then; and though they are not all the same persons, yet they all bear the same testimony that was then offered, but were not credited; and I hope when my evidence is heard, they will have the same reputation with this jury that they had with those others. My lord, I must acquaint your lordship and this court, That in this indictment for which Mr. Ireland was convicted, Mr. Whitebread and Mr. Fenwick did undergo part of the trial, and did hear the whole body of the evidence that the witnesses testified against them; but there being but one witness against them two at that time, which was myself, (Mr. Bedloe being then upon an intrigue, as your lordship may remember) my lord chief justice Scroggs, who was then the mouth of the court, did discharge the jury of Mr. Whitebread and

Mr. Fenwick; and remanded them to prison, which Mr. Whitebread six months after did remark to the court, and urged it as a plea for himself to be discharged; but that being overruled by the court, he was tried. Now, he had six months time to provide himself with new fresh evidence to asperse me, and to endeavour to falsify that testimony I gave in against Whitebread and Fenwick, when Ireland was tried, and so he knew what it was. I must further observe to you, my lord, and gentlemen of the jury, That my case is very hard, that since the substance of my testimony was with credit received, and the jury upon convicting them were acquainted, "That they had found an unexceptionable verdict; that all the objections against the evidence, were then fully answered; that there was nothing that the prisoners had been wanting in to object, which could be objected; and that the thing was as clear as the sun." And yet after six years time, I must come to be called to an account for perjury in my testimony of that part of the Popish Plot; with which the king and kingdom, four successive parliaments, all the judges of the land, and three juries, were so well satisfied. I shall therefore offer to your lordship and the jury's consideration the unanimous Votes of three Houses of Commons; I shall offer the Proceedings of the House of Lords, that is the highest judicature in the kingdom; I shall prove what I have opened by the testimony of several noblemen that are here, who will testify this for me. My lord, I shall prove, that several attempts have been made to baffle this testimony, as that of the murder of sir Edmundbury Godfrey, who took my depositions, the contrivance of Peine, Farewell, and Thompson, made in the year 1681 or 1682, I forget which; I shall then produce Evidence that I was actually here in town at the time in question; and then upon the whole I shall submit it to your lordship and the jury. But to prepare your lordship and the jury the better for my evidence, I would again urge the strangeness of this prosecution, and the hardship that is put upon me, to be tried for perjury in an evidence given six years ago, and formerly very industriously, though not successfully, endeavoured to be falsified by sixteen St. Omers youths, that were produced and examined before all the judges in the kingdom, and that not only once at Whitebread's trial, but a second time at Langhorn's trial; in neither of which would the jury believe them, because of their religion and education, and the persons under whom they were educated, who were men of known artifice. Then, my lord, I would argue thus: if at that time my evidence were true, it must be true still, for truth is always the same; and if it were then true, and I can prove it to be true, it will be thought a hard thing without all doubt, that this should be put upon me. Then, my lord, I would fain know from my prosecutors, why this indictment of perjury has been deferred so long? Why these witnesses that come

now to testify this matter, and could then have been brought, did not come before, to justify at the trials of these persons what they now say, which might have saved their lives, if true, and had it been credited. Then I shall offer to your lordship what I desire you and the jury would please to observe, that though the king's counsel are now against me, yet they are also against themselves, for they were of counsel for the king in those cases; particularly Mr. Solicitor at Langhorn's Trial, sir Robert Sawyer at sir George Wakeman's Trial; they were of counsel before for the truth of my testimony; they are now against it. I only mention that, and pass it over. But this is not the first attempt that has been made to discredit the testimony of the Popish Plot, as I told you before. Now, can it be supposed that the love and desire of public justice can be the cause of this attempt to falsify my evidence after so many trials, in which it has been credited and confirmed? Can any thing, my lord, more plainly tend to destroy and subvert the methods of justice, to frighten all witnesses from henceforth from ever appearing to discover any conspiracies? And does it not tend to expose and vilify the known understanding and justice of the late king of ever-blessed memory, to arraign the wisdom of his privy-council, his great and noble peers, his loyal Commons in three successive parliaments, his twelve judges, and all those several juries that were upon those trials? Had not those juries sense? Had they not honesty? Had they no consciences? And the judges before whom those conspirators were tried, were they men of no justice, nor honour, nor integrity, nor conscience, nor understanding? Shall those juries be said to have drawn the innocent blood of these men upon their own heads and the nation? as, if I were perjured, it must be innocent blood that was shed upon it.

L. C. J. No, no, that goes a great deal too far, Mr. Oates: the jury have no share, nor the judges neither, in that blood which was shed by your oath.

Just. Withens. No, that is your own most certainly, and not theirs.

Oates. But this, I say, makes it most plain: the evidence was then true, and I hope I shall make it as evidently plain, it is as true now; and I do not question, but upon the evidence I shall now give, both positive and collateral, the jury will believe me, and acquit me of this foul accusation. Pray, my lord, be pleased to consider, that when the jury brought in Ireland guilty of the high treason, of which he was accused, and convicted him, Pickering, and Grove; says my lord chief justice Scroggs (that then was) to them: "Gentlemen, you have done like very good subjects, and very good Christians, that is, like very good Protestants; and now much good may do them with their thirty thousand masses;" as I shall prove he did say. Then I insist, in the second place, that Whitebread's conviction does reinforce the conviction of Ireland, because of

the attempt by the St. Omers witnesses to have overthrown my evidence: but since I am attacked again in the same kind, by the violence of the popish interest, and by the malice of my popish adversaries, I am contented to stand the test with all my heart. And then, to conclude all, I shall shew the court, that it is in vain for the popish party to expect and think to wipe their mouths, with Solomon's whore, and say, 'they have done no wickedness.' No, I question not but thousands of Protestants in this kingdom are fully satisfied and convinced of the truth of the popish plot, all and every part of it. Now, my lord, if you please to give me leave to proceed on in my evidence, I shall beg that these records of conviction may be read, which are my first proof of the consult; and I shall then bring witnesses *viâ voce*, and shall make it appear, that what I did swear at those trials was true.

L. C. J. Not to interrupt you in your defence, or the method you will take for it, I would put you upon that which is proper for you to apply yourself to, because the question now is not, whether there was a consult or congregation of the jesuits here upon the 24th of April 1678? but the question that toucheth you is, whether you were present at any such consult here in London the 24th of April 1678? These gentlemen, some of them, do say, there was a consult, and others that they heard of it, and believe there was such a one, because it was usual to have a triennial congregation for some particular purposes: but the question is, whether you have sufficient proof to prove yourself to be here on the 24th of April 1678, at which time it is agreed on all hands there was a consult?

Oates. But will your lordship be pleased to take notice of the drift of the evidence, how they are consistent one with another? These gentlemen that have now been sworn to prove that I was not at this consult, do attempt to prove that I was at St. Omers: now, to answer this, I shall not go about to prove that I was not then at St. Omers, but that I was actually then, and about that time, here in London; and then all that proof that Mr. Attorney General has brought, must be laid aside.

L. C. J. You say well; prove that.

Oates. Now, my lord, to introduce and prepare the jury for this, it will be necessary, I humbly conceive, to read the Records of the conviction of Whitebread and Ireland.

L. C. J. Well, go your own way; we are not to direct you: I only tell you where the question lies.

Oates. Sir Samuel Astrey, pray be pleased to read them in English, that the jury may understand them. First read Ireland's record. [Which was done.]

Oates. Now read Whitebread's record: read but the attainer, I will not trouble the court with the whole record.

Cl. of Cr. "Thomas White, alias Whitebread, William Harcourt alias Harrison, John Fenwick, John Gaven, and Anthony Tupper,

were found guilty of high-treason, and attainted, and execution awarded against them upon that attainer."

Oates. Does not the record say, the jurors say upon their oaths they are guilty?

L. C. J. Yes, I will warrant you.

Cl. of the Cr. It is 'dicunt super sacramentum suum.'

Oates. Very well. These, my lord, I do produce as my first evidence, to prove that there was a traitorous consult held upon the 24th of April 1678, at the White-Horse tavern, in the Strand, it having been believed and affirmed by two verdicts. Now give me leave to offer but this to the court, that at the trial of Mr. Ireland I gave so full and ample a testimony against Whitebread and Fenwick, accompanied with all the circumstances of time and place, that my lord chief justice Scroggs said, 'The evidence might be sufficient to have satisfied a private conscience, though it was not a legal proof then to convict them, there being but one witness against them : ' and for this I call Mr. Robert Blaney.

Oates. Pray swear Mr. Blaney. [Which was done.]

L. C. J. What do you ask Mr. Blaney?

Oates. Mr. Blaney, have you your notes of Ireland's trial here?

Blaney. Yes, Sir, I have.

Oates. Pray will you look into what my lord chief justice Scroggs said when he discharged the jury of Whitebread and Fenwick.

Blaney. Whereabouts is it, Sir, in the printed trial?—*Oates.* It is page 55.

Blaney. I have found the place, what is it you would ask me about it?

Oates. Whether my lord chief justice Scroggs did not use these words to the jury? 'I do acknowledge that Mr. Oates has given a very full and ample testimony, accompanied with all the circumstances of time and place, against them all; that may go far with you, all things considered, to believe there is a plot: yet I do not think they have proved it against Whitebread and Fenwick by two witnesses; though the testimony be so full as to satisfy a private conscience, yet we must go according to law too. It will be convenient from what is already proved, to have them stay till more proof come in; it is a great evidence that is against them, but it not being sufficient in point of law, we discharge you of them. It is not a legal proof to convict them by, whatsoever it may be to satisfy your consciences.'

Blaney. I have looked upon my notes, and I cannot find exactly those words.

L. C. J. He says he cannot find that passage as it is there.

Blaney. There is something to that purpose, my lord.

Oates. Pray, Sir, will you look into your notes in the very same place, what my lord chief baron said: 'You must' (speaking to the jailor) 'understand they are no way acquitted: the evidence is so full against them by Mr. Oates's testimony, that there is no

reason to acquit them; it is as flat as by one witness can be.'

Blaney. There is such a passage, I find, in my notes.

L. C. J. He says there is such a passage.

Oates. Then I desire Mr. Blaney would look into his notes, what my lord chief justice Scroggs said in his summing up the evidence against Ireland. He mentions the evidence of sir Dennis Ashburnham, who was produced to discredit me, and then he adds, 'When the matter is so accompanied with so many other circumstances which are material things, and cannot be evaded or denied, it is almost impossible for any man either to make such a story, or not to believe it when it is told.' It is Ireland's trial, page 72.

Blaney. My lord, I do find such a passage in my notes.

L. C. J. He says there is such a passage in his notes.

Oates. Then I would ask Mr. Blaney another question: At the bringing in the verdict of the jury against Ireland, Pickering, and Grove, my lord chief justice Scroggs (that then was) had this expression: 'You have done, gentlemen, like very good subjects, and very good Christians, that is to say like very good Protestants; and now much good may their 30,000 Inneses do them.'

Blaney. Yes, my lord, there is in my notes such an expression of my lord chief justice Scroggs.

Oates. Pray you, Mr. Blaney, have you Whitebread's trial? the Trial of the five jesuits, I mean.

Blaney. My lord, when I received a subpoena from Mr. Oates to be here this day, and to bring my notes of Ireland, Whitebread, and Langhorn's Trials, I did (as I did before upon another occasion) make a search for all my notes, but could not find any but those of the Trial of Ireland and Langhorn, and those I have brought here, but have not Whitebread's.

L. C. J. He says he has not the notes of Whitebread's trial; he cannot find them.

Oates. Then I must desire, my lord, that the printed trials may be read.

L. C. J. No, they are no evidence: if you can prove what was said at any of them, you may by witnesses, but not by the printed books.

Oates. Then will your lordship be pleased to give me leave to mention what was said by your lordship at that time, when you were Recorder of London, about your satisfaction with the evidence.

L. C. J. Ay, with all my heart; and whatever I said, I will own, if I can remember it.

Oates. Will your lordship be pleased to be sworn then?

L. C. J. No, there will be no need for that; I will acknowledge any thing I said then.*

Oates. Then, if your lordship pleases, I will read those passages out of the books.

* See in this Collection a Note to Bushell's Case, vol. 6, p. 1012.

L. C. J. Ay, do so.

Oates. Says Mr. Recorder of London, (in particular to that part of the prisoners defence, at the trial of the Five Jesuits, and the full scope given them of making objections to the evidence) when he gave judgment of death upon these five jesuits and Langhorn (for I now speak of your lordship in the third person,) 'Your several crimes have been proved against you; you have been fully heard, and stand convicted of those crimes you have been indicted for.'

L. C. J. I believe I might say something to the same purpose as you have read now.

Oates. I thank your lordship for that acknowledgment.

L. C. J. Ay, I will own any thing I did say.

Oates. My lord, I have one passage more to urge, and that was, my lord, after the Jesuits had been convicted, when the jury brought in their verdict, and found Whitebread, Fenwick, Harcourt, Gaven, and Turner guilty, your lordship, applying yourself to the jury, said thus to them: 'Gentlemen, you of the jury, there has been a long evidence given against the prisoners at the bar; they were all indicted, arraigned, and tried for high treason, depending upon several circumstances: they can none of them say the court refused to hear any thing they could say for themselves; but upon a long evidence, and a patient hearing of the defence they made, they are found guilty; and for any thing appears to us, it is a just verdict you have given.'

L. C. J. I believe I might say something to that purpose too at that time; and no doubt the jury did (as the case then stood) find an unexceptionable verdict.

Oates. There is another place, my lord, that I would instance in, for your lordship's opinion of the evidence of the Popish Plot, and that is this: now, my lord, I bring your lordship as you were of counsel for the king at Mr. Colledge's Trial at Oxford, the 17th of August 1681. There you, my now Lord Chief Justice, directing yourself to the jury, had this expression; 'We come not here to trip up the heels of the Popish Plot, by saying that any of them who suffered for it did die contrary to law; for if Mr. Dugdale was not a person fit to be believed, or if the rest of the judges who tried Gaven were out in the law, then that man died wrongfully; for he had as much right to be tried according to law as any other person whatsoever.' This was your lordship's opinion of the matter then, and your lordship, as counsel for the king, did there deliver the law as well as fact to the jury. If then they went against law, that would go to trip up the heels of the Popish Plot—

Just. *Withins*. We are got into an endless wood of sayings of people, I know not where and when; and when all is done, it is to no purpose.

Oates. My lord, it is a part, and a great part of my defence, to shew what credit has been given to the evidence of the Popish Plot.

L. C. J. Ay, but what counsel says at the bar, or what judges say in the court of their opinion, is no evidence of a fact, of which the jury are judges only.

Oates. My lord, every judge is upon his oath, and delivers his judgment according to his oath.

L. C. J. Not as to the fact, but only in points of law, so as to tell the jury what the law is, if the fact be so and so.

Oates. My lord, it goes a great way with the jury to have the judge's opinion.

L. C. J. Mr. Oates, deceive not yourself; all this you have insisted on hitherto, has not been to the purpose, nor is any sort of evidence in this case; and therefore do not run away with an opinion of this as evidence; a judge's opinion is of value in points of law that arise upon facts found by juries, but are no evidence of the fact: for judges only do presume the fact to be true, as it is found by the jury; and therefore say they, out of that fact so found, the point of law arising is thus or thus. Then in case, after a jury has given a verdict of the fact, a judge's opinion of the fact (which may be perhaps contrary to the verdict) should be an evidence as to that fact, that would be to overthrow and nullify the jury's verdict: no, that is not the judge's province. Surely you would not have a judge's private opinion, that twelve men have found a verdict against the fact, to be an evidence as to that fact; no; but admit the fact to be so or so, then the person convicted of the fact ought to suffer so or so. And by the same reason as this, a jury of honest gentlemen here, when I tell them here is a plain fact either to convict you, or to acquit you upon this indictment, are not bound to go by what I say in point of fact, but they are to go according to their own oaths, and according to the evidence and testimony of the witnesses: it is not my opinion that is to weigh at all with them, whether you are guilty of this perjury, or are innocent, but the evidence that is given here in court. Therefore, what my Lord Chief Justice Scroggs said at any of those trials, or what I said, or any other person, that either was of counsel, or a judge on the bench, said as our opinions is but our opinions on the fact as it occurred to our present apprehensions, but is no evidence nor binding to this jury. I must tell you, there is no doubt, but that those juries did every one of them believe the evidence you gave, or they would not have convicted the prisoners. Do you think they would have found a verdict against their own belief, and being upon their oaths to make true deliverance between the king and the prisoners, have perjured themselves to hang others? If they had so done, they had committed wilful murder, and the worst of murders too, being under colour of the process of law; but yet all this is no evidence. I do not discommend you for

* See vol. 7, p. 488. † See vol. 7, p. 418.

‡ See vol. 8, p. 704.

insinuating these things, as introductive and preparative to what evidence you have to offer; but it is no evidence one way or other. Alack-a-day! how many times have we causes here in Westminster-hall, wherein we have verdict against verdict? and yet no imputation to either of the juries, which might give different verdicts upon different grounds. There was a notable case lately of my lady Ives* at this bar: we all thought upon the first trial, that she had as good a title to the land as could be; all the judges and the counsel went away (I believe) satisfied with the jury's verdict for her: but when the cause came to be heard again, we found all the witnesses to prove her title, were guilty of notorious perjury, and the same persons which did believe before that she was in the right, and the jury had done well, when they heard the second trial, did believe she was in the wrong, and accordingly the second jury found it so; and we believe that last verdict to be good, without any reflection on the credit of the first jury, because the evidence was as strong on her side then, as it was afterwards against her. In these cases we give our opinions always according to the present testimony that is before us.

Oates. Then, my lord, I offer this to your consideration that those men that were thus charged by me with high treason, were priests and Jesuits most of them, and particularly Mr. Ireland, in whose trial I am said to have committed this perjury; and you shall find him to have been by others proved a priest and a Jesuit and actually engaged in a design against the life of the king. If I then do prove, that Ireland was engaged in a design against the late king's life, and was a priest and a Jesuit, I desire to know, whether this be not a collateral evidence to render me of credit sufficient and support my testimony?

L. C. J. By no means upon this indictment. It is true, it may give some credit to your testimony, but it is not of itself sufficient: nay, I will go a great way further than that; I will suppose that there was a consult of the Jesuits upon the 24th of April 1678, at the White-Horse tavern in the Strand, where those you say were present; were all present; Ireland and Whitebread, and Pickering, Grove and Fenwick, were all there, and that they did there come to a resolution to destroy the late king: suppose all this to be true, and yet you all this time are not innocent of the fact imputed to you, because you swore directly, 'That you were there at that consult too,' which you were not, if these men swear true, for then you were at St. Omers at that time; and therefore give us some sort of testimony to satisfy us that you were here, and then you will set all right again. If the Jesuits and priests did plot, that is nothing to make your evidence true, if you swore that which you did not know of your own knowledge.

* See p. 555, of the present Volume.

Oates. Shall it be allowed then, that Ireland was a Jesuit and a Papist?

L. C. J. If it should, that will be to very little purpose for your turn.

Oates. There is the evidence of record for it, my lord; but if that be not sufficient, I can call witnesses to prove it. Pray, call Mr. Miles France. [Which was done, but he did not appear.]

Cryer. He is not here.

Oates. He was subpoenaed, my lord, to come hither.

L. C. J. I cannot help it, if he will not come, but I will tell you, for method's sake, not to prescribe to you, but to tell you what I think may be more for your advantage than any of these inferences that you are making. If you did call two or three witnesses to prove that you were in town the 22d, 23d, or 24th of April, it would be the best defence you can make, and would give the best answer to all that is objected against you.

Oates. I will do that, my lord, then, and follow your directions.

L. C. J. Do so, that is the best way.

Oates. Cryer, call Cecilia Mayo.

Cryer. Here she is.

Oates. Swear her. [Which was done.]

L. C. J. Well, what do you ask this witness?

Oates. Pray, Mrs. Mayo, give my lord and the jury an account, whether you did see me in London the latter part of April or the beginning of May 1678? for that is the question now before the court.

L. C. J. Ay, what say you? When did you see him in 1678?

Mrs. Mayo. My lord I saw him the latter end of April: He came to sir Richard Barker's house, where I did then live, and afterwards he came again thither within a few days. By this circumstance I remember it; sir Richard Barker, my master, was sick all the month of April, and in the country, only he came now and then home for a little while and went again: Now Mr. Oates came there when he was absent, and a young man that lived in the house came to me, and told me, that there was one Mr. Oates in the strangest disguise that ever was. Says he, I think he is turned Quaker. No, said I, he is no Quaker, for they wear no perriwigs, and I rebuked the young man for saying so. As for Mr. Oates, I never saw his face before that time, that I know of.

L. C. J. How do you know that to be Mr. Oates then?

Mrs. Mayo. The family knew him, and they told me it was he: That is the gentleman there. I speak now nothing but that which I testified seven years ago, and it is all truth, and nothing but the truth.

L. C. J. Ay, no doubt of it; thou swearest nothing but the truth.

Mrs. Mayo. My lord, he came three or four days afterwards again to the house, and then the young man came to me, and told me, that parson Oates was turned Jesuit: and thereupon I said to him, good Lord! Why dost

thou concern thyself with him? Can'st not let him alone? I looked upon him, and I saw him at that time: And when he came that time, he went to sir Richard's lady's sister, who is now in Wales, and coming to her, said she, Mr. Oates, I hear you are turned Jesuit, and we can have no society with you now: At last he staid to dinner with them, and staid most of the day there. Then he comes the latter end of May; Whitsuntide was in May that year, and I know he came before Whitsuntide by this token; I speak of the second time of his coming: Our custom in the house was to wash and scour before the time, and I was sending for a woman to come and help to wash and scour, and then he was walking in the garden; and the young man came and told me Oates was there: He came into the pantry to me, look, said he, he is come again, and he is turned Jesuit by his disguise. Why, Benjamin, said I, what hast thou to do with the man? Can'st not let him alone?

L. C. J. What was the name of that young man you speak of?

Mrs. Mayo. Truly, my lord, he is dead, or he would have testified the same thing.

L. C. J. But what was his name?

Mrs. Mayo. Benjamin; I cannot tell his other name.

L. C. J. Well, go on.

Mrs. Mayo. Said I to him, Why dost thou scorn this man? Prithce get out of the room, I am not able to bear it: so he walked the space of an hour in the garden.

L. C. J. Is sir Richard Barker living?

Mrs. Mayo. Yes, my lord, he is, but he is not well.

L. C. J. Was he at home when Oates was there?—*Mrs. Mayo.* No, my lord, I think not.

L. C. J. Who dined with him, do you say, when he dined there?

Mrs. Mayo. My lady's sister.

L. C. J. What is her name?

Mrs. Mayo. Madam Thurrel.

L. C. J. And who else?

Mrs. Mayo. And her sons.

L. C. J. Where are they?

Mrs. Mayo. They are both dead.

L. C. J. And who else was there?

Mrs. Mayo. One Dr. Cocket.

L. C. J. Where is he?

Mrs. Mayo. He is in Wales too, my lord.

L. C. J. It is a great misfortune to have so many dead or so far remote.

Oates. My lord, six years time makes a great alteration in a family.

L. C. J. Was there any body else there?

Mrs. Mayo. There were two of the daughters, and they could all come and testify the same thing.

L. C. J. Where are they, and what is become of them? Why are they not here?

Mrs. Mayo. They are living in Lincolnshire, my lord, I think.

L. C. J. What else have you more to say?

Att. Gen. Pray, Mrs. Mayo, let me ask you a question: What coloured clothes had he on when you saw him first?

Mrs. Mayo. He had a whitish hat, and coloured clothes.

Sol. Gen. What time of the day was it you saw him?—*Mrs. Mayo.* In the morning.

L. C. J. Did he go publicly?

Mrs. Mayo. Yes, he went publicly.

Sol. Gen. Did he come often to the house?

Mrs. Mayo. He was there frequently, my lord.

Sol. Gen. Then it seems he was so disguised that he could walk publicly in the streets of London at noon-day, and was frequently in the family?—*Mrs. Mayo.* Yes, my lord.

L. C. J. Now tell me who was in the family?

Att. Gen. Mrs. Mayo,——

L. C. J. Pray, give me leave to ask her the question: Who was there at that time?

Mrs. Mayo. Sir Richard Barker's lady's sister, Madam Thurrel, and his two daughters, and two of his kinsmen, and two of the servants, one is here a witness now.

L. C. J. Who is that, that is a witness now?

Mrs. Mayo. One that belongs to sir Richard Barker, and the other is now dead, and those two kinsmen are dead.

L. C. J. What is become of the two daughters, say you?

Mrs. Mayo. They are in Lincolnshire, as I take it, my lord.

L. C. J. When did you hear from them?

Att. Gen. My lord, it is half a year almost since Mr. Oates had notice of this Trial.

L. C. J. Where is sir Richard Barker himself?

Mrs. Mayo. I was with sir Richard Barker, and he purposed to have come hither; but being a crazy man, and antient, it seems he could not, and desired to be excused, for he had a bad night, and was not well; but he desired that the court should know, if he were well, he would be there.

Att. Gen. Were you sworn at a former trial about this matter, Mrs. Mayo?

Mrs. Mayo. Yes, Sir, I was.

Att. Gen. Do you remember what you swore then?—*Mrs. Mayo.* The same I do now.

Att. Gen. Then I ask you this question, How long before Whitsuntide was it that you saw Mr. Oates at sir Richard Barker's?

Mrs. Mayo. A pretty while before, twice.

Oates. Mrs. Mayo, I'll put you a fair question, Whether or no it might not be a fortnight before Whitsuntide, you think?

Mrs. Mayo. The last time I saw you was a week before Whitsuntide.

L. C. J. How can you tell it was but a week?

Mrs. Mayo. It was but a week, because at that time I had sent the boy for the woman to scour and wash there.

L. C. J. Was that the last time you saw him?

Mrs. Mayo. Yes; I saw him several times before, and it was all before Whitsuntide.

L. C. J. How long before that, was the first time that you saw him?

Mrs. Mayo. He would be away for three or four days, and come again.

L. C. J. But how long before the last time, was the first time you saw him?

Mrs. Mayo. He came still to and again.

L. C. J. When was the time that you saw him next before the week before Whitsuntide, which, as you say, was the last time you saw him?

Mrs. Mayo. I am not able to say that.

L. C. J. Did you believe it was within the compass of a week before?

Mrs. Mayo. To the best of my remembrance it was.

L. C. J. When was the first time you saw him?

Mrs. Mayo. It was in the beginning of May.

L. C. J. You said at first it was at the latter end of April.

Mrs. Mayo. Pray, my lord, let me a little think; I am unwilling to be mistaken, I would say nothing but the truth.

L. C. J. No, I would not have thee; but for God's sake, let us have the truth; that is that we look for.

Mrs. Mayo. I say, the coach-man saw him there as well as I, and he can tell you better than I.

L. C. J. But I ask you this question positively, Was it in May or April?

Mrs. Mayo. To the best of my remembrance it was the beginning of May.

L. C. J. Was it within a week of May?

Mrs. Mayo. I believe it was, I cannot tell exactly to a day.

Sol. Gen. Was it so, or not?

Mrs. Mayo. I cannot be positive to a day; it is now six years time since I was first examined about it.

Att. Gen. But you can remember what you swore then, can't you?

Mrs. Mayo. I declare it, I speak not a syllable, but I will aver to be true, before the great God.

Sol. Gen. Can you swear it was within the first seven days of May?

L. C. J. You see, Mr. Solicitor, she says she cannot.

Att. Gen. Did not you say at that trial, that you did never see his face till a week before Whitsuntide, or a little after?

Mrs. Mayo. I did swear the same that I do now, to the best of my remembrance, and that is the truth.

Att. Gen. But did not you swear so?

Mrs. Mayo. I never saw him before that first time he came to sir Richard Barker's, and after the last time that he came, I saw him not till after the Plot was discovered.

Sol. Gen. How long was that after he had been at your master's house?

Mrs. Mayo. It was a good while, I cannot tell how long.

L. C. J. Was it within a month, or two months?

Mrs. Mayo. It was more, my lord.

L. C. J. Where was sir Richard Barker at that time?—*Mrs. Mayo.* He was at Putney.

L. C. J. Then he did not see him?

Mrs. Mayo. Not then he did not.

L. C. J. Did he afterwards?

Mrs. Mayo. Yes, he did see him afterwards.

L. C. J. How long afterwards was it?

Mrs. Mayo. I cannot tell how long afterwards it was, my lord.

L. C. J. About what time was it?

Mrs. Mayo. After the Plot was discovered, he was up and down in the family.

L. C. J. You never knew Mr. Oates before that time he came in disguise, and you did not know him then, but as they told you it was he?

Mrs. Mayo. No, I did not, but as they told me then; and this is the man I will swear it.

Oates. Call John Butler.

Cryer. Here is John Butler.

Oates. Swear him. [Which was done.]—My lord, if you please, I will propose any questions to your lordship; and my first question is this, I pray your lordship would ask him, Whether he gave in any evidence at the five Jesuits Trial, or Langhorn's Trial, about my being in town in April or May 1678?

L. C. J. Did you give any evidence at the five Jesuits Trial?—*Butler.* Yes, I did.

L. C. J. Did you give any evidence at Langhorn's Trial?

Butler. Yes, my lord, I was a witness there.

Oates. My lord, it is so long ago, that ignorant people that come innocently without design, may not be so ready in their remembrance, as those that conn'd their lesson for so long time together.

L. C. J. Well, well; what do you ask him next, Whether he will stand by that evidence he gave then?

Butler. That is all I have to say, my lord: I did testify the truth then, and will abide by it.

L. C. J. But he must give the same over again here, or it will signify nothing.

Oates. My lord, it is now six years since, and this question was not thought to be stirred so long after: therefore I beg so much favour, that the evidence he did give at Mr. Langhorn's Trial may be read to him.

L. C. J. O! by no means.

Oates. My lord, it is such a distance of time—

L. C. J. Look ye, if he has any notes himself, he may look on them to refresh him.

Oates. My lord, he comes raw hither, without any instruction at all.

L. C. J. So should every witness: God forbid we should countenance the instructing of witnesses what they should swear.

Oates. I beg your pardon, my lord, I did hope this favour might be granted: I will then ask him some questions.

L. C. J. Ay, ay, do, refresh his memory by questions as much as you can. Come, I'll ask him some questions for you: Do you remember you saw Mr. Oates at any time in the year 1678?

Butler. If it please your lordship, as near as I can remember, I saw him in May before the plot was discovered.

L. C. J. That was the year 1678?

Butler. A sim. sure I did see him about that time.

L. C. J. Where did you see him?

Butler. I was a servant to sir Richard Barker, and Mr. Oates and I had been acquainted before he went to sea; he used to come to my master's house frequently, and divers times he dined at the table, and I waited upon my master there.

L. C. J. When was it that he dined there at the table?

Butler. A year before that time in May that I spoke of before: It was before he went to sea.

L. C. J. When did you see him again?

Butler. After he came from sea, I saw him at my master's house.

L. C. J. When was it that he went to sea?

Butler. It was a year or two before the May that I saw him disguised coming to my master's house.

Att. Gen. Ay, what disguise did he come in?

Butler. His hair was cut off, close cropt to his ears, and an old white hat over his head, and a short grey coat over like a horseman's coat.

L. C. J. How came you to take such notice of him at that time, as to be able to swear when this was?

Butler. I was called presently after for a witness.

L. C. J. How long after this was it, that you were called to be a witness?

Butler. It was when the trials were at the Old-Bailey.

L. C. J. Was this the first time you had recollect-ed these circumstances?

Butler. Yes, my lord, that was the first time.

L. C. J. Then how came you a year and an half's time afterwards to remember the precise month of May, when you did not know you should be called to question about it, and yet you cannot remember the time particularly when Oates went to sea, but take the compass of a year or two?

Butler. I guess it was a year before, I cannot exactly tell.

L. C. J. When you can but guess at the time of such a remarkable passage, within the compass of a year or two, how can you pitch upon the very month for such a thing as this is, a year and a half's time after?

Oates. No, my lord, it was not so long as a year and a half.

L. C. J. Pray, Sir, have patience.

Oates. My lord, the records shew, that Ireland's Trial was the 17th of December 1678, and the Five Jesuits Trial was the 15th of June 1679.

L. C. J. Then it is a full twelve-month's time and more from the May that he says he saw you at sir Richard Barker's to Whitebread's Trial, in which he was examined the first time. Now that which I desire of him, is, to give me a reason why he remembers it was in the May was twelve-month before?

Butler. My lord, the lady whom I did serve, died in February before, that year.

L. C. J. But give me some reason of your remembrance so long after.

Butler. My lord, I do as well as I can.

L. C. J. Well, what is it?

Butler. My lady was buried in February, and he comes into the yard where I was cleaning my coach, in May following that February, which was May before the discovery of the plot. He asked me what alteration was in the family? I told him my lady was dead, and the escutcheon was over the door for her. He asked for Dr. Tongue when he came first in the house.

L. C. J. Why should he ask for Dr. Tongue?

Butler. My lord, Dr. Tongue lodged there; and he did ask for him: I come to justify the truth; upon my salvation; what I say is true.

L. C. J. Well, when he asked whether Dr. Tongue was within, what said you?

Butler. I told him, no; but he went into the room where Dr. Tongue used to lie, but found him not there: so he went out again. That was the same time Mrs. Mayo saw him.

L. C. J. But, friend, prithee mind what I ask thee, because thou must give me satisfaction how thou comest to remember this, so as to be able to swear it; for his going to ask for Tongue, or the escutcheon being over the door, neither of those can be a reason for you to remember that this was in May, for the escutcheon may be up in June, or July, or in August, or in any other month after the time you speak of: But how came you to take notice of this business that it was in May?

Butler. Sir Richard Barker, my master, was then sick at Putney, which was in May, though I cannot speak to a day or a week particularly.

L. C. J. Then prithee let me ask thee this question, how long had your master been sick before that?

Butler. He had never been well since my lady died.

L. C. J. When was it that your lady died?

Butler. In February before.

L. C. J. How long after that did your master, sir Richard Barker, continue sick?

Butler. Half a year, I believe.

L. C. J. Why then, suppose your master fell sick immediately after your lady died, and he continued sick half a year after, yet all this while Oates might come during his sickness even in the month of June or July, when it is acknowledged he was in town, and not be here in February, which is testified by a great many witnesses.

Butler. My lord, I tell your lordship the truth, it was in May.

L. C. J. But how dost thou come to take notice it was in the month of May so as to be able to swear it.

Butler. My lord, I tell your lordship my lady was dead, and the escutcheon was over the door.

L. C. J. So it might be, though he came in June or July, I tell ye.

Butler. My master was sick at Putney at that time.

L. C. J. How long did he lie sick at Putney?

Butler. He was sick there a fortnight, my lord.

L. C. J. Then prithee when did thy master go to Putney?

Butler. I cannot tell to a day.

L. C. J. In what month was it that he went?

Butler. It was the latter end of April, my lord, as I remember.

L. C. J. How long continued he sick at Putney?

Butler. The matter of a fortnight.

L. C. J. Was not your master sick, when your lady died at Putney?

Butler. No, he was not there then.

L. C. J. When did he go to Putney, say ye?

Butler. He went not thither till the latter end of April, my lord.

L. C. J. And did he continue at Putney but a fortnight?

Butler. Not at a time, but he continued going and coming a quarter of a year.

L. C. J. But this was the first time of his going, was it?

Butler. Yes, as I do remember.

Oates. My lord, he is my witness, and I desire I may examine him.

L. C. J. Hold there, Mr. Oates; he is mine too. All the witnesses are mine to satisfy me in the truth of the fact.

Oates. And to satisfy the jury too, my lord.

L. C. J. Yes, and to satisfy the jury too, but I must and will sift out the truth, for both our satisfactions.

Oates. My lord, it is now, come the next month, six years ago since the evidence of this matter was first given by these witnesses.

L. C. J. Then, Mr. Oates, I will come a little rounder to you, and I will put you into a certain way of clearing this business. I will tell you what you shall do; you had a lodging in town, as well as diet, and as well as you did eat at Dr. Barker's sometimes, so you eat and lay sometimes elsewhere. You were here in town a great while together, if your own assertions be true; for you were from April till June in town; now come and give us account by some witnesses if you can, where did you lodge at that time, and where did you diet? for it seems you had but one meal at sir Richard Barker's.

Oates. Is that the question, Sir, here in hand?

L. C. J. Ay indeed is it, and the main one too.

Oates. I beg your lordship's pardon if I mistake, but I think that is not now in question; for these St. Omers men do swear. That I was all April and May at St. Omers: then if I do prove that in April and May I was not at St. Omers, but here in London, it is argument good enough against them that their evidence

is false. And indeed, can your lordship or the jury expect, that I being then engaged among and for the papists, and afterwards an evidence against them to discover their treasons, can bring any of them to testify for me now? No, they will as certainly forswear themselves, as these young fellows have all done.

L. C. J. Let me ask you a shorter question: did you always lie in a papist's house all the two months you say you were here?

Oates. My lord, I lay at several houses.

L. C. J. Tell me the names of those houses, or any of them.

Oates. It is not to the point in question here, my lord.

L. C. J. Yes, it is very much; but I perceive it is a secret, and let any body judge why.

Oates. My lord, they that have by the principles of their religion, liberty to affirm or deny any thing, and can have dispensations for the violations of oaths and sacraments, certainly are not to be admitted as witnesses in such a case as this.

L. C. J. Talk not to me of dispensations, and I know not what; I speak from a plain demonstrative proof: can it be believed that you should be here in England so long, and as they say publicly, and no person living see you that we can hear of, but an old woman that never saw you, nor knew you before, and a coachman that tells a wild story without reason? If you will not tell me where you lay, can you tell me where you did eat all that time?

Oates. I can tell where I did lie that time.

L. C. J. Do so then. Let us hear it, that will be your best defence.

Oates. Is that the point, my lord, in question?

L. C. J. Ay, upon my word is it, the main point in this case.

Oates. If it should go upon that foot, my lord, it is impossible for me now to prove it; for it is well known, I lay sometimes with Mr. Whitebread, and sometimes with Mr. Mico, neither of which can I have to testify for me; and besides, I must insist upon it, these things were in question at Whitebread's trial, nor do I believe that Mr. Whitebread, if asked at his death, would have justified, and stood by it, that I was not here then.

L. C. J. Well, this I must certainly say, I cannot help it, but it will stick with me till better answered. I can never be satisfied, that if you were here so long, there should no better evidence be produced to prove you here.

Oates. My lord, nor can I help your dissatisfaction, but I am to satisfy all that hear me this day, that is a very hard case that is put upon me; I have taken the most effectual course that I could, to provide for evidence to make my defence; and I think, by your lordship's good leave, those that I have produced do prove me here in town in April and May 1678. And if your lordship has done with this witness, I will call another.

L. C. J. Well, go on as you will. I tell you what sticks with me.

Oates. Pray call Mr. Philip Page.

Sol. Gen. Hold, Sir, a little; I would ask these witnesses a few questions before they go away. You Butler, let me ask you, pray the first time you saw Mr. Oates at the time you speak of, was it in April or May?

L. C. J. He swore it was the beginning of May.

Butler. To the best of my knowledge it was the beginning of May.

Sol. Gen. Who did you tell first, that there was Mr. Oates, at that time?

Butler. I told it Mrs. Mayo.

Sol. Gen. Consider, friend, what you say now, you are upon your oath, and consider what you said at the former trial, when you were upon your oath too.

Oates. Pray, my lord, I desire my witnesses may be examined without threatenings.

L. C. J. It is not a threatening, it is an admonition not to go beyond the truth.

Sol. Gen. Be sure you be in the right in what you say, and now I ask you upon your oath, when was the first time you saw Mr. Oates when he came in that disguise you speak of?

Butler. I told you it was in May, Sir.

Sol. Gen. How far in May? consider well what you say?

Butler. To the best of my remembrance, it was the beginning of May.

Sol. Gen. Do you think it was within a week, or the first ten days of May?

Butler. I cannot tell that; as well as I remember, it was the beginning of May.

Sol. Gen. When you saw him first in May, who else, as you remember, was by?

Butler. Mrs. Mayo.

Sol. Gen. And nobody else?

Butler. Yes, one Benjamin Turbet, who is since dead.

Sol. Gen. But consider your oath, friend, once more, and recollect yourself; do you swear positively Mrs. Mayo was by; and did see him at the same time?

Butler. I saw her look out out of the window into the yard, and I believe she did see him.

Sol. Gen. Well then, let us examine her evidence and your's together, and see how they agree.

Oates. My lord, these are not questions tending to satisfy the jury at all, as to the point in question.

L. C. J. Are they not? methinks they are, whatsoever you think.

Oates. After six years time, to ask such poor ignorant people such trifling questions!

L. C. J. Pray, Sir, be contented, and let the king's counsel examine the witnesses.

Oates. My lord, he says I was here in May, that is enough.

L. C. J. Well, Sir, I know what he says.

Sol. Gen. And you shall hear, Mr. Oates, how your witnesses agree.

L. C. J. Go on, Mr. Solicitor, and do you sit still and be quiet.

Sol. Gen. Then, my lord, I would ask him

this question more; the first time you saw Oates come to sir Richard Barker's, what habit pray you, was he in?

Butler. He was in a disguise?

Sol. Gen. Ay, what disguise?

Butler. He had a white hat flapping over his ears; his hair cut short, close to his ears, and a grey short coat.

Sol. Gen. Had he never a periwig on?

Butler. No, his hair was cut short to his ears.

Mr. Hanes. Was he in such a disguise, that a man might not ordinarily know him, that had not known him before?

Butler. Truly, my lord, I did not know him, when he first came in, 'till he spoke to me, and asked me, How do you, John? and then I recollected who he was, that it was Mr. Oates.

Sol. Gen. Was he always in the same habit, when he came thither?

Butler. The next time he came he had a cinnamon-coloured suit, and a long black perrwig that was curled down thus far, and a black hat, with a green ribbon and green cuffs about his wrists.

L. C. J. Did you ever see Oates dine there?

Butler. Yes, I did.

L. C. J. When was that?

Butler. After my master came home from Putney.

L. C. J. Who was there besides?

Butler. One sir William Thurrel and madam Thurrel.

L. C. J. How often did he dine there?

Butler. Several times.

L. C. J. Who else was there?

Butler. My master and his daughter.

L. C. J. And who else?

Butler. Mrs. Mayo.

L. C. J. What is become of your master's daughter?

Butler. I beg your pardon for that, my lord.

L. C. J. Where is she, man?

Butler. She is at home, I suppose.

L. C. J. What dost thou beg my pardon for then?

Butler. My lord, I call to mind she did not dine with them.

L. C. J. Did she dine at any time with him there?

Butler. Yes, I remember several times; but not then.

L. C. J. When did you see your master's daughter last?

Butler. I have not seen her this quarter of a year.

L. C. J. Where is she now?

Butler. At home at Putney, my lord, I believe.

L. C. J. And she was several times there when he dined there.

Butler. Yes, she was at home.

L. C. J. Did Mrs. Mayo see him at dinner there?—*Butler.* Yes, I believe she did.

L. C. J. How often did he dine there about this time you speak of?

Butler. Several times.

L. C. J. Do you think seven times?
Butler. I do think he might have dined there seven times.

L. C. J. Did he more than seven times, do you think?

Butler. I cannot number how many times it was.

L. C. J. Now come in, Mrs. Mayo, again.

Mrs. Mayo. Here I am, my lord.

L. C. J. Mrs. Mayo, give me leave to ask you a question or two.

Mayo. Yes, my lord, what you please.

L. C. J. You say (if I do not misremember; if I do, I beg your pardon, and you'll correct me) a week in May was the first time you saw Mr. Oates, and that was at sir Richard Barker's?

Mrs. Mayo. I think it might be about the beginning of May.

L. C. J. Had he been in the house before?

Mrs. Mayo. Not at that time that I know of, but as they told me.

L. C. J. Who told you?

Mrs. Mayo. That coachman there, John Butler, and one Benjamin who lived in the house.

L. C. J. Then you did not see him the first time he came? what say you, Butler?

Butler. She did see him out of the window, in the yard.

L. C. J. Well, let that pass then: come, I'll ask you another question upon your oath, how often have you seen him dine there?

Mrs. Mayo. I saw him dine at that time that I spoke of.

L. C. J. Did not he dine there above once?

Mrs. Mayo. No, he did not.

L. C. J. What say you, Butler?

Butler. He did dine there several times with them.

L. C. J. Then one of you two must be mistaken, I am sure.

Oates. My lord, if your lordship would please to give me leave to speak, I would set it right.

L. C. J. Good Sir, let them set themselves right if they can, we need none of your instructions.

Oates. My lord, I desire—

L. C. J. Why, how now? Pray, Sir, be at quiet. Mrs. Mayo, pray what habit had Oates when you saw him first?

Mrs. Mayo. He was in a grey hat and a grey coat.

L. C. J. Was his hair short or long?

Mrs. Mayo. He had on a kind of a short wig.

Sol. Gen. Are you sure it was a wig?

Mrs. Mayo. Yes, a kind of a brown perriwig.

L. C. J. And he says his hair was cut short to his ears?

Oates. These things are very lean stuff to perjure a witness upon.

Sol. Gen. When he came the second time, what clothes had he on?

Mrs. Mayo. Afterwards he came in black clothes and a long perriwig.

Mr. Hauses. What coloured perriwig was that, a black or a white one?

Mrs. Mayo. Not a black, but a brown.

Sol. Gen. You say it was long?

Mrs. Mayo. Longer than his other, yet not very long neither.

L. C. J. Here are I know not how many contradictions in these witnesses testimonies.

Oates. Truly, my lord, I do not find in the examination of the St. Omers witnesses, you were so strict, or bore half so hard upon them, as you do upon my witnesses; what does it signify, my lord, whether the wig were long or short, black or brown?

L. C. J. We have no other way to detect perjuries, but by these circumstances; and 'tis the duty of a judge to enquire into all particulars; as in a controversy about words, were they spoken in Latin or in English, and so to all places and postures of sitting, riding, or the like; as you know the perjury of the elders in the case of Susanna, was by their different testimony in particular circumstances discovered.

Oates. My lord, I will ask her but one short question. By the oath you have taken, Mrs. Mayo, to speak the truth, the whole truth, and nothing but the truth, as you expect the face of God with comfort in another world; did you see me at sir Richard Barker's at any time in May 1678; the May before the plot was discovered, for that is the main question?

Mrs. Mayo. Yes, I did, and I speak nothing here, but what I speak as in the presence of the Lord.

L. C. J. Prithee, woman, dost thou think we ask thee any thing that we think thou dost not speak in the presence of the Lord? we are all of us in the presence of the Lord always.

Mrs. Mayo. And shall answer before him for all that we have done and said, all of us, the proudest and the greatest here.

L. C. J. But I would not have so much to answer for, as thou hast in this business, for all the world.

Sol. Gen. Well, we have done with her now, she may go away.

L. C. J. Where does she live now?

Cryer. Mrs. Mayo, where do you live now?

Mrs. Mayo. In Leaden-Hall-street, my lord.

L. C. J. When did you see sir Richard Barker's daughter?

Mrs. Mayo. About a fortnight ago.

L. C. J. Where?

Mrs. Mayo. In Barbican, in London.

L. C. J. Do you live with sir Richard Barker now?

Mrs. Mayo. I do not live with him now.

L. C. J. Did his daughter use to be at the table at dinner?

Mrs. Mayo. She was often in the country, my lord.

L. C. J. Did she eat at his table at that time when Oates was there?

Mrs. Mayo. I am not able to say whether she did or not; she used to be in Wales at sir Thomas Middleton's sometimes, and with

madam Thurrel, her aunt, who was her mother's sister, and her two daughters.

L. C. J. In Wales, dost thou say? Where?

Mrs. Mayo. My lord, in your own country, at one Dr. Cocket's; I know your lordship, though your lordship does not know me.

L. C. J. I am very glad of it, good woman; but pritheedid ever sir Richard Barker dine with Mr. Oates?

Mrs. Mayo. I cannot say he did, he went to and fro.

L. C. J. Well, have you any more witnesses?

Oates. Crier, call Philip Page.

Cryer. Here he is, Sir.

Oates. Pray, swear him. [Which was done.] Pray, be pleased to give my lord and the jury the best account you can of my being in town. But Mr. Page, the question that I first ask you, is, whether I was here in April or May, and in what year it was that you did see me at your master's house?

L. C. J. When did you see Mr. Oates at your master's house? You mean sir Richard Barker to be his master, I suppose?

Oates. Yes, my lord.

L. C. J. What do you say to it?

Page. Truly I cannot be positive to the year; but to the best of my remembrance it was 1678.

Oates. Pray tell my lord and the jury some circumstances in that year that did happen to you, that makes you believe it was 1678.

Page. Sir, I'll give you the best satisfaction I can to the best of my knowledge; he came to sir Richard Barker's one evening, and there he enquired for Dr. Tongue: he was in a disguise, in a light-coloured coat, something like a frize, but it was not frize; the term that they give it, I cannot so readily tell. He had his hair cut short, almost to his ears, and he had a broad-brim'd hat on, and a small stick in his hand, walking melancholy about the hall: I happening to be the first body he met with, as I suppose, he asked me if Dr. Tongue was within. I told him no, I had not seen him of a considerable time. He then asked me where sir Richard Barker was? I told him he was ill now at Putney. Says he, When will he be here? I told him I could not tell.

L. C. J. Did he see any body there but you?

Page. That I cannot tell, my lord; not that I know of.

L. C. J. What time of the year was it?

Att. Gen. And what month?

Page. What year and what month it was, I am not able to say, my lord.

L. C. J. What became of him after that?

Page. He went out of our gates then, Sir; he was walking up and down melancholy, and not finding any one, as I suppose, to answer him, he continued walking in the patient's hall, where they used to wait on sir Richard Barker, that came to discourse with him about physic; and upon my answer to his question, he went away.

L. C. J. Did you ever see him any other time near to that time?

Page. No, I did not.

L. C. J. Did you use to wait at table?

Page. No, I did not.

L. C. J. What service were you then engaged in at sir Richard Barker's?

Page. I made up the physic, my lord.

L. C. J. Did you not acquaint the coachman, nor Mrs. Mayo, nor sir Richard Barker with it?

Page. I think sir Richard Barker was in town soon after, and I did acquaint him with it.

Oates. But cannot you tell what time this is, Sir?

Page. I can say no other than I have said; I believe it was in 1678.

L. C. J. Was this in June, July, or May, or when?

Page. I cannot say punctually what month it was, my lord; but to the best of my knowledge and remembrance, it was in the beginning of May.

Oates. Had not your master a patient at Ilington at that time, that was sick of a fever?

Page. Yes, he had.

Just. Withins. Why, would Mr. Oates have given the patient physic?

Page. No, my lord, but it was about that time that the patient was under my master's cure.

Oates. Indeed the St. Omers men do swear thorough-stitch; but my honest witnesses are cautious, it being so long ago; and he that is a minister of the Church of England (as they say) speaks to a very day, upon a much slighter circumstance. Pray call Mr. William Walker.

Cryer. Here he is.

Oates. Swear him. (Which was done.) Be pleased, Walker, to give my lord to understand, when it was you saw me here in London in disguise, and when it was you swore six years ago at the Old-Bailey, that you saw me here in London. Sir, the time in controversy is this: I came here to discover a Plot of the Papiests against the king's life and the religion, and I swore—

L. C. J. You must not ask questions in that manner. It is properest for you to propose your questions to the court, and they will ask the witnesses.

Oates. Then I will not ask him, but propose it to your lordship.

L. C. J. Ay, propose what questions you please, and if they are fair, I will ask them.

Oates. Then, my lord, I would ask Mr. Walker this question; when it was he met me with a disguise, in what year and what month?

Walker. My lord, I have been interrogated in former times upon this point, six or seven years ago; and I do confess I did see the man, and met him between St. Martin's-Lane and Leicester-fields; and truly, my lord, I think I may say it was my unhappiness to meet with him; for I have had a great deal of trouble by it since, subpoena upon subpoena, trouble after trouble, that I am even weary of it; for I am an old man. But I do say I did meet

him at that end of the town, between St. Martin's-Lane and Leicester-fields in a strange disguise; he was just like a vagrant, a very rasal, and that is true, I believe, my lord.

Att. Gen. Did you know him before?

Walker. Yes, or I had not known him then.

E. C. J. When was this?

Walker. My lord, I will tell you; my lord chief justice Scroggs, when I was at the Old-Bailey, asked me if I knew what time I saw him thus? Said I, my lord, it is almost a year and an half since I saw him; and I being an old man, little thought it worth the while to lay up the particular time in my memory; but I will cast about in my thoughts to make the best conjecture I can; for now I will not be upon my oath, it being but conjecture.

L. C. J. But now you are upon your oath, remember that, man.

Walker. My lord, I am speaking what I said to the court at that time.

L. C. J. Pray do not tell us an old tedious story of the questions and answers in the Old-Bailey, but mind what is said to you here; my question is now, what time you saw Oates disguised between St. Martin's-Lane and Leicester-fields, as you say you did.

Walker. My lord, I cannot prescribe the time; but I will guess as near as I can with the best probability, and that is, upon this circumstance; when I went forward into Leicester-fields, in the court before the house, I saw the elm-trees budded forth as big as an hazel-nut; so that I did conjecture by that token, it might be between Lady-Day and the latter end of April; that was the time, as near as I could guess.

L. C. J. In what year was it?

Walker. I cannot very well tell what year it was.

L. C. J. Was it in 1677 or 1678?

Walker. Truly, my lord, I never thought it worth so much taking notice of, to fix the particular time in my memory.

Oates. Whether was it that year the Plot was discovered, or the Michaelmas following?

Walker. I cannot tell when the Plot was discovered, or whether it be found out yet or no?

Oates. But was it the year before you were examined?

Walker. To answer you, Mr. Oates, when it was exactly, I cannot say; truly I would give you the best satisfaction I could, and do you as much right as I would do myself. I think if that time when I was examined were in 1677 or 1678, it was near a year and a quarter before I did see you.

L. C. J. Well, what can you make of this?

Oates. It is not to be supposed he is a very willing witness; but yet he says, it was a year and a quarter before the trial in which he was examined, which must be in April 1678.

L. C. J. I would know this question of you: were you present at the Old-Bailey, when the Five Jesuits were tried?

Walker. I was there, my lord.

L. C. J. Were you at any trial but one?

Walker. I was not examined at any time but one.

L. C. J. Have you any more questions to ask him?

Walker. My lord chief justice that then was, did ask me, if I knew any of the prisoners at the bar; and I looked upon all of them, and said I knew not either of them.

Oates. Pray, my lord, ask him, whether he was not produced, when the St. Omers men were produced, and gave his evidence as to my being in town at that time.

L. C. J. He hears the question, let him answer it.

Walker. I am not able to answer you, because you put several questions together; but this I say, I was never subpoenaed but once, though I have been subpoenaed often, to my great torment and trouble.

Oates. Did you give evidence at that trial, that you saw me in April 1678?

Walker. I testified that I saw you, and by such circumstances, it must be about such a time as well as I could suggest; but I could not, nor cannot speak positively.

Oates. Now, my lord, I shall go on to another part of my evidence, and call some other witnesses; and first of all, I come to Mr. Serjeant Maynard, and I desire he may be sworn. [Which was done.]

L. C. J. What do you ask my brother Maynard?

Oates. I call Mr. Serjeant Maynard to give an account of the proceedings of the House of Commons upon my discovery of the Popish Plot.

L. C. J. We will not admit that to be any evidence at all; nor can it be by law.

Oates. My lord, Mr. Serjeant Maynard was one of the committee of the House of Commons that managed the Impeachment, and can give an account of the evidence and records that were produced at the trial of the late viscount Stafford.

Serj. Maynard. I know nothing truly, nor can I remember any thing of it now.

L. C. J. He says he remembers nothing.

Serj. Maynard. If Mr. Oates had told me before-hand, when he subpoenaed me, what time, and what particular things he would have examined me to, probably if I was there, I have notes that I then took; but I can never swear to my memory, for any cause so long ago.

Oates. My lord, I am very sorry Mr. Serjeant Maynard's age should so impair his memory.

L. C. J. I dare say, you are not more sorry than he is for his age.

Oates. Well, my lord, I cannot help it: then I desire Mr. Blayney may be asked, whether he has his notes of my lord Stafford's trial.

Blayney. No, my lord, I have them not here; Mr. Oates, by his ticket of his subpoena, desired only the notes of Ireland, Whitebread, and Langhorn's trial.

L. C. J. But I must tell you, Mr. Oates, if those notes were here, they could be of no use to you, without the record of my lord Stafford's attainder; if you ask any thing upon another trial, you must produce first the record of that trial, and then you may examine to what was given in evidence at the trial.

Oates. My lord, it is of record in the House of Lords.

L. C. J. But that we are not to take notice of, without the record be brought in evidence before us: we must go according to the course of law in all cases.

Oates. Then, my lord, I must betake myself to another part of my defence; and that is, to prove the frequent attempts made to baffle the discovery of this Popish Plot, and to stifle the murder of sir Edmundbury Godfrey, and to fling it upon a Protestant peer.

L. C. J. But that is no evidence neither.

Just. Holloway. Surely that is very collateral evidence.

L. C. J. Nay, it is no evidence at all in this case; we must not admit of any such evidence to be given.

Oates. Good my lord, if this had not been true, which was sworn by witnesses that had discovered the Plot, why should these men appear to suborn witnesses (and they have been convicted of subornation, and endeavouring) to baffle the discovery, particularly as to justice Godfrey's death?

L. C. J. Mr. Oates, I must keep you to evidence that is proper; we are upon our oaths to go according to law, and the jury are upon their oaths to try this cause according to the evidence; and we are bound to give them this advice in point of law, that nothing must weigh, or have any consideration with them, that you offer, if it be not legal and proper evidence. If you can say and prove, that any of the witnesses that have been produced this day against you have been tampered with; or that they have tampered with any of the former evidence, that is a good evidence against them; but it must not be by any means admitted, that the time of the court be taken up, or the jury inveigled by that which has not a natural tendency to the business before us.

Oates. But if your lordship please, this consult in April 1678, was discovered to the House of Commons, among the other parts of the discovery of the treasons of several noblemen and gentlemen: now upon the discovery of the Plot, I desire that I might give in proof the proceedings of the House of Commons.

L. C. J. No, no, you cannot.

Oates. Pray, my lord, is not the Journal of the House of Commons evidence?

L. C. J. No, we say it is not at all.

Oates. Is that the opinion of the whole court, my lord?

L. C. J. Yes, undoubtedly, there is no question of it.

Oates. Is any record of the House of Lords evidence?

L. C. J. Yes, I tell you it is, and that be-

cause it is a record; but there is a vast difference between the Records of the House of Lords; and the Journals of the House of Commons.

Oates. The Journals have been delivered in as evidence before now.

L. C. J. I cannot tell what they have been, but I am sure they ought not to be, and whatever they have been elsewhere, they cannot be here; and I will tell you a plain reason for it, because they have not so much power in the House of Commons, as to give an oath: but the House of Peers is a court of record, and therefore their proceedings are evidence, as the proceedings of the King's-bench here, or any court of record are.

Oates. Then, my lord, if that part of my evidence be over-ruled, before I come to sum up my evidence, I desire to offer this thing: my lord, I can produce several members of the House of Commons in the several parliaments, that can remember how they proceeded against the Lords in the Tower, and the Popish traitors, upon my discovery, and what credit I had in the House of Commons; will that be evidence, pray my lord?

L. C. J. No, it will not; if you will produce any one that you told this to before the public discovery, that may be evidence such as it is, and is often allowed; but what the House of Commons did upon the discovery, that is not any evidence at all.

Oates. Then, my lord, suppose I can prove, that I gave an early and timely account to any of the House of Lords of this conspiracy, and did acquaint them with the consult in April as part of it; I desire to know whether in producing any of those lords, I shall give that which is evidence?

L. C. J. Call whom you will that you told any thing to, that is a sort of evidence, I tell you.

Oates. Then I call my lord of Devonshire.

L. C. J. Here is my lord of Devonshire.

Oates. My lord, I beg your pardon for the trouble I put your lordship to; but your lordship sees the necessity of it: it is for the justification of the truth, to which I will give my blood for a seal, if I be called to it.

L. C. J. My lord of Devonshire, your lordship must be sworn.* [Which was done.]

Oates. Will your lordship please to acquaint the court and the jury (your lordship being at that time a member of the Commons House) what account I gave there of this particular consult (to keep to that point that is here in question) before the court this day, and with what credit I was received in all these parliaments; for my credit and the credit of the parliament is now in question.

Earl of Devonshire. My lord, all I can say to it is this; you, Mr. Oates, gave a long account of a consult and conspiracy among the

* See lord Stafford's Case, vol. 7, p. 1458, and the passages referred to in the Note there.

Jesuits: but I cannot remember any particular, it is so long ago.

L. C. J. Every body knows this, you gave a long Narrative in to the House of Commons and House of Lords too.

Oates. Ay, and it was a true one; but my lord of Devonshire, I desire your lordship would be pleased to give the court and the jury an account, with what credit I was received in those three parliaments your lordship sat as member in.

E. of Devonshire. I remember that the two Westminster parliaments after the Long Parliament, were so satisfied with the discovery, that they passed a Vots in the House of Commons—

L. C. J. The Votes of the House of Commons are no evidence at all.

Oates. They shew what opinion the parliament was of.

L. C. J. Many votes that have been made of late, I hope will neither be evidence for, nor put in practice again.*

E. of Devonshire. My lord, it is well known to all the world the vote I speak of.

L. C. J. Nay, my lord, I speak not to your lordship; for we all know those votes that I speak of were not according to your lordship's mind: but we only say thus in general, that because the House of Commons cannot give an oath,† therefore what is done there, is not an evidence here, or in any court of record.

Oates. But, my lord, that I must urge; I do perceive that in the time of parliament, and during the sitting of the House of Commons, votes have been brought in as bars to the proceedings of inferior courts; and this court does not look upon itself as superior to the great court of parliament: and then if they may be brought—

L. C. J. Which they cannot be, nor never were, nor I am sure ought to be; nor I hope never will be as long as there is any justice in the nation.

Oates. But, my lord, you will allow the Records of the House of Lords to be evidence?

L. C. J. Yes, I tell you, I will, and for that reason, because they are Records out of a Court of Record: an order of Court-Baron is no evidence, because it is no Court of Record; but a Judgment of a Court-Leet is evidence, because it is a Court of Record; and there's the difference.

Oates. My lord, I call in the next place my lord of Anglesey, if he be in court.

L. C. J. No, he is not here.

Oates. Pray, will you give me leave to call my Lord Keeper then?

L. C. J. See in the Court of Chancery, whether my Lord Keeper be there.

* See Peake's Compendium of the Law of Evidence, ch. 2, s. 2.

† See Hatsell's 'Precedents of Proceedings in the House of Commons,' &c. vol. 2, title, Whether the House of Commons can administer an Oath?

Cryer. No my lord, he is not; he's gone.

Oates. He was subpoena'd, my lord, and I can have affidavit made of it: he was a material witness for me.

L. C. J. I cannot help it; he is not here.

Oates. Pray call my Lord Chief Baron.*

L. C. J. Go one of you into the Exchequer, and see if my Lord Chief Baron be there, and tell him, Mr. Oates calls for him as a witness.

Oates. And Mr. Justice Levinz.

Cryer. The courts are both up; and they are all gone.

Oates. They were subpoena'd, I am sure, to be here; well, go and see, whether they are or no.

L. C. J. In the mean time do you call some other witnesses.

Oates. I call my lord chief justice Jones.

L. C. J. The cryer is gone to look for the judges.

Oates. Then I call my lord of Clare.

L. C. J. Here is my lord of Clare.

Earl of Clare. My lord, I can remember nothing, it is so long time ago.

L. C. J. My lord of Clare says, he can remember nothing.

Oates. I only call my lord of Clare to ask him one question, which I hope his lordship will remember.

L. C. J. Swear my lord of Clare. [Which was done]. Well, what is it you ask my lord?

Oates. My lord of Clare, the question, I would ask your lordship is, with what credit I was received in the House of Lords upon my discovery; and that you will to the best of your memory, give my lord and the jury an account, how the House of Peers proceeded upon my evidence?

Earl of Clare. Truly, my lord, I cannot give any account, it is of so long standing.

Oates. It is a great while ago, my lord, and therefore it is hard measure, that I must be brought to this trial so long after.

L. C. J. If it be a long time, we cannot help it: we cannot force people to prosecute sooner than they will do.

Oates. I desire Mr. Baron Gregory may be called.

L. C. J. He is not here, but see and call my brother Gregory; I hear they are all together in the Treasury.

Oates. Then I call Mr. Williams,† that was Speaker of the House of Commons.

L. C. J. Here is Mr. Williams. [He was sworn.]

Oates. I desire, Mr. Williams, because you were then Speaker of the Commons House of Parliament, you would be pleased to tell what you remember concerning the credit I received in that parliament, in which you were Speaker, upon the discovery I made of the Popish Plot; and particularly as to the consult of jesuits to kill the late king in the month of April 1678.

* William Montagu.

† See the Proceedings against him for directing the Publication of Dangerfield's Narrative, A. D. 1686.

Mr. Williams. My lord, my memory is never very good; but especially in a case that is at such a distance of time, and which consists of so many particulars as this, I mean *Mr. Oates's* discovery. But this, my lord, I do remember; he was examined at the bar of the House of Commons, and gave a long account: but it is more than any man can do, to tell every particular that is said in that House.

L. C. J. Was he upon his oath, *Mr. Williams*, at the bar of the House of Commons?

Mr. Williams. My lord, he was as other men are, that are examined in the House of Commons.

L. C. J. We all know it could not be upon oath, they have not power to give an oath.

Mr. Williams. What reputation he was of, I cannot say so well, as what their proceedings did testify.

L. C. J. Nor in case they did believe him never so much, is it any thing to this question; which is, whether he swore true or false at Ireland's Trial?

Mr. Williams. My lord, when a person is brought to the bar, there to be a witness in any cause, every body is silent, and the witness is heard what he has to say; and so was *Mr. Oates*. When he had done, he withdrew; but what the opinion of the House was upon it, I must submit to their Votes and Resolutions.

L. C. J. Which, you know, *Mr. Williams*, are no evidence.

Mr. Williams. That I must submit to the court.

Oates. I desire my lord of *Clare* would be pleased to tell, if he remembers, what credit the House of Lords gave me upon my discovery.

E. of Clare. My lord, I do not well hear *Mr. Oates's* question.

Oates. My lord, my question is this, When I was brought to the bar of the Lords House, whether I did not receive the thanks of the Lords House for my discovery?

E. of Clare. Truly, Sir, at the beginning of the discovery of the Popish Plot I was not in town, nor in the House.

L. C. J. But now, *Mr. Oates*, I hope you are satisfied by the answer that is given by your own witness, that what is done in the House of Commons is no evidence; and I would have you remember that is the reason of it, because they are no Court of Record,* and because they cannot so much as give an oath.

Oates. My lord, I see my lord of *Huntingdon* is here; and though I did not subpoena his lordship, nor designed to have troubled him, yet being here, I desire his lordship would give an account what credit I had in the House of Lords upon my discovery.

* See in this Collection a Note to the Case of *Shirley and Fagg*, vol. 6, p. 1191. *Mr. Hatsell*, vol. 3, c. 4, states a doubt whether the Commons Journals are public Records. See a Note to *Fitzharris's Case*, vol. 8, p. 286.

L. C. J. Swear my lord of *Huntingdon*. [Which was done.]

Earl of Huntingdon. I do believe, my lord, *Mr. Oates's* discovery found a good reception in the House of Lords; but it was grounded upon the opinion, that what he said was true, and that he was an honest man; for so the House then accounted him to be; and upon this it was their lordships gave credit to his testimony. And indeed had the matter been true, it was of high importance to have it thoroughly examined: But since that time it being apparent there were so many and great contradictions, falsities, and perjuries in his evidence, upon which so much innocent blood hath been shed; I believe a great many persons who were concerned in the trials of those unfortunate men, are heartily afflicted and sorry for their share in it: And I do believe most of the House of Peers have altered their opinion, as to this man's credit; and look upon his evidence, as I do, to be very false.

L. C. J. Do you hear him, *Mr. Oates*?

Oates. No, my lord, I do not very well.

L. C. J. Then, my lord of *Huntingdon*, turn your face to the jury; and say what you said to us over again. [Which his lordship did to the same effect.]

Oates. Very well, my lord.

Just. Withins. There's your credit with the House of Lords, *Mr. Oates*.

Oates. My lord, I called you in to answer my question, as to somewhat that is past, and not to give your judgment how you are inclined to believe now.

L. C. J. *Nay*, but with your favour, it was to declare what opinion the House of Lords had of you; and he says very well, and that this is in truth the same answer that must be given for the judges and the juries that tried the people upon your evidence. Says my lord of *Huntingdon*, at first truly I did believe *Mr. Oates* did swear true, and he had credit with me, and so he had with others; but now upon further examination into things, and in process of time discoveries have been made of the truth, and that what he swore is false; so that now I believe in my conscience he is actually forsworn, and has drawn innocent blood upon the nation; and nobody will believe a word he says.

Oates. Well, my lord, I have done with my lord of *Huntingdon*.

Just. Withins. And he has done with you, as I perceive.

L. C. J. Yes, truly, methinks ye shake hands, and part very fairly.

Just. Holloway. There's my lord chief baron; what say you to him, *Mr. Oates*?

L. C. J. Is my lord chief baron sworn?

Cryer. Yes, my lord, he is.

L. C. J. Then what do you ask him?

Oates. My lord, I called your lordship, because your lordship sat as a commissioner of *Oyer and Terminer* in the *Old-Bailey*, at *Ireland*, *Whitebread*, and *Langhorn's* trials; and that which I call your lordship for, is to give

an account to my lord and the jury, of the satisfaction your lordship received concerning the fulness and fairness of the evidence then delivered by me in those trials.

L. C. Baron. My lord, I cannot charge my memory with it.

L. C. J. He says he cannot remember.

L. C. Baron. No, not in particular; but in general I remember there were a great many persons that gave evidence in those trials on the one side and the other: There were a great many persons that came from St. Omers, that gave evidence there of Mr. Oates being at St. Omers, when he said he was in town.

Oates. And what credit were they of, at that time, pray, my lord?

L. C. Baron. I think they were persons of very good credit; they were gentlemen of good families, many of them.

Oates. Did the jury believe them at that time?

L. C. Baron. I cannot tell what the jury did.

L. C. J. Nor is it any matter at all what they did: But I ask you, my lord, but one question: Have you heard this evidence that has been given here to day?

L. C. Baron. No, my lord, I have not.

L. C. J. If you had, I would then have asked you, whether you believe him now or not?

L. C. Baron. Truly, my lord, I never had any great faith in him, I do assure you, as to myself.

Just. Withins. You hear what he says, Mr. Oates; you had never any great credit with him.

Oates. My lord, I am not at all concerned at this; I value myself more upon my own innocence and integrity, than any man's good or bad opinion whatsoever.

L. C. J. Ay, your innocency is very great!

Oates. Then, my lord, I will conclude my evidence.

Att. Gen. My lord, before Mr. Oates goes to sum up his evidence, we have some other evidence to give.

L. C. J. What say you, Mr. Oates? Will you call any other witnesses to this point?

Oates. My lord, if they bring any other evidence, I hope I may have my turn to answer it.

L. C. J. Ay, truly, if they bring any new evidence that you have not applied to already, God forbid that you should not be heard; but if it only gives an answer to the evidence that has been given, then you must not retort on them; for they are to have the last word: but it is not fit withal, that you should be denied any thing that is necessary or really of advantage to you.

Oates. If they offer any new evidence to my disreputation, the question is, whether I may have a time allotted me to make my defence against that evidence?

L. C. J. Ay, ay, in God's name, by all means.

Att. Gen. This is the usual method of proceedings; but I would know if Mr. Oates has

any more witnesses to examine to this point that he has examined to already?

Oates. My lord, I think I have no further evidence at present, till I hear what they further say.

Att. Gen. Then may it please your lordship, and you gentlemen of the jury—

Oates. I hope when your lordship sums up the evidence, you'll remember what has been said by the witnesses.

L. C. J. You may assure yourself, I will remember whatsoever has been said on the one side and t'other, as near as I can: the gentlemen of the jury are men of understanding, and I see they take notes, and I'll give them all the assistance I can.

Oates. Truly, my lord, I have some more witnesses to the same purpose, if your lordship please to spare time to hear them.

L. C. J. Ay, ay, we sit here to hear the witnesses, call whom you will.

Oates. Is my lord Lovelace here?

L. C. J. I cannot tell, I do not see him here; but you did call my brother Gregory, there he is, what say you to him?

Oates. Mr. Baron Gregory was Speaker of the House of Commons in one of the Westminster parliaments.

L. C. J. Swear my brother Gregory.

[Which was done.]

Oates. I desire your honour would be pleased to give this court and the jury an account, you being Speaker of the House of Commons, what credit I received there in that House upon my discovery of the popish plot?

Bar. Gregory. My lord, that is a pretty general question, it is not possible for me to remember the proceedings in the House of Commons so long ago.

L. C. J. But, brother, I tell you what he means by it: he would have you to answer this question, whether he was of good credit in the House of Commons, or not?

Bar. Gregory. I know not what answer to make about the credit he there had; any member of the House of Commons may give as good and better an account in that matter than I; and truly I do not remember that Mr. Oates was before the bar of the House when I was Speaker: I believe it was before I was Speaker, that he was examined at the Commons bar.

L. C. J. Well, he can remember nothing of it.

Oates. Is my lord Lovelace there?

Cryer. He has been called, but he is not here.

Oates. Call my lord of Stamford.

Cryer. He is not here.

Oates. Call sir Francis Winnington.

Cryer. He is not here.

Oates. Call Silas Titus, esq.

Cryer. He is not here.

Oates. Call sir George Treby.

Cryer. He is not here.

Oates. Call sir Francis Pemberton: these have been all subpoena'd.

Cryer. He is not here.

Oates. Is my lord bishop of London? *

L. C. J. Here is my lord bishop of London, pray swear my lord bishop of London.

[Which was done.]

Oates. I beg your lordship, if you can, would give an account of your remembrance in this matter: your lordship was often in committees of the House of Peers about this business, and from first to last you were in the committee for further examination of the popish plot; and you were not only of the committee, but you also sat as a baron in the House. I humbly beg your lordship would please to tell, as far as you can charge your memory, what reputation he had in the House of Lords, where I was upon my oath; and in particular, whether your lordship remembers that I received the thanks of the House for the service I had done for the king and kingdom in the discovery.

Just. Holloway. It is a long question, my lord.

L. B. of London. It is so, my lord; but my answer will be very short: for it is a very little I can remember after so great a distance of time, and the transactions have been public; nor can I acquaint the court with any thing, but what is known already; and that is this, I remember that the plot was discovered by him, and his discovery was received as evidence at the bar of the House of Lords, and believed, and the thanks of the House were given him at that time for it.

L. C. J. There's sir George Treby; what do you ask him? But first let him be sworn.

[Which was done.]

Oates. Pray be pleased to ask sir George Treby, who was chairman of the committee of secrecy, and was manager in the trial of the lord viscount Stafford, that he will be pleased to tell what credit I had in both houses upon that trial.

L. C. J. I told you before, you must urge nothing of that trial, unless you have the record here.

Oates. Then, my lord, I desire sir George may give an account what he knows of the correspondencies between Mr. Coleman and the See of Rome.

L. C. J. No, that will not be any evidence at all in this case; for that is not at all here in question.

Oates. Then, my lord, I desire sir George Treby may speak what he knows of my credit in the House of Commons.

L. C. J. Ay, what says he to that?

Sir G. Treby. My lord, I can answer for nothing but my own judgment; I cannot tell what credit he had with any particular member of the House of Commons; I do remember, indeed, he was there several times at the bar, but not upon oath, but as others usually are there: and concerning the discovery, there was a vote all the kingdom knows of, that they were

satisfied there was a plot, but whether that vote was grounded altogether upon his evidence, or how far upon his evidence I cannot tell, nor what any man thought of it besides myself.

Oates. I desire Mr. Serj. Pemberton might be called again.—*Cryer.* He is not here.

Oates. Then pray call sir William Dolben.

Cryer. He is not here neither.

Oates. Then I call sir Edward Atkins.

Cryer. He is not here.

Oates. Call Mr. Richard White.

Cryer. He is not here.

Oates. My lord, these were all subpoena'd, but they will not come; they are frighted away.

L. C. J. We know nothing of that, they may come if they will.

Oates. Call Mr. Thomas Cox.

Cryer. He is not here; but here is Mr. White.

Oates. I pray he may be sworn. [Which was done.] I desired to know of him, whether he were not a jury-man upon the trials of Ireland and Whitebread?

White. No, I was not.

Oates. Then I am mistaken; I beg your pardon for this trouble.

L. C. J. Well, there is my brother Dolben come now. What say you to him? Swear my brother Dolben. [Which was done.]

Oates. May it please you, sir William Dolben, you sat as a judge upon the Trials of Mr. Ireland, Mr. Whitebread, and Mr. Langborn; and I call you, sir William Dolben, to give an account to my lord and the jury, what credit my evidence had at those trials, and how the jury was satisfied with it.

L. C. J. There is the verdict, man, that finds the persons you speak of, guilty.

Oates. If that be evidence enough, I am satisfied, my lord.

L. C. J. Is not that better than his opinion to shew how the jury was satisfied? Ay, certainly; better than the opinion of all the twelve judges for that point; they would not have convicted them except they had been satisfied with the evidence.

Sir W. Dolben. Have you done with me, Sir?

Oates. I have, Sir.

L. C. J. Have you called all your witnesses, or will you call any more.

Oates. No, my lord, I will call no more at present.

Att. Gen. Then, my lord, we will go on with another part of our evidence. Gentlemen, you see Dr. Oates, to support his credit, has given two sorts of evidence; the one is, some records of trials at the Old-Bailey, wherein he had the good hap to be believed; the other is, several noble persons, and other gentlemen as to the credit he has had given to his evidence before. What they have said I shall not meddle with at all at this time, but leave the observations that are to be made thereupon, till we come to sum up the evidence for the king. But as to the first part of his evidence, that is,

* Dr. Henry Compton, see in this Collection the Proceedings against him, A. D. 1686.

as to the records produced, and the verdicts therein given, and the opinions of the judges, we have this to say in point of evidence as an answer. First, we shall produce to you several records, wherein he has not been believed; as that of sir George Wakeman, and my lord Castlemain: and not only so, but we shall actually prove that he was perjured in them; that what he swore against them was utterly false, and you will hear this was not the first time that he had sworn false; for in an accusation that he gave at a trial at Hastings, we shall prove he swore buggery upon a person, which was proved false.

Oates. Can you produce any such record, Mr. Attorney?—*Att. Gen.* Yes, we shall.

L. C. J. Do not interrupt the king's counsel; let them go on; you shall be heard quietly in your time.

Mr. Hanes. Nay, Mr. Oates need not be so hasty as to ask for the records, by degrees we shall produce records enough against him.

Att. Gen. We shall prove also by the Journals of the Lords House, that he did forswear himself; for after he had there made a long narrative of the plot, being asked, whether he had any more to accuse than those persons that he had named, and this upon his oath; he did there swear that he had no more persons to accuse.

Oates. That were members of that House, it was.

L. C. J. Sir, you must be quiet till they have done.

Att. Gen. But soon after he bethought himself, and accuses the queen and his royal highness the duke, our now present sovereign, of being in the plot.

Oates. What plot did I accuse them of?

L. C. J. Nay, you must sit down and be quiet; how now, will you not let the king's counsel speak? You were heard quietly, and so shall they be too.

Oates. Well, my lord, I will be quiet.

Att. Gen. These things, my lord, will shew what credit he was of at that time. Another thing we say to these records, is this; there were two other witnesses, Mr. Clay, and Mr. Smith, besides those that were now produced, which were the home-witnesses, that did positively swear, that in April and May 1678, Oates was here in town; he did then indeed make use of those other canting witnesses, for I cannot call them any otherwise, that beat so about the bush, and speak of uncertainties, and contradict one another; but those that I name Clay and Smith, were home-witnesses; and there lay the credit of his being in town, when the witnesses, which came from St. Omers, say he was beyond sea.

Oates. My lord, I beg I may ask one thing; whether my lord bishop of London be there still.

L. C. J. No, my lord of London is gone.

Oates. I am sorry for it, because he could have given an account of this Smith, for he knows him.

L. C. J. I cannot help it, you should have desired him to stay while he was here; go on, Mr. Attorney.

Att. Gen. I will, my lord; and this which I am going to say, as an answer to his evidence, will give a full answer to that other objection which he made; which was, what was the reason, when he had given such an evidence so long ago, it should be delayed so long ere it was prosecuted. I'll give your lordship a reason, and a satisfactory one: Till those discoveries were made that have lately been made, the evidence these witnesses gave, carried a probability of truth in it; and sir Richard Barker himself added his testimony to it, though he does not think fit now to come and confirm it: I say hitherto it had some semblance of truth, and so did balance the other testimony of them that came from St. Omers. But when we had discovered that it could be testified by twenty persons, that had not been at any of the former trials, that he was certainly all that time at St. Omers; and when we had discovered the tampering and practices of Mr. Oates, in suborning these witnesses to swear as corruptly as he swore at first, which we shall shew you palpably to be true that he did so; that gave us encouragement to go on to make enquiry into the matter: but this was not discovered till half a year ago, or thereabouts. Now as to one of those witnesses, that is, Mr. Clay, the case stands thus: indeed I expected he would have brought the same witnesses he did then, for I presume they are all about town, but he has not thought fit to do that: this Clay was then a priest, and a prisoner in the Gate House for that very reason, as being accused for being a Romish priest. While he was there a prisoner, Mr. Oates comes and threatens him, and solicits him to swear that he was here in town in May 1678, that he might be provided with proof against what the boys of St. Omers (as he called them) would come to testify; and threatened him, if he did not, he would hang him, for he could swear him to be a priest; and this was about three or four days before the trial of the five Jesuits: at length they came to a bargain and agreement, as you will hear, that he should come and swear this; when Mr. Oates cannot pretend that the evidence of Clay was known at all by any of the committees that were concerned in the management of his discovery; or that he was so much as thought of for a witness. But we shall prove how it came to pass; and I believe, if Mr. Oates would call him now, (as I do not question he knows where to have him) Clay would not be so hardy now as to affirm his former testimony. Then as for Mr. Smith, his case stands thus: Mr. Oates had sworn him into the plot, as you will find in his narrative that he gave in upon oath, which is upon record, and entered in the journal of the Lords' House. He was a schoolmaster in Islington, and Oates swears high-treason against him, and thereupon warrants went out to take this Smith, and Mr. Oates was very violent in the

pursuit of him but two or three days before the trial: and then, when all these witnesses from St. Omers were come, as he knew very well, he was in some doubt his design would have failed; and then does he prevail with Smith to become a witness for him. And it is evident he did tamper with him, for that which was done by him at that time: for now he gives him under his hand (to shew the impudence as well as villainy of the man, as it has been evident enough in all his carriage) a paper that should give him authority to go free from all process and arrests upon any warrants; and this protection under Mr. Oates's hand, is directed to all the king's officers, thereby commanding them to take notice that this Mr. Smith, whom before he had accused of being in the plot, was an honest man, and employed in great service for the king at that time. This paper, when produced, will shew the time when it was made; and then it will appear, that two days after Smith comes and swears, that he dined with him the first Monday in May 1678. This was what Smith swore then; and upon my mentioning of this practice, if he have any shame in him, it must put him in some confusion; for we are prepared to prove by undeniable testimony, that Mr. Oates did not dine with this Mr. Smith that day; we shall prove it by the whole family: but the first time ever Mr. Oates came there, was in July after, when he came into England from St. Omers, which these witnesses say, was the latter end of June. Then it was that he was with Mr. Smith, and came to his house, and not before. And we shall prove by several witnesses, that upon the question being asked of Mr. Smith, how he came to testify such a thing; his answer was, I must have died for it, if I had not done it; it was only a mistake in point of time: but he threatened me, and so did some others, too, that he would have me hanged for being in the plot, if I did not comply with him, and swear this for him. My lord, I shall offer this evidence that I have opened, and then I hope we shall satisfy the jury, and all that hear his trial, that he is one of the most notorious villains that lives upon the earth; to be sure that ever was known in this kingdom.

Sol. Gen. First, my lord, we will produce our records: where is the record of sir George Wakeman?

Mr. Swift. This is the record of sir George Wakeman, and this is a true copy; I examined it.

Sol. Gen. Pray, sir Samuel Astry, read a word or two of it.

Cl. of Cr. Here is an indictment against sir George Wakeman for high-treason; he pleaded not guilty; and here is an acquittal by the jury.

Att. Gen. He being acquitted, I desire he may be sworn. [Which was done.]

Sol. Gen. Pray, sir George Wakeman, was Mr. Oates sworn against you at the trial?

Sir G. Wakeman. Yes, Mr. Solicitor, he was.

Sol. Gen. Do you remember what he swore against you at that trial?

Sir G. Wakeman. Yes, I do, Sir.

Sol. Gen. Was that true that he swore, by the oath you have taken?

Oates. Is that a fair question? I desire the opinion of the court.

L. C. J. Ay! Why not?

Oates. He was legally accused; he cannot swear himself off.

L. C. J. But he is legally acquitted too; we have a record for that here.

Oates. Ay, my lord, he was acquitted; it is well known how.

Sol. Gen. Come, Sir, was that he swore against you at your trial true?

L. C. J. What do you say, Sir?

Sir G. Wakeman. It was false upon my oath, my lord.

Sol. Gen. What particulars did he swear against you?

Mr. Pollexfen. Ay, pray tell the particulars as near as you can, what he swore against you.

Sir G. Wakeman. My lord, if your lordship please, I will give a little account what he swore against me before the king and council.

Sol. Gen. That will not do, sir George Wakeman; we do not ask you that.

L. C. J. No, it must be only the evidence that was given upon this acquittal, which is the record here produced before us; what did he swear against you then?

Sir G. Wakeman. He swore at that trial, as near as I can remember, that I undertook for a certain sum of money, 15,000*l.* as I think it was, to poison the king, and I was to do it by the means of the queen. I was to provide this poison for her, and she was to give it to the king. This he swore at my trial, which God forbid it should be true; nothing can be more false.

L. C. J. I ask you by the oath you have taken, you are now acquitted, and so in no danger; and being upon your oath, ought to speak the truth, without malice or ill-will to him that did accuse you; was that he swore true or false?

Sir G. Wakeman. False, false, upon my oath; I speak it without any malice against the man in the world.

Att. Gen. Then swear my lord Castlemain. [Which was done.]

Sir G. Wakeman. My lord, I will be bound to make it appear, that all he swore against me was false.

Att. Gen. And so was it he swore against my lord Castlemain, and others that were acquitted, at the same time with sir George Wakeman.

Sol. Gen. First, read the record of my lord Castlemain's acquittal.

Cl. of Cr. Here is the very record itself: it was in this court my lord Castlemain was indicted of high-treason, and tried and acquitted.

Att. Gen. My lord Castlemain, pray what did Oates swear against you at your trial?

And pray tell the court, whether that was true or false.

Earl of Castlemain. My lord, as near as I remember, Mr. Oates did swear at my trial, that he met me in Lincoln's-Inn-Fields, and that he went with me somewhere to Mr. Fenwick's chamber in Duke-Street in Covent-Garden, where he said I did talk a great deal of treason, and a great discourse of that kind he said there was, and he swore that I was in several cabals in relation to the king's death. I was afterwards acquitted by the jury that tried me, as appears by the record; and here I do declare, as in the presence of God, and with all the imprecations of divine vengeance to fall upon me, if I speak any thing but the truth, that not only that which he swore was false, but that I never had any thoughts in my heart, much less did ever declare in my words, of any injury or hurt against the late king. And besides, that I never saw the face of Oates in my life, till after I was put in prison upon his accusation of me.

Oates. My lord, I desire to know what religion that noble lord is of?

Earl of Castlemain. I am a Roman Catholic, my lord.

L. C. J. We all know what religion my lord is of, you need not ask that question.

Oates. That is not the point, my lord, I must have it declared in evidence.

L. C. J. I wonder to see any man that has the face of a man, carry it at this rate, when he hears such an evidence brought in against him.

Oates. I wonder that Mr. Attorney will offer to bring this evidence, men that must have malice against me—

L. C. J. Hold your tongue; you are a shame to mankind.

Oates. No, my lord, I am neither a shame to myself nor mankind: what I have sworn is true, and I will stand by it to my last breath, and seal it, if occasion be, with my blood.

L. C. J. It were pity but that it were to be done by thy blood.

Oates. Ah! Ah! my lord, I know why all this is, and so may the world very easily too.

L. C. J. Such impudence and impiety was never known in any christian nation.

Oates. But this will not do the work to make the Plot to be disbelieved; things are not to be done by great noises; I will stand by the truth.

L. C. J. Can you think to out-face such evidence as this with your impudence?

Oates. But I hope you will give me leave to make my defence.

L. C. J. Then carry yourself as becomes you in the court.

Oates. My lord, I will do so.

L. C. J. If you do not, we know how to make you do it, you shall not think to domineer here.

Oates. My lord, I hope I do behave myself as I ought.

L. C. J. No, you do not.

Oates. His language may provoke any man's passion, my lord.

L. C. J. Keep yourself within bounds, and you shall be heard; but we will suffer none of your extravagancies.

Oates. My lord, if I had been aware of this, I could have produced evidence that would have supported my testimony in these matters.

L. C. J. Go on with your proofs, Mr. Attorney.

Att. Gen. We will do so, my lord.

E. of Castlemain. Have you done with me, Sir?

L. C. J. Have you any other questions to ask my lord Castlemain?

Att. Gen. No my lord.

L. C. J. Then your lordship may sit down again where you were.

Att. Gen. Now, my lord, we shall shew the Lords Journal where it is recorded that he swore he could accuse nobody else but those that he named, and then we shall give an account, that soon after, he accused our present sovereign and the queen dowager.

Sol. Gen. Where is the clerk of the parliament?—*Mr. Swift.* Here he is; *Mr. Walker?*

Att. Gen. Swear him. [Which was done.]

Sol. Gen. Mr. Walker, is that the Journal of the House of Lords?

Mr. Walker. Yes, my lord, it is.

Sol. Gen. Deliver it in to the clerk, and let him read it.

L. C. J. Then you must direct to the time, or else it will be to no purpose.

Mr. Swift. Sir Samuel Astry, pray turn to Friday the 19th of November 1678.

Cl. of Cr. Reads. 'Die Veneris decimo nono Novembris 1678.' Titus Oates being called in at the bar, desired to be heard a few words before he was sworn—

L. C. J. Mr. Attorney, I doubt this will not be evidence: It is only a paper of what he said, taken before the Lords; but now, whether that was upon oath or no, is the question: nay it appears it was not upon oath, but says, it was before he was sworn.

Att. Gen. My lord, I desire it may be read, all out.

Cl. of Cr. Reads. Titus Oates being called in at the bar, desired he might be heard a few words before he was sworn to speak to the main business: which being granted to him, he complained of the restraint he is under, and being debarred of the liberty of his friends coming to him, and of conversing with any body in private, and that no Englishman ought to be restrained, unless accused by one or more witnesses; and prayed that the restraint might be taken off, that he might be enabled to give his evidence more cheerfully, and that the House would be pleased to address the king for that purpose, and that his pardon may be renewed, because he is under misprision of treason. To which the Lord Chancellor told him, that the House would take his condition into consideration: and then being sworn, he was told by the Lord Chancellor, that the Lords

have received an Address from the House of Commons in part upon evidence by him given there, and that the House expects he should give an account what that is, which has begot such astonishment in the House of Commons as is expressed in the Address. Upon which Titus Oates said, that in July last, he saw a letter from sir George Wakeman.—

L. C. J. Is this evidence, Mr. Attorney?

Att. Gen. My lord, the use we make of it is to prove that he did accuse the queen.

L. C. J. What is the accusation of the queen to this purpose?

Att. Gen. My lord, we say he had sworn several days before, that he had no other persons to accuse.

L. C. J. You should produce that first, that he swore so.

Att. Gen. My lord, we should so, I think, and I thought it had been so done.

L. C. J. This is no evidence, for it is not upon oath; it does not say so.

Att. Gen. Yes, it does, my lord; but we will go on in order.

L. C. J. Come then, let us see what was sworn about his having no more persons to accuse.

Att. Gen. Pray, sir Samuel Astry, look the 30th of October 1678.

Cl. of Cr. Reads, Die Mercurii 30 Octobris 1678, Titus Oates, being called in, was sworn at the bar, and required to answer to what he is now called in for, concerning his discourse with the lord Annesley last night about the duke of York.—

L. C. J. I doubt this will not be evidence neither; for we are now speaking only about what shall be evidence: we are not now meddling with the methods of the House in their examination of witnesses, but what is evidence here; suppose an oath be administered to me for a particular purpose in the House of Lords, that I shall answer to what is asked me concerning a discourse that I had with a third person.

Att. Gen. Pray, sir Samuel Astry, look the next day; for there, my lord, he is examined upon the general.

Sir S. Astry Reads. 'Die Jovis 31 Octobris 1678.'

Att. Gen. But first read the latter end of the former day's proceedings, beginning at those words, upon consideration.

Cl. of Cr. Reads. Upon consideration of what Titus Oates had said, he was called in again, and told by the Lord Chancellor, that the House has directed he shall be heard again to-morrow at nine o'clock, and the Lords do expect that by the oath he hath now taken, he should go through with what he hath to say, and therefore he should prepare himself to deliver the whole truth of what he knows concerning the design against the king's person, and the government of this kingdom.

L. C. J. But still, Mr. Attorney, we are but where we were; for supposing upon my examination upon oath given me in the House of

Lords to a particular purpose, that my lord Chancellor should tell me here, my lords intend to-morrow, that you, by virtue of the oath now given you, should come and give them satisfaction as to other questions, I doubt that would not be evidence in Westminster-hall: let us not stretch any thing further than it should be upon any account whatsoever. For suppose I give you an oath to make true answer to such questions as I shall ask you concerning what was said at the Sessions-house at such a trial, and then I come after and ask you upon the oath you have taken what do you say concerning such a business seven years ago, would that be evidence?

Att. Gen. With submission, my lord, if a man be told he is upon his oath, to say all he knows of such a design, what he says upon that oath is evidence.

L. C. J. You say very true, Mr. Attorney, if I give him a general oath; but what he says concerning any other matter than that particular thing which he was sworn to give an account of, can never be evidence.

Sol. Gen. Truly, my lord, I think we need not labour in such a thing as this is.

L. C. J. Truly, Mr. Solicitor, I think it is no evidence at all; if you can prove he was sworn to his whole Narrative, and can bring any thing out of that, you say something.

Att. Gen. We desire that my lord of Berkeley may be sworn. [Which was done.]

L. C. J. What do you ask him?

Att. Gen. Pray, my lord, will you give the court and the jury an account, whether Mr. Oates was not sworn to his Narrative, and delivered in his evidence at your lordships' bar upon oath?

L. C. J. My lord of Berkeley, let me ask you this question, was every thing that he gave an account of at the bar of the Lords' House given in upon oath?

E. of Berkeley. I cannot remember that, my lord.

L. C. J. It is impossible that he should.

Earl of Berkeley. All I can testify is but what I answered to the question which was asked me at my lord Stafford's trial.

L. C. J. But that is not material now, my lord, because the record of that trial is not here.

E. of Berkeley. The same thing is entered here particularly.

Att. Gen. My lord, we desire it may be read again.

L. C. J. Read it again with all my heart.

L. C. J. This is a particular oath to a particular purpose; and shall I help it by intendment, that he was afterwards sworn to the general matter? No, I will not: suppose any thing had happened afterwards that it should have been thought fit to prosecute Oates; could the man have been convicted of perjury for this? Certainly he never could.

Sol. Gen. Well, my lord, we submit it to you; but we will now go on to prove that which Mr. Attorney opened, that Oates did suborn these witnesses to swear what they did swear:

you have had one part of the evidence that was then given; now we shall prove that Clay was sworn at Whitebread's trial, and what he did there testify about Oates's being in town.

Oates. I own it, he was sworn then.

Att. Gen. Do you own that you suborned him?—*Oates.* No, I think not, Mr. Attorney.

Sol. Gen. Then we will prove that you did tamper with him, and by threatenings prevailed with him to swear for you.

Att. Gen. Nay, we will prove that he was mistaken in what he did swear a whole year. Pray call Mr. Charles Howard.

Oates. My lord, I desire I may have leave to ask the court a question, and I beg the opinion of the court in it, whether a Popish recusant convicted, may be a good witness?

L. C. J. We are not bound to answer your question; for we see no ground why you should ask it: if you have any occasion to object against any witness, and can produce any record against him; then we will tell you more of our minds.

Oates. Pray then let me ask you another question, my lord.

L. C. J. Prithee do not trouble us with thy questions, let them go on with their evidence.

Oates. My lord, I desire to know, whether a man confessing himself a Popish priest—

L. C. J. We do not sit to answer every idle question; it is nothing at all to the purpose: when you ask a proper question, we will answer it.

Oates. Yes, it is, my lord, and you are my counsel in matter of law.

L. C. J. I am not so.

Oates. Yes, my lord, the court is always of counsel for the prisoner.

L. C. J. That were well, indeed, if we were bound to give advice in every case, where a man is prosecuted at the king's suit: indeed in those cases where a man can have no counsel allowed him, the court is of counsel for him; but where he may have counsel, the judges are not of counsel for him.

Just. Holloway. Besides, we are not here putting of cases, but trying of a cause.

Sol. Gen. Here is Mr. Charles Howard, swear him. [Which was done.]

Att. Gen. My lord, we bring this gentleman Mr. Charles Howard only to this part of our evidence, to prove that Mr. Clay was mistaken a whole year; mistook 78, for 77.

L. C. J. But, Mr. Solicitor, if you take this confused method, we shall never be at an end, and for my part I cannot make any thing of it; it is impossible for me to retain these things in memory, so as to give any direction to the jury, if there be not a method used: for do you think that it is possible for a man to retain in his head a hundred things huddled up and down without any order?

Sol. Gen. We beg your lordship's patience but a little while, and we shall have it in very good order. Swear Higgins. [Which was done.]

L. C. J. Pray what do you ask him?

Att. Gen. The matter we examine him to, is this; for I would open to you the nature of our evidence: first he swore Smith into the Plot, and then gave him a certificate, that he was an honest man.

L. C. J. Is that Oates's hand?

Att. Gen. We shall prove it to be so.

L. C. J. You must first prove what he swore of Smith.

Att. Gen. My lord, we desire that we may read his Narrative.

L. C. J. But first prove it, Mr. Attorney.

Att. Gen. It is upon record in the House of Lords.

L. C. J. Was that delivered in upon oath to the House of Lords? Or else we shall be but where we were.

Att. Gen. For proof of that, we call my lord Bridgwater.

L. C. J. Here he is. Swear my lord. [Which was done.]

Att. Gen. My lord Bridgwater, do you remember the Narrative that Oates gave in to the House of Lords, and was it upon oath? But first of all, if you please, I desire my lord may see the book, whether any thing be there under his hand, and then, whether it be entered to be upon oath, and whether this be the Journal agreeing with the paper delivered him?

L. C. J. This is a Narrative, my lord, that he himself delivered in, and I would ask my lord Bridgwater this one question. Was not this Journal compared with the Narrative given in upon oath by order of the Lords' House.

Earl of Bridgwater. Yes, I must say I was one of the committee appointed to take care of the Journal, and here is my hand to it among other Lords, and that is a copy of what Mr. Oates did deliver in as his Narrative, which was inserted upon a Report of the Committee into the Journal Book by order of the Lords, and we did examine the Narrative with the book.

L. C. J. But what is all this to our purpose now? Do not mistake me, my lord Bridgwater, I do not speak to you now, but to Mr. Attorney: what does this prove as to the matter in hand?

Att. Gen. Pray, my lord Bridgwater, did you see the Narrative, brought in by Oates?

E. of Bridgwater. That Narrative was delivered to us by the clerk of the parliament.

L. C. J. But my lord, do you know that Narrative was given in upon oath?

E. of Bridgwater. I know no other, but that the clerk of the parliament brought it to us.

Att. Gen. Here is the clerk of the parliament will tell you that Oates was sworn to it.

L. C. J. Prove it if you can; but hitherto I see nothing that looks like evidence.

Att. Gen. Really, my lord, I should take it to be as much evidence as any that was ever offered in the world.

L. C. J. Pray, Mr. Attorney, let us reason the point a little: Suppose you bring an Answer in Chancery, except the man be sworn to it, can you read his Answer? and yet I ever looked upon an Answer in Chancery as evidence.

Att. Gen. In that case the record proves itself, and so it should here; and therefore we desire it may be read.

L. C. J. But surely you would not allow an Answer to be evidence, unless you prove it to be sworn.

Att. Gen. Truly, my lord, I always took it, that we need not come to prove a man was actually sworn to his Answer; but if it be once entered upon record in chancery it proves itself.

L. C. J. It is true, Mr. Attorney, if it appears upon record that the Answer was sworn.

Att. Gen. My lord, if this Journal of the House of Lords is a record, then that which is entered into it, is a record; it is a thing recorded as a deed enrolled is, and proves itself.

L. C. J. Mr. Attorney, either we mistake one another, or we do not differ in opinion. If you could make it appear that Oates brought this thing in the House of Lords, and delivered it upon oath, that were evidence; otherwise I cannot see how you can make evidence of it.

Att. Gen. I always thought, my lord, that a record out of a court of record, would have that credit in another court of record as to be read.

L. C. J. My lord Bridgewater tells you, it was delivered to them by the clerk of the parliament.

Att. Gen. Pray, my lord, let the clerk read what is at the end thereof.

Cl. of Cr. Reads. Hitherto examined the 3d of December, 1678. The Narrative and Examination of Titus Oates being first inserted, according to the order of the House, of the 21st of November, last, by us Anglesey, &c.

Att. Gen. Pray read the order of the 21st of November.

Cl. of Cr. Reads. Die Jovis 21st of November 1678. Upon report made by the earl of Bridgewater, from the Lords sub-committees for the examining the Journal of this House, That upon examination thereof, their lordships find, that the Narrative made upon oath by Titus Oates, at the bar on the 31st of October last, of the horrid design against his majesty's person and government, is only mentioned in the Journal, but not entered at large in such manner as he then related it; and that therefore their lordships desire the direction of the House concerning this matter: It is thereupon ordered, that the said Narrative made by Titus Oates on the said 31st of October shall be entered at large, and inserted in the Journal, as part of the business of that day.

L. C. J. Now you make it evidence; for it appears that he was sworn, and gave his Narrative upon oath.

Att. Gen. Then now, my lord, I hope we may read it.

L. C. J. Ay, read it.

Att. Gen. Read the 54th article.

Cl. of Cr. Reads. This is the Narrative of Titus Oates, the 54th Article. That one Matthew Medborne, a player in the duke's theatre; one Mr. Penny, Mr. Mannock, Mr. Sharpe, and Mr. Seddon; and one W. Smith a

School-master at Islington; and one E. Everard and others, meet in a club on Thursday nights and Sunday nights, with one Jones a priest, and one Keydash within mentioned: and all these persons are employed by the Jesuits, to vilify the House of Commons, and to go about the city to incense the people against them, and against the bishops of the nation; and they deliver this treasonable position, That the Commons assembled in parliament are the devil's representatives, and not the nation's; which treasonable and detestable words the deponent did hear at the said club, which is kept at Fuller's Rents, near Gray's-Inn. And in the month of August the deponent was ordered by the Jesuits in London, to give the said persons great respects; and in their names to thank the club for their faithfulness to them in that particular.

Att. Gen. Thus you see what he had sworn against him; now we shall shew how he dealt with him. Is that Mr. Oates's hand?

Witness. It is; yes, I believe it is.

Att. Gen. I believe he will hardly deny it himself.

Oates. Let me see it, I pray you, Mr. Attorney.

Att. Gen. Shew it him. [Which was done.] Is that your hand?

Oates. I cannot say it is my hand, nor do I believe it to be so.

L. C. J. He does not own it to be his hand.

Oates. I do not say it is not my hand; but I do not remember any thing of it.

Att. Gen. Read it, Sir, pray you.

L. C. J. What is it you would read?

Att. Gen. A certificate under Oates's hand of Mr. Smith's honesty, not three days before the Trial of the five Jesuits.

L. C. J. Read it, let us hear what it is.

'These are to certify that William Smith is no Papist; and that he is upon good service at this time for his king and country; of which, I hope those that are inquirers after recusants, will take notice.—Witness my hand this 3d day of June, 1676. TITUS OATES.'

L. C. J. What harm is there in all this? I must needs say, I cannot comprehend what you would make of it.

Att. Gen. This protection was given Mr. Smith by Mr. Oates, three days before the Trial; but after he had sworn him into the plot in his Narrative.

L. C. J. I see not any plot, for my part, that he swore him into, unless you mean treason against the House of Commons: for that is the accusation he made, that he spoke such words of the House of Commons. Pray read it again. [Which was done.]

L. C. J. Well, and what is all this?

Att. Gen. Is not this a swearing him into the plot?

L. C. J. No, not that I see; it only gives an ill character of him.

Att. Gen. But he is accused as a confederate with the priests and jesuits.

Oates. Did I charge him, Mr. Attorney,

with having any hand in the plot against the king's life?

Att. Gen. I only offer this as an evidence that there was tampering.

L. C. J. You call it a being in the plot; I see no such thing.

Att. Gen. And then he comes and gives him an acquittal under his band, and then produces him as a witness.

L. C. J. There can be no great matter in this, Mr. Attorney.

Att. Gen. Then, my lord, we'll call Mr. Smith himself, and he will tell you how Oates drew him in. Swear Mr. Smith. [Which was done]. Pray acquaint my lord and the jury, how you came to swear at the former trial, by whom you were persuaded, and how you varied from the truth.

L. C. J. That is very nauseous and fulsome, Mr. Attorney, methinks, in a court of justice.

Att. Gen. What did you swear at the former trial? and was that true you did swear then?

L. C. J. I tell you truly, Mr. Attorney, it looks rank and fulsome; if he did forswear himself, why should he ever be a witness again?

Att. Gen. 'Tis not the first time by twenty that such evidences have been given.

L. C. J. I hate such precedents in all times; let it be done never so often. Shall I believe a villain one word he says, when he owns that he forswore himself?

Att. Gen. Pray, my lord, give me leave; I must pursue my master's interest.

Sol. Gen. My lord, it was ever testimony allowed to be given to detect a subornation.*

L. C. J. I am sure 'tis not fit to be allow'd at any time: if he did forswear himself in a

* Vide infra, in *Eliz. Canning's Case*, A. D. 1754, for perjury, the *Argument of Davy, Serjeant*, and the *dicta of Legge, Baron*, and *Moreton, Recorder of London*.

"Another thing that derogates from the credit of a witness is, if upon oath he affirmed directly contrary to what he asserts; then if the matter be civil, you may give in evidence the criminal proceedings, and swear that he gave evidence at the Trial; and this takes from the witness all credibility, inasmuch as contraries cannot be true." *Gilb. Law of Evidence*, p. 136 (edit. of 1801). See also p. 139. But a witness shall be admitted to swear, that what he swore before was false. See the *Cases of Timothy Murphy*, January 13th, 1753, in this Collection; and also of the King against *Teal* and others, *Trin. 49 G. 3. 11 East's Rep. 307*: in which case it was said, that such contradiction will not warrant the rejection of the evidence by the judge; it only goes to the credit of the witness, on which the jury are to decide. So before Committees of the House of Commons for trial of Election Petitions, voters who had taken the Bribery Oath, have, notwithstanding, been admitted to prove that they had been bribed. See the *Boston Case*, A. D. 1803; *Peckwell's Cases of Controverted Elections*, Case xxiv.

Court of Record, in my opinion he is not to be receiv'd as a witness any more.

Sol. Gen. We do only make this use of him, to prove that Oates did suborn him.

L. C. J. Pray call some other witnesses, if you have them to contradict him; but do not offer to bring a man to swear, that he did forswear himself before.

Sol. Gen. My lord, we give evidence here of a man's being produced by Oates, to swear he was here in May 1678, and he did make such an oath: now I hope, with submission, my lord, it is evidence to contradict that oath, if we can prove that he has confess'd he was forsworn, and mistaken in his oath; such evidence perhaps will be of little value, yet evidence it is.

L. C. J. Make it what you will, Mr. Solicitor; I think it is of no value at all, nor to be admitted, for the man to come and swear it himself: prove what you can by others.

Sol. Gen. Surely, my lord, this confession of his to others, is of less value than when we bring the man himself to confess his fault; that man himself coming and owning the thing, that he was mistaken, with great sorrow for it, sure is a good evidence.

L. C. J. Argue the matter as long as you will, Mr. Solicitor, you will never convince me, but he that has once forsworn himself, ought not to be a witness after that in any cause whatsoever. If any man tell me otherwise till doomsday, I cannot be convinced of it.

Sol. Gen. I go but to ask him this question, whether or no what he swore were true?

L. C. J. Mr. Solicitor, we are all of another opinion, that it is not evidence fit to be given.

Sol. Gen. My lord, I must submit it to you.

L. C. J. I tell you, Mr. Solicitor, if you should call him to know what it was he swore, and it does appear by any evidence, or by his own confession, that it was false, you ought not to believe what he says, even in that matter. And I think truly for example's sake, it ought not by any means to be admitted.

Sol. Gen. My lord, I must submit it to you; but then I humbly conceive it will be in very many cases impossible to detect a perjury or subornation, if the party suborned cannot be admitted to be a witness.

L. C. J. What good will the admitting him to be a witness do? For either what he swore then, or what he swears now, is false; and if he once swears false, can you say he is to be believed?

Mr. North. My lord, if a man come and swear—

L. C. J. Look ye, Sir, you have our opinion; it has been always the practice heretofore, that when the court have delivered their opinion, the counsel should sit down, and not dispute it any further.

Att. Gen. Then we will go about the business of Clay, and for that we will call *Lawrence Davenport*.

L. C. J. It is certainly against the law to

admit a man that has once forsworn himself to be a witness again in any cause.

Att. Gen. Swear Lawrence Davenport. [Which was done.] Pray give my lord and the jury an account how Clay came to be a witness, and by whom he was wrought upon to be so.

Davenport. May it please you, my lords, and gentlemen of the jury, Mr. Oates came to the prison, I being then a prisoner at that time in the Gate-house at Westminster myself; and having no other employment, I had the government and care of some of the prisoners for a livelihood, being in custody; and at that time Mr. Oates, as I said, when old Clay was in prison, did come there to visit this Clay, at several times. And coming there to visit this Clay, up stairs he went to his chamber, and desired to speak with him; and I did desire your worship, Mr. Oates, that you would go in to him, and you did go into his chamber, and there these words you did speak to him before the Trial of the five jesuits; That if he did not swear what you put to him, he should be prosecuted as a priest, which you did believe he would die for:

L. C. J. What is this man's name?

Att. Gen. Lawrence Davenport.

L. C. J. Did you hear him say so?

Davenport. Yes, my lord, upon my oath I did hear him say so, and sir William Waller was with him; and then he replied, and said, with a proviso that you would give him his gold and silver that was taken from him, being then a prisoner, under my keeping in the Gate-house, and wanting his money; if you would do that, he said, he had been a rogue before, and he could not say what he might do.

L. C. J. Now make it appear that this Clay was sworn at the trial.

Davenport. My lord, afterwards I was keeper to him under the other keeper, and he had a keeper to wait on him to Newgate sessions at the Old Bailey; wherefore this gentleman that is standing there, Mr. Oates, comes to us; says he, do not you trouble yourself about this prisoner; let him alone with me, I will see him at home again; and then the jesuits there did take their trials; how it was I cannot tell, for we could not come into the court. Afterwards they went to the Fountain-tavern by Newgate to dinner, and Mr. Oates and he went to dinner together; we were below in the house waiting there till it was night, and still thinking that he should come down again: but away went he home, and left us in the lurch; but indeed he did come home to the prison very honestly and civilly, because he was civilly guarded.

Att. Gen. Now, my lord, we will give you an account, that the next morning after this discourse betwixt Oates and Clay, at the Gate-house, this witness told it to another that was a prisoner there then too.

Oates. My lord, I would ask this man a question, whether he had the sole keeping of Clay, without any other keeper with him?

Davenport. There was no keeper in the house but myself, where he lay, which was in Margaret's-lane, not in the prison, but in the house.

Oates. Pray ask this gentleman, why he did not come in and testify his discourse he speaks of when Clay was a witness?

Davenport. I was not by when he was sworn.

Oates. Did he not know he was a witness?

L. C. J. No, he says he did not go into the court with you, he was not suffered to go in.

Davenport. My lord, I am a poor tradesman, and know nothing what belongs to the law.

Att. Gen. Come, pray swear this man, Mr.

— [Which was done.]

Sol. Gen. Pray tell what Davenport told you, and when?

Mr. —. He came and told me the next day in the prison, where I was then, what Mr. Oates and sir William Waller had been tampering with Clay about, to make him swear for Mr. Oates.

L. C. J. What were the words he told you they said to him?

Mr. —. It was, that he must swear that Mr. Oates dined at Mr. Howard's house such a day of the month, and Mr. Clay did say he knew nothing of the matter; but then sir William Waller and Mr. Oates did reply to him again, here's your choice; if you will not swear this we will try you for a priest, and hang you; and so Clay agreed, if he might have his money restored that was taken from him; he had been a rogue before, and did not know what he might do.

Oates. Is this evidence, my lord?

L. C. J. Yes, doubtless, very good evidence.

Oates. It is only upon hear-say, that he speaks.

L. C. J. But that establishes the other man's testimony, this being told the very next morning; for he would not conceal it, it seems.

Att. Gen. Now that Clay was sworn at the trial, you admit, Mr. Oates.

Oates. Yes, I do, he was so.

Att. Gen. Then I think here's a plain proof of a subornation.

L. C. J. You must observe how they apply this evidence: they say you are an ill man, not only as to swearing false yourself, but as to suborning others, to swear more than they knew; and particularly as to this Clay, that you and sir William Waller did threaten him, you would hang him up for a priest, if he would not swear as you would have him; and by your threatenings he was prevailed with to swear.

Oates. Is Mr. Clay in court, my lord?

L. C. J. Nay, I cannot tell where he is.

Att. Gen. He was your witness, Mr. Oates; we expected you would have brought him.

Oates. I cannot tell where to find him, my lord, now, truly.

Att. Gen. Call Mr. Howard.

Cryer. Here he is, Sir; he is sworn

L. C. J. Mr. Attorney, you have not proved what he swore.

Att. Gen. We are now about it, my lord. Mr. Howard, pray were you at the Trial of the five jesuits, or at Langhorn's, when Clay was sworn as a witness for Dr. Oates?

Howard. Yes, I was at Langhorn's Trial, my lord.

Att. Gen. What was the effect of his testimony there?

Howard. He did swear that he was with me and Mr. Oates at dinner at my house, in May, in the year 1677.

Att. Gen. 1677 did he say, or 1678?

Howard. Stay, I will look upon my notes I took at that time.

L. C. J. Ay, do so, to refresh your memory, Mr. Howard.

Howard. It was May 1678, my lord.

Sol. Gen. Pray, Sir, was he then at your house with Oates?

Howard. No, he was not there in May; Mr. Clay was with me and Mr. Oates both together in July 1678, after the 4th day of July.

Att. Gen. That is, after the time he came to London from St. Omers.

L. C. J. You say very well. Have you any more witnesses?

Sol. Gen. My lord, we must desire that the 28th article of Mr. Oates's Narrative, may be read.

Cl. of Cr. Reads. 'That in order to this command on April 24, 1678, father Warren, rector of Liege; sir Thomas Preston, bart. father Marsh, rector of Gaunt; and father Williams, rector of Watton, and master of the novices; sir John Warner, bart. Richard Ashby rector of the English seminary at St. Omers, being sick of the gout could not go. But out of the said seminary went sir Robert Bret, bart. father Pool, Edward Nevile. There were in all with the deponent nine or ten, who met in London in consult with Thomas Whitebread, father Harcourt senior, and father Harcourt junior, John Fenwick, Basil Langworth, William Morgan, John Keimes, father Lovel, father Ireland, father Blundel, Richard Strynge, father Mico, father Grey, and others to the number of fifty jesuits, met at the White-Horse Tavern in the Strand, where they plotted their designs for the society, and ordered father John Carey, who was also there to go to procurator for Rome; at which consult thus held in the month of May, the deponent was present to attend the consultors, and deliver their concerns from company to company; and then a little after they left the White-Horse Tavern, and divided themselves into several clubs and companies; some met at Mr. Saunders's house in Wild-street; others at Mr. Feawick's, at Aires's house in Drury-Lane; others at Mr. Ireland's in Russel-street, near Covent-Garden; and in other places. All which, though in several companies, five or six in a company, did contrive the death of the king; and in order to which, there were papers sent from company

'to company, which the deponent did carry, containing their opinions of the tuning their business, and the manner how it was to be done; and within three or four days after the deponent went to St. Omers, with the fathers that came from the other side of the water.'

Att. Gen. My lord, we produce this to overthrow their witnesses, that speak of his being here a week in May. Now Mr. Oates in his Narrative says, that the consult ended the 24th of April; and that three or four days after he returned back to St. Omers.

L. C. J. Pray read that over again, where the names are; for the witnesses for the king swear, that Mr. Williams came over from St. Omers; but he there says he did not, I think. [It was read again.]

L. C. J. I thought it had been otherwise; it is darkly penned.

Att. Gen. My lord, I myself heard him declare in many trials here, and at the Old-Bailey, that all was finished in that day, and he went in a few days.

Oates. Mr. Attorney, you are mistaken: for if you please, my lord, the consult was not dissolved in six or eight days, though they were not sitting or acting every day.

Att. Gen. It is not a difference of six or eight days that is contended for, but it is, either Mr. Oates or his witnesses do not swear true. If it were as Mr. Oates says, that six or eight days were allowed after the 24th of April, then it must be the 5th or 6th of May that he went to St. Omers; and then his witnesses, that say he was here the latter end of May, cannot swear true. And our witnesses say he was all April and May, till the 23d of June, at St. Omers.

Oates. My lord, Mr. Attorney does not apprehend the evidence aright.

L. C. J. Well, you may make your remarks by and by, and set him right if you can.

Att. Gen. We have done our evidence, my lord.

L. C. J. Have you any more witnesses, Mr. Oates?

Oates. No, my lord, I have not.

L. C. J. Then you must conclude, and say what you have to say to the jury.

Oates. My lord, I have one thing more, and that is, a copy of the record out of the House of Lords. It is in the Journal the 25th of March 1679.

Mr. Walker. My lord, I have not the book here, it was not spoke for.

Oates. But do you know this hand?

[Shewing him a copy.]

Walker. Yes, and I believe it is a true copy.

L. C. J. Read it.

Cl. of Cr. Reads. 'Tuesday the 25th of March, 1679.'

Oates. It is the last clause in the journal of that day.

Cl. of Cr. Reads. 'Resolved, Nemine Contradicente, by the Lords spiritual and temporal, and Commons in parliament assembled that they do declare that they are fully sa-

tified by the proofs they have heard, that there now is, and for divers years last past hath been a horrid and treasonable Plot and Conspiracy contrived and carried on by those of the Popish Religion, for the murdering of his majesty's sacred person, and for subverting the Protestant Religion, and the ancient and established government of this kingdom.

Oates. There is an order to have that vote printed, and inserted before the Form of Prayer for the Fast. Pray, Sir, read the next page.

Cl. of Cr. Reads. 'Die Lunæ 25 Oct. 1680.

'Upon Report from the Lords' Committees for examining matters relating to the discovery of the late horrid Plot and Conspiracy, that captain Thomas Bickley hath lately vilified Dr. Titus Oates at a public meeting at Chichester, to the prejudice of his majesty's evidence, for the further discovery of the discovery of the said Plot: it is thereupon ordered by the Lords spiritual and temporal in parliament assembled, that the said Thomas Bickley be, and is hereby required to appear before their lordships, in the lord privy seal's lodgings, near the House of Peers, on Wednesday the third day of November next, at eight of the clock in the forenoon. And it is further ordered, that alderman Exon and alderman William Bury of Chichester aforesaid, who were then present at the said meeting, do likewise attend their lordships at the time aforesaid, to give evidence of what they know concerning this matter.'

L. C. J. What of all this? We know hereupon Bickley was turned out of commission, and now Bickley is in again. But it seems, as you had credit with some then, so you had not with others. Well have you now done all?

Att. Gen. Yes, my lord.

Sol. Gen. If Mr. Oates will sum up his evidence, then I will do the same for the king when he has done.

L. C. J. Well, what say you, Mr. Oates?

Oates. Now, my lord, here is an Indictment preferred against me for perjury, and the evidence they have given for the king, is this. 1. They have called Mr. Foster, and he tells you, that I was produced at the sessions-house in the Old-Bailey, where he was summoned as a jurymen, upon the trial of Ireland; and he says, that when I was produced at the sessions in the Old Bailey as a witness, and sworn (if I do remember Mr. Foster aright in what he says), he did hear me swear, that there was a treasonable consult of Jesuits upon the 24th of April 1678, at the White-horse tavern in the Strand; and he does further say, that I said those Jesuits afterwards came to a resolution to kill the king; and that they separated themselves into lesser clubs, the resolution being drawn up by one Mico; and that I carried it from chamber to chamber to be signed, and did see it signed. My lord, I did ask Mr. Foster, whether I in my evidence called it a consult, or a traitorous consult. Now, my lord it

is true I did call it a traitorous consult; it is as true that I did swear there was such a consult; and it is as true, that I did swear this consult did divide itself into lesser companies; it is as true as I did say I carried that resolution about from chamber to chamber, and saw them sign that resolution for murdering the king, I do not mean of this king, but of the late king. My lord, the evidence I think I, nor no honest man shall need to be ashamed of: I am not ashamed to own, that I repeated this evidence several times, nor that I gave that evidence upon oath; for it is truth, my lord, and nothing but truth, and I resolve by the grace of God to stand by it, and confirm it with my blood, if there be occasion. My lord, to convict me of perjury, they have brought a parcel of St. Omers witnesses, and these do swear that which they would have sworn six years ago; but then the court thought them fit to be sworn, not only because the law will not allow them, but because of their religion, that can dispense with false oaths, if it were for a good cause, and that was the remark my Lord Chief Justice Scroggs then made on it. I shall not insist much upon what they have sworn, for that I suppose your lordship and the jury do very well remember: but I have five things to object to their evidence, and I hope the jury will take notice of my objections, and make their remarks upon them; for since you have heard the evidence that is brought against me, it will be necessary for your lordship to weigh the nature of these witnesses, and the value that the several juries of London and Middlesex had for them. It is true, there are several brought here now, that never were witnesses before; there are indeed other men, but of the same religion and the same interest, and therefore their testimony must be of the same value; I think your lordship will allow me that. Therefore I begin with their religion, and that I take notice to be a great objection to their evidence, as I am advised by those that are learned in the law. And I must appeal to the court, whether a papist, in case of religion, may be believed and received as a good witness.

L. C. J. We must not hear any of these idle expressions.

Just. Withins. Do you think you are come here to preach, Mr. Oates?

L. C. J. I'll tell you, a papist, except you'll prove any legal objection against him, is as good a witness in a court of record, as any other person whatsoever.

Oates. But if it is your lordship's, I'll tell you my lord Coke's practice was not to admit them as good witnesses.

L. C. J. Do not tell me of my lord Coke's practice; the law is otherwise; keep to the business that you have here in hand, the question before us, whether you were forsworn in Ireland's Trial or not? Answer that if you can; but you must not run out into clamours, and idle extravagancies.

Oates. My lord, I demand it as my right to

be heard what I have to except against the witnesses.

L. C. J. I tell you, you shall be heard when you speak properly; but are you to determine what is right or what is wrong?

Oates. I am to determine my own right now in this point, and I insist upon it, and demand it.

L. C. J. It may be presently you will tell us we have no right to judge of it.

Oates. Yes, you, my lord, have; but I hope I have a right to urge it.

L. C. J. Urge what you will that is to the purpose, but then you must keep to the matter in hand, and not make such idle excursions as these are.

Oates. I will keep to the matter, my lord, if you will hear me.

L. C. J. So you shall; we'll make you keep to the matter, or we will not bear you at all; do not think your impudence shall storm us out of our senses.

Oates. My lord, I do insist upon it, that these men's religion is an exception to their testimony, and a papist is not a good witness in a cause of religion; and I desire I may have leave to argue that as a point of law in my own defence.

L. C. J. No, Sir, it is no point of law at all. *Oates.* Then I appeal to all the hearers, whether I have justice done me.

L. C. J. What's that? Why you impudent fellow, do you know where you are? you are in a court of justice, and must appeal to none but the court and the jury.

Oates. I do appeal to the hearers.

L. C. J. Take him away there; if you will not behave yourself as you ought, I can assure you, the court will do what they ought to do, and stop your mouth.

Oates. What you please, my lord, I must make my own defence as well as I can.

L. C. J. You are here in judgment before us, and are to appeal to us; we'll suffer none of your commonwealth appeals to your mobile; keep within the bounds of decency, and say what you can for yourself.

Oates. My lord, this I move to the court as one of my objections to this evidence given against me, That their religion makes them no good witnesses; especially in this cause.

L. C. J. I tell you that is nothing to the purpose, what their religion is.

Just. Holloway. Mr. Oates, we come not here to dispute points of religion, we come to try a bare matter of fact, whether you are perjured, or no.

L. C. J. I tell you a papist is a good witness without a legal exception.

Just. Withins. Pray, Mr. Oates, is not a papist as good a witness as a dissenter?

Oates. My lord Coke would not admit a papist to be a good witness in any cause.

Just. Withins. How, not in a cause of *meum* and *tuum*?

Oates. No, my lord, not in any cause between party and party.

L. C. J. Where is that opinion? *Oates.* I'll cite you the case, if you please, my lord.

L. C. J. Pray let us hear it.

Oates. It is in Bulstred's Reports, in the Second part, 155. A Popish Recusant is not to be admitted a witness between party and party.

Just. Withins. May a presbyterian be a good witness, Mr. Oates?

Just. Holloway. Or would Mr. Colledge have been a good witness, Mr. Oates?

Oates. I tell you this was my lord Coke's practice.

L. C. J. You have our opinion, and be satisfied with it; that book says it was my lord Coke's practice, and we think if that was his practice, his practice was against law.

Oates. Then another thing I object to their testimony, is their education.

L. C. J. That's no objection at all neither.

Oates. My lord, they are bred up in a seminary against law, and for which their friends are to be punished.

L. C. J. So is every man living that is bred a dissenter, bred up against law.

Oates. My lord, I have not offered any dissenter as evidence for me.

L. C. J. No, they are all no doubt of it very good people. Good-wife Mayo, and her companions, excellent Protestants without all question!

Oates. My lord, I humbly offer a statute to your lordship: and that is law sure.

L. C. J. Yes, a statute is law. What statute is it?

Oates. It is 27 of Eliz. cap. 2. The law says there—

L. C. J. Come, we will see what the law says. Read the statute he speaks of.

Cl. of Cr. It is intituled, 'An Act against Jesuits, Priests, and other such like disobedient persons.'

Oates. My lord, I desire that the preamble of the act may be read.

Cl. of Cr. 'Whereas divers persons called and professed Jesuits, Seminary Priests, and other Priests, which have been, and from time to time are made in the parts beyond the seas, by or according to the order and rites of the Romish Church, have of late come, and have been sent, and daily do come, and are sent into this Realm of England, and others the queen's majesty's dominions'—

L. C. J. This is nothing to this business before us at all.

Just. Withins. Does this statute say they are no good witnesses?

Oates. They own themselves to be educated at St. Omers, and that is against this law expressly.

L. C. J. What then! Do they own themselves to be in orders, Jesuits and Priests, then you might say somewhat to them upon this law; but do not spend our time in such trifles.

Oates. I do not spend your time in trifles, my lord; it is my defence.

L. C. J. Mr. Attorney, do you go on; for we will not sit here to spend our time for nothing.

Oates. Pray, my lord, let me but shew this, I only propose one statute more to your lordship's consideration.

L. C. J. You may propose to read the whole Statute-book.

Oates. Pray, my lord, hear me out.

L. C. J. Speak then to the business in hand.

Oates. It is the statute made in the 3rd of King Charles 1, chap. 2.

L. C. J. It is nothing to the purpose.

Oates. I am advised it is very material for me.

L. C. J. I tell you it is not, and we will not let your importunity prevail upon us to spend our time for nothing: there has been a great deal of time spent to no purpose already.

Oates. Then if you will over-rule it, my lord—

L. C. J. We do over-rule it: for it signifies nothing to this purpose.

Oates. Pray, my lord, be pleased to give me leave to offer their judgments in cases of conscience, whereby they own they have dispensations to swear lyes for the promoting of the cause.

L. C. J. That is no evidence neither.

Oates. This is very hard in such a case as this.

L. C. J. No, it is not hard, that what is no evidence in law, should not be suffered to be given in evidence.

Oates. It is evidence against the poor dissenters, my lord.

L. C. J. Indeed, Sir, it is no evidence against any one body in the world, if you will take my word for it; if you will not, I cannot help it.

Oates. Then I offer you one thing more, my lord, and that is what was said and done in the case of the earl of Shaftesbury, when he was charged with high-treason, and committed to the Tower of London; at several sessions in the Old-Bailey and at Hickeys-Hall, they did move that they might have liberty to bring in an indictment of perjury, against the witnesses which did accuse him of treason; but now the court there over-ruled those motions, and would not suffer my lord of Shaftesbury's friends to bring indictments of perjury against them, because they would not have the king's evidence indicted of perjury, nor the popish plot called in question: this is a matter of fact in the Old-Bailey.

L. C. J. And this is all idle too.

Oates. Pray, my lord, will you hear me?

L. C. J. But pray, Sir, will you hear me too? I tell you this is nothing to the purpose neither.

Oates. My lord, I desire to speak but these few words then, as to my own witnesses I have produced. And the first is Cicely Mayo; and, my lord, though it be your lordship's pleasure, not to have that good opinion of her, as I think the poor woman does deserve, yet I hope her evidence will have its due weight and consid-

ration with your lordship and the jury. She says, she saw me in town in the month of May: Now, indeed, she could not be positive what May it was, but she said it was the May before the Popish Plot broke out, that is, before the rumour of that Plot was spread abroad, and she believes the Plot broke out in 1678. But this she says positively, she saw me in the month of May here. My lord, she comes to give this evidence freely and voluntarily: a man that is a knave, is a knave for something, either out of malice, or for gain or interest; but she has no reward given her, nor can hope for any; but in love to justice, without any by-end or particular interest, she came here to testify the truth about her seeing me in London, in May 1678. The next witness is Mr. Botter, he was then sir Richard Barker's coachman. He lived some years with him, as his servant; but he is now set up for himself; and he says, that when he was about his master's business in the coach-yard, and fitting the coach for to fetch his master home from Putney, I came in, and this was the beginning of May, in a disguise; and he says, he saw me a second time in another disguise. Then comes a third witness that I called, and that is Page; and he came into the hall, where the patients use to wait for his master, and there he met me, and spoke with me. Then I called Walker, the minister, but it happens his memory is not so good now, as it was heretofore; and indeed I cannot tell how to blame him, for it is so long since, that it is impossible for any body to remember the circumstances of times and places, that in some short time after the fact might have been remembered with far greater ease. I expected sir Richard Barker might have been here subpoenaed, to justify the evidence of these people; and I did suspect that Mr. Smith would have been examined: but I perceived the court tender of that point, as knowing it would then easily have been seen upon which side it was that he was suborned, that is, to make such a confession as Mr. Attorney would have hinted at.

L. C. J. Have you a mind to examine him, Mr. Oates? With all my heart. If you consent to it, he shall be examined.

Just. Withins. If you will, he shall be examined, it was for your sake he was not.

Just. Holloway. It was to do you right, that he was refused to be sworn before.

Oates. Good Mr. Justice Holloway, you are very sharp upon me.

Mr. Just. Holloway. No, I am not sharp upon you; I think the court did you a great deal of justice, you have no reason to complain.

Oates. But, my lord, this I say, the evidence upon which I am now indicted of perjury is the same which was delivered six years ago at the Old-Bailey, at Whitebread's trial first, and then at Langhorn's trial, where were sixteen witnesses then produced and heard against me: But then, my lord, what credit did they receive at Whitebread and Langhorn's trials? Now if this evidence that I gave was then to be

believed, though opposed by so many witnesses, what new objection does rise against it, which was not then hinted, and received an answer? For as to all the records that are brought out of the House of Lords, they have not amounted to a charge sufficient to diminish any man's evidence in the world: for as to the Narrative that is entered there in the Journal, I think I and any man else, that were concerned as I was, may very well defend the truth of it: and I do avow the truth of the Popish Plot, and will stand by it as long as I have a day to live; and I do not question but the jury, upon consideration of those Protestant witnesses that I have here brought against these Popish Seminaries, will acquit me of this perjury. I leave it to your lordship and the jury to judge; and I hope those passages of heat, that have fallen from me in court, shall not make me fare all the worse in your judgment. I have called some noble lords to testify for me; but I find, either the distance of time has wrought upon their memories, or the difference of the season has changed their opinion, so that now they disbelieve that which they did believe before, and perhaps for a little reason as—

L. C. J. As they believed you at first.

Oates. Yes, truly, my lord, for as little reason as they believed me at first; for I cannot expect that a man, who believes without a principle, should not recant that belief without a reason.

L. C. J. What do you mean by that?

Oates. I name nobody.

L. C. J. But the nobility that are here, and that have been witnesses in this cause, are all persons of that honour, that the court is bound in justice to take notice of and vindicate them from your scandalous reflections; but only I think that a slander from your mouth is a very little scandal.

Oates. Nor from somebody else's neither.

L. C. J. But, Sir, you must be taught better manners.

Oates. I find, my lord, I am not to be heard in this cause with patience.

L. C. J. I think you do not deserve to be heard at all.

Oates. I cannot tell how to help it, if you will not hear me.

L. C. J. Can't you say what you have to say for yourself without reflections, and running out into such extravagancies?

Oates. My lord, you will suffer me to offer nothing that is material for my defence.

Just. Walcot. Do you think it decent for this court to suffer persons of honour, that by your own desire were sworn to give testimony in this cause, should lie under the reproach of your tongue?

Oates. Good Mr. justice Walcot, was there ever any man dealt with as I am, or had such evidence offered to be given against him? Here they offer to blacken me with the imputation of that foul infamous crime of perjury; and who are the witnesses to prove it, but youths

out of a seminary? Sir George Wakeman, and my lord Castlemain, known papists, and perhaps Popish recusants convict too. As for my lord Castlemain, the record of his acquittal is brought as a charge against me, to prove that I was forsworn, and not believed at his trial; when all the world knows, it was because there was but one witness against him, that he came off, and that was the reason that was urged by my lord chief justice Scroggs at that very time, who would not admit Dangerfield to be a witness, and reflected not at all upon my testimony, but directed the jury, for want of another witness, to acquit him. Then, my lord, here is Wakeman brought, and his acquittal too; he swears all I said against him was false: whereas, had it not been for two dishonest persons, one I have now in my sight, I shall not name any names, we could at that time have proved five thousand pounds of the money paid to him, and that he gave a receipt for it. But, my lord, this I am sure of, if I had been brought in as a witness in the case of those that suffered lately for the Presbyterian Fanatic Plot (as they call it), I had never been called in question, if my evidence had been false; but it is apparent the Papists have now a turn to serve, and these Papists are brought in, the St. Omers youths, to bear this testimony on purpose to falsify my evidence, and to bring off the Popish Lords that now stand impeached of high-treason for the Popish conspiracy: but, my lord, I hope as the court would never admit indictments of perjury against the witnesses in that case of my lord Shaftesbury, so you will not admit it here; and if my lord chief justice Jones were in the right, who did the same thing in his circuit, I hope I shall have that right done me here. My lord, it is not me they indict, but the whole Protestant interest is aimed at in this prosecution; and hereby they arraign the whole proceedings of so many parliaments, all the courts of justice, and the verdicts of those juries that convicted the traitors that were executed; for my own part, I care not what becomes of me, the truth will one time or another appear.

L. C. J. I hope in God it will.

Oates. I do not question it, my lord.

L. C. J. And I hope we are finding it out to-day.

Oates. But, my lord, since I have not the liberty to argue those things that were most material for my defence against this indictment, I appeal to the great God of heaven and earth, the judge of all; and once more in his presence, and before all this auditory, I avow my evidence of the Popish Plot, all and every part of it, to be nothing but true, and will expect from the Almighty God, the vindication of my integrity and innocence.

Sol. Gen. May it please your lordship, and you gentlemen of the jury—

Oates. My lord, I have one thing to move to your lordship; I desire I may be brought up to-morrow by rule of court to hear my trial that is then to be.

L. C. J. Ay, let him be brought up by rule to his trial.

Oates. My lord, I lie under very great affliction with the stone and the gout, and besides that, I have lain in irons these twenty-one weeks; I beseech your lordship, that this cruelty may not be inflicted upon me. My lord, I am but hitherto a debtor to the king upon a civil account; and if I should be convicted upon these indictments, I could then be but in execution for a trespass: and I humbly conceive and hope the court will shew me that favour, as to acquaint my keeper, that I ought not to be so handled.

L. C. J. Look you, for that, I tell you again what I have often said, I expect from the marshal that he keep you as he ought to keep you; I have heard that there have been abundance of attempts made for your escape, and therefore the marshal must have the greater care of you.

Oates. Let any of those complaints be made out, my lord, and I will be contented to be used how they will.

L. C. J. I repeat it again, Let the marshal have a care to keep you 'in salvâ et arcâ Custodiâ,' according to law.

Just. Holloway. If the marshal does otherwise than his duty, inform against him, and take the remedy the law allows.

Marshal. But the last night, my lord, ropes were brought into his chamber, on purpose to give him means to escape, and here are the bundle of ropes.

Oates. I know nothing at all of them, I assure you, my lord.

L. C. J. Well, you have our rule. Go on, Mr. Solicitor.

Sol. Gen. May it please your lordship, and you gentlemen of the jury, I am of counsel for the king in this cause; which is upon an indictment of perjury against Titus Oates, the defendant; and the perjury charged upon the defendant, is laid to be in his oath at the trial of Ireland, at the Old-Bailey; and it is thus, that he in his evidence at that trial did swear, that there was a treasonable consult of the Jesuits, held at the White-Horse tavern in the Strand, the 24th of April 1678, and that he was there present—

Oates. Ay, I was there.

L. C. J. You must be quiet, and let the counsel go on without interruption.

Sol. Gen. And that they separated themselves into lesser companies and clubs, and that the Jesuits came to a resolution to murder the late king, and that he, the defendant Oates, carried this resolution from chamber to chamber, and saw it signed by them: now all this is laid in his indictment to be false; for that, in truth, he was not present at any such consult of the Jesuits at the White-Horse tavern in the Strand upon the 24th of April 1678, nor did carry any such resolution from chamber to chamber to be signed, as he had sworn in the Old-Bailey at that trial; and so has committed wilful and corrupt perjury.

Gentlemen, The evidence that has been given to prove, that he was not present at any such consult, nor did carry any such resolution, has been by proving where he was at that very time that he swears this consult was held, that is, that he was really at St. Omers, in parts beyond the seas, and not in London; and to make out this, we have produced no less than twenty witnesses, that swear positively, and give you very many circumstances to induce you to believe, that what they have taken upon them to remember, is really and effectually true.

First, You have Mr. Hilsley; and he swears that he himself came away from St. Omers the 24th of April, New Stile, which is the 14th of April, Old Stile, which was a Sunday; that night he came to Calais, the next day he arrived at Dover, and coming up to town towards London, the next day he met with Mr. Burnaby, who was then going to St. Omers. And he further swears, that at that very time, when he came from St. Omers, he left Oates, the defendant, upon the place: this, I say, was the 14th of April. And for a confirmation of this to be true, he left him there at that time, I would mention what two other witnesses do testify, and therein do verify what he swears; for they tell you, that at this very time when he came over, or within a day or two, but long before such time as there was any occasion to bring this to be a question, he told one of them, in a discourse that was between them, that he had left upon the place from whence he came, which was the college at St. Omers, an English minister, whose name was Sampson Lucy—

Oates. My lord, I beg I may have leave to withdraw, for I am very weak and ill.

L. C. J. Then make room for him to go away, if he will.

Sol. Gen. And they give you an account, that the defendant, Oates, went by that name there, and it is not denied by him that he did so: and this is a circumstance greatly verifying Mr. Hilsley's evidence. Then comes Mr. Burnaby, who swears, that he met Mr. Hilsley when he came from St. Omers, about the 16th of April, Old Stile, and the 21st of April, Old Stile, he came to St. Omers; and that when he came there, he found Oates there upon the place; this was the 1st of May, New Stile; and he gives you this circumstance to strengthen his testimony, that he very well remembers, that upon the 2nd of May, New Stile, the day after he came to St. Omers, Oates intruded into his company, and got himself acquainted with him. He says further that upon the 3rd May, New Stile, he particularly remembers Oates was in his company there, and they went into the garden and walked together: he also says, he saw him the 5th of May, New Stile, which is the 25th of April, Old Stile, the day after this day assigned for the consult, with this circumstance, that he remembers to have seen him in the Rhetoric school, and so successively afterwards he gives you a parti-

cular account down to Midsummer : after that, Oates continued in the college at St. Omers, and then went away.

Then the next witness we produce is Mr. Pool, and he gives you an account, that upon the 25th of April 1678, New Stile, which was the 15th of April, our Stile, he came over here, and he left behind him at St. Omers the defendant Oates ; for he particularly remembers, that he saw him there when he came away ; so Hilsley left him the 14th of April, Mr. Pool came away the 15th of April, which is their 25th, and left him at St. Omers, and does not remember, that he used to be absent out of the college ; and Mr. Burnaby finds him there the 21st of April ; so that particularly at the times the other two came away, and Burnaby came thither, there he was, and there they saw him.

The next witness is Mr. Thornton, and he gives you an account when Oates came thither first, and how long he staid there ; he says he came about Christmas 1677, and there he staid till Midsummer eve 1678 ; and he tells you some particular days he saw him on ; he says he saw him there on the 1st of May, New Stile, and he saw him the 2nd of May, New Stile, in company with Mr. Burnaby, the next day after his arrival there, wondering at their sudden acquaintance. And he adds a particular circumstance, why he remembers it was the 2nd of May ; because that day the scholars at St. Omers acted a play, at which Oates had a scuffle for a seat : and he says he does likewise remember him to have been there when Mr. Pool came away, which was the 25th of April, New Stile.

Then Mr. Conway, that was our next witness, gives you an account likewise of Oates's coming to St. Omers about December 1677, and how long he staid there, viz. till the latter end of June 1678. And he does not remember, that he lay out of the college above one night, and that was in January. And he remembers particularly that he saw him with Mr. Burnaby such a day in May.

Then we brought another witness, and that was Mr. Haggerstone ; and he tells you, he had good reason to remember Mr. Oates, for he was in the same classis with him ; and this gentleman gives an account particularly, that he remembers him to be there the next day after Mr. Burnaby came, and agrees in testimony with all the rest, that from Christmas till Midsummer, he was not absent out of the college but one night.

We have another witness, Mr. Beeston ; and he remembers, that Oates was playing at ninepins the 1st of May ; he remembers the 2d of May to have seen him with Mr. Burnaby after the play was over ; and that agrees with the other witnesses about his being in Burnaby's company the 2d of May ; and he remembers likewise, that he himself was chosen reader to the sodality, but upon Mr. Oates's importunity he supplied the place in Mr. Beeston's room, only with this reserve and condition, That Mr.

Beeston was to be reader at any time, if Oates failed. And he gives you this particular account, that Oates did read, as he believes, every Sunday and holiday, from the latter end of March, when he was chosen reader, to withint a week of his going away ; for that he did never read himself, as he should have done if Oates had been absent or failed to read.

We have another witness, and that is Mr. Smith : and he swears his being there from Christmas 1677 to Midsummer 1678, and he remembers particularly as to April and May, because the 21st of April he himself fell sick in the college, and went into the infirmary, and remained there till the 7th of May ; and he does remember that Oates visited him very oft in that time in the infirmary, and told him Mr. Hilsley was gone away, and Mr. Pool was gone away, and two or three other particulars, which happened in the college at that time ; so that there is another evidence, that is very strong with circumstances to confirm the testimony of the rest ; and he gives you a very satisfactory account of it, by shewing the reasons how he comes to remember these things.

Mr. Price, who was our next witness, has given you a relation all to the same purpose of Oates's coming there at Christmas, and of his going away at Midsummer. And he remembers particularly, that Oates was at St. Omers when the Jesuits went to the consult at London ; for that there was a consult, and at that time, is acknowledged to be true ; but not such as he says, nor was he there ; but he says some of the fathers did call there in the way to England. And at that very time and after, he saw him there. And Mr. Doddington gives you the same account.

Then comes Mr. Gerrard, and he tells you a story to the same purpose : how long Oates was there, and when he came. And that the 2d of May, he remembers Oates was at the play ; and he remembers the 26th of May, Oates was there, which was the 16th of May Old Stile. And he is sure Oates was there at that time, for this reason, that being the day whereon he himself was confirmed, St. Augustine's day ; and Oates was confirmed, with him : and therefore he has reason to remember Oates was at St. Omers.

My lord Gerrard of Bromley was our next witness, and he gives you an account to the same purpose ; and to the general evidence, in which he confirms the others, he adds this particular, That Oates used to read with a singular canting tone so that he must needs remember him, and was so remarkable for other things, that he could not be absent without being missed, which he never was.

Then comes Mr. Morgan, who was there at that time, a scholar ; but he is now a minister of the church of England ; and therefore not liable to Mr. Oates's great exception of religion. He confirms what all the witnesses said of the time of Oates's coming, and of the time of his going away : and particularly he swears, that when Mr. Hilsley went away, he was

there; when Mr. Pool went away, he was there; and when Mr. Barnaby came thither, he was there. And this is not all, for there is something more remarkable in his testimony; for he tells you particularly he does remember, That upon the 24th of April, Old Stile, the day, gentlemen, when Oates says he was at the consult in London, Oates was then at St. Omers. And the occasion of his remembering this, he gives you an account of; for he tells you, upon reading the trial of Ireland, where Oates swears, That he was here at the consult the 24th of April 1678, Old Stile, all the college reflected upon it, and wondered at the impudence of the man, that he should dare to swear such a thing, when all the college remembered him to be there all the while. And upon recollection of circumstances, he himself did particularly recollect his own playing at ball that very day, and having tossed his ball over the wall, he borrowed Oates's key to go into the garden to fetch it: And this was thought of whilst things were fresh, and every man remembered this, or that, or the other thing to be done at such a particular time.

Mr. Arundel, who was another witness, proves the general testimony of the rest, and agrees in some particular things; and all he says is to the same purpose.

Mr. Christopher Turberville, he comes and swears Oates's being at St. Omers the 4th or 5th of May, which is the 24th and 25th of April Old Stile. For that upon Mr. Pool's going away, he changed his chamber in the college, and saw Oates divers days afterwards in his chamber, and at the door; and he knew that he constantly read in the sodality, and that he left particularly the Sunday before he went away, which was about Midsummer 1678.

There was another gentleman, and that was Mr. Anthony Turberville, who gives evidence all to the same purpose; and this circumstance goes thorough all the testimony of these persons, that there's scarce any body can come to, or go out of the college, but it is known to all that are there; every man takes notice of it, it is the common discourse amongst them; and therefore they give this as the reason of their belief, that he was there all this while, because they did not remember any thing that should give them occasion to believe Mr. Oates was away from the college from Christmas till Midsummer, but only one time; and the remembrance of that does shew, that they do really observe these things, for they could all tell that in January he went to Watton, and staid out one night.

There is one witness more that is positive and particular, and that is Mr. Claving, and he remembers Oates, by a very remarkable circumstance, was at St. Omers at the very time the congregation is said to be held in London; for he tells you there came a person to beg money of him, and there was a collection made in the house; and this person did desire to speak with Oates, who was then in the col-

lege, and whom it seems this person had known in Spain; but Oates did refuse to speak with him, and did not come down to him. Thus he remembers such an one came there, and when he was there, he was sent to Oates to desire him to come down to this man, and he would not. Ay, but now how is this remembered to be at the time when the congregation was held here in England? As to that, he gives this plain and full account, That it must be at that very time; for the scholars did discourse among themselves, and were reckoning up what he had gotten among them, and what he had gotten at Watton; and finding that it was very inconsiderable that he had gotten at Watton, they talked among themselves what should be the reason; and concluded it was, because the fathers were gone over to England to the congregation.

These particular circumstances our witnesses give you as the reasons of their particular remembrances of the particular times: But, gentlemen, you must take along with you those general considerations too that are offered, which do affect the whole time, from Christmas till Midsummer. First, That none can come or go, without being discoursed of in the college: Next, that much more Mr. Oates must needs be missed, than any other, being so remarkable a person, as they tell you, that scarce any week passed without his making it remarkable by some ridiculous action or another. They say he sat singly by himself, at a particular table, that no man could come into the hall, but they must see him; and therefore, if absent, must needs miss him. And yet they swear they do not ever remember him absent, but that one night; and if he had been absent, they must needs have observed it, because of all those circumstances that have been reckoned up.

These are the witnesses, gentlemen, that we have produced to prove this charge upon the defendant, two of whom are brought only to verify Mr. Hilsley's testimony; having heard it from him at that time that he had left Oates at St. Omers, when there was no thoughts of this question.

Now among these twenty witnesses, there are not above two or three at most that were at either of the trials before. They were never produced as evidence, though indeed they proved the same thing that was testified by others then, but with many other circumstances and particularities that were not before spoken of; some are now produced that were produced before, and the reason is, because they are themselves concerned in those particularities which gave occasion to the others to remember them.

Gentlemen, after the producing of so many witnesses, and so strong a proof, what is it that Mr. Oates has produced against it? His main objection to their testimony is, There were several that came from St. Omers to testify at those former trials what these now swear, who were not believed, but I was believed, and the

men were convicted, condemned, and executed upon my testimony: But is that all he has to say? No, says he, I have likewise witnesses to offer as a counter-proof to them, a positive proof that I was here in England at the time they swear me to be at St. Omers. And he says well; if that be proved, there is an end of the case. Well, what is the proof? The witnesses that he has, have been these four, Cicely Mayo, servant to sir Richard Barker; Butler, his coachman; Page, another of sir Richard's servants; and the parson Walker.

The evidence of Page and Walker, though produced last by Mr. Oates, yet I crave leave to mention first, and set them out of the way. Page, he remembers to have seen Mr. Oates in a disguise at sir Richard Barker's, that is, in grey cloaths; but he is not certain as to the time; and he cannot take upon him to say what time of the year, or what year it was, only he believes it was in May: and therefore that can be no sufficient evidence to contradict witnesses, that with great particularity speak to certain times. As for Walker, the parson, he said he saw him between St. Martin's-lane and Leicester-fields; but he cannot remember the time when neither: nay, the remembrance he has of it goes rather to another time, than the time in question; for being asked what circumstance he knew the time by, he said, it was about a year and a quarter before the plot was discovered, which must be in April or May 1677, and that will do the doctor no service at all upon this question.

Now let us consider Mrs. Mayo's testimony; and the oath that she made was this, That when Oates came over into England, she saw him at sir Richard Barker's house the latter end of April, or the beginning of May, and the week before Whitsuntide, the latter end of April or the beginning of May, was the first time that he came, that she saw him; but that he came before, as she heard, but the coachman only saw him, and told her that Oates had been there: but the second time she did see him, and he went in and dined there in the house. Sir Richard Barker was not there, but my lady's sister, her sons and daughters were there. She says, that she saw him again a week before Whitsuntide; that when he came the first time he was in grey clothes, a white hat, and a short perriwig. Afterwards he was in black clothes, a pretty long perriwig not very long, but the perriwig was brown; and these are the circumstances she remembers to have seen him by.

Now let us see what Butler, the coachman, says: he remembers about the beginning of May he saw Oates at his master's house in a disguise; the other said it was the latter end of April, or the beginning of May; but I stand not upon that: but this he does swear, That the first time he saw him, Cicely Mayo saw him too, that he was then in grey clothes, a white hat, but his hair was cut short, and he had no perriwig on; afterwards he came in a cinnamon-coloured coat, and green ribbons,

and a long black perriwig. This is Butler's evidence.

Now these two people's evidence are utterly impossible to be reconciled, they contradict one another so much: first they contradict one another in this; she says, the first time he came she did not see him, but the coachman told her he had been there; but he swears, That she did at that time look out of the window into the yard, and did see him as well as he. Another contradiction is this: she remembers the first time he came in grey clothes, a white hat, and a short perriwig; the coachman swears he had no perriwig on; but his hair was cut short to his ears. Then again she swears the second time, he was in black clothes and an indifferent long perriwig, and the perriwig was brown: and the other swears he was in cinnamon-coloured clothes, and a long perriwig, and it was a black one. Now thus you see the witnesses contradict themselves, and cannot be reconciled to one another.

But take one thing more, which is very considerable, wherein she contradicts Mr. Gerrard; for she swears he was here a week before Whitsuntide; that she is sure of: now that falls upon the nineteenth day of May; then upon the sixteenth day of May, was the week before Whitsuntide; now, that is a most eminent day, by the testimony of Mr. Gerrard; for that happens to be the twenty-sixth of May, New Stile, and that was the day he was confirmed with Mr. Gerrard at St. Omers; and no man sure can doubt which of the two witnesses is to be believed; and it cannot but be true, that he was there at that time, because so remarkable a circumstance cannot be forgotten: and yet this woman swears that he was there a week before Whitsuntide, and that by computation must be the time of his confirmation. But, gentlemen, another thing that I offer upon the testimony of these witnesses, is this: if you will believe it, he himself contradicts his own witnesses, or they him, and one of them is forsworn: for he has sworn the consult was the twenty-fourth of April, and that three or four days after that was over, he went back with the fathers to St. Omers: now this contradicts all that his witnesses have said. But he has given himself, as he thought, some little latitude; says he, the consult began the twenty-fourth but it held six or seven days longer. We will for this time admit it to be so, and give him the six days he requires; and yet after all, it will not come up to the time that his witnesses speak to: for to the 24th of April, add six days and that brings us just to the last day of April; and then take four days in May, to make up the three or four days after the consult was over, and we are yet at a great distance from the Whitsun-week; for that was the 19th of May, and the week before must be the 12th or 13th, and so it is impossible to be reconciled to truth what he and his witnesses swear; either the evidence that the doctor now brings, must be a contradiction to his own former oath, or his oath proves they are mistaken beads

the contradiction that is between the witnesses themselves; for they vary in a great many material circumstances, which I have before reckoned up to you.

But gentlemen, false witnesses are very often detected by little circumstances, though I must needs say, these are not small ones; for these are very remarkable things in themselves, and great contradictions to one another, and therefore it is impossible they both can swear true.

There were some other witnesses that were produced by Mr. Oates formerly upon this point; one of which was Clay, the priest, and he, you hear, is contradicted by Mr. Howard's testimony, who not only tells you he was not at his house when he says he was, but shews that Clay was mistaken in point of time: it was not in May, but in July. But that is not all, we have another evidence, gentlemen, to shew how this mistake comes to pass, and will give a great light into this sort of practice that has been used in this matter; for we have two witnesses that give you an account how Oates and sir William Waller were at the Gate-House with Clay, and there did threaten him, that unless he swore he dined with Oates at Mr. Howard's in May, they knew he was a priest, and he should be hang'd. The man was somewhat cautious at first, for truly he knew nothing of the matter; but at last, upon condition he might have his money again that was taken from him, he had been a rogue formerly, and he did not know what he might do. Now, we find presently after, that he was in fact brought as a witness; what he swore, Mr. Howard tells you, and you have heard him contradicted in that point of time. For Mr. Howard says it was in July; and then it was agreed that Oates was in England; for our witnesses tell you that at Midsummer he came away from St. Omers.

So that, gentlemen, the evidence that was formerly produced for him, is not only taken away by positive counter-proof, but there is fixed upon him, with great infamy, the additional crime of subornation, by forcing people to swear for him, under the threats of being hang'd; and we all know how such people lay under great fears and terrors at that time.

There was another witness that was produced formerly for him; but I shall not take upon me to repeat all the particular evidence that has been now given about that matter. In short, our objection to the testimony lies thus: That Oates did swear in his Narrative, that Smith was a dangerous man, and employed by the Jesuits to stir up the people against the government; that appears by Oates's own oath. But it likewise appears, that afterwards they were reconciled, and that he gave Smith a certificate under his hand, that he was a good Protestant, and a good subject, and about eminent service for the king. Now we see no reason hitherto, why Mr. Oates should change his mind, after having sworn him such an ill man, all of a sudden to be so kind to give him his protection, and so advantageous a character as

that was in that season. But, gentlemen, the mystery is easily unfolded, if we go three or four days further in time, which brings us to the trials of Whitebread and Langborn; it seems Mr. Oates was then aware of that, which is now an objection to his testimony; for it was made an objection at the first trial of Ireland, That he was not at this consult, for he was then actually at St. Omers; but no witnesses were there to prove it; but now he was aware that some were a coming over, and it concerned him to make some good proof if he could, that really and in truth he was here in London at that time.

And I cannot omit to take notice of what my Lord Chief Justice was pleased to observe and object to him now: It is a wonder a man should be here in town so long; a man that had much acquaintance, as it seems he had; a man that went about freely and publicly, as his own witnesses say he did, should be seen by nobody, but these few, should not be able to give an account, by any body, where he lodged, at any one time in this interval. Nay, by no circumstances that must occur to his own knowledge, to be able to shew where he lodged, is very strange; though it should be that he did lodge in the houses of those that would not come to give evidence, as he alleges; yet it is almost impossible, but there must be some other circumstances to prove his being here, besides the evidence of the landlord of the house where he lodged; but he gives no account where he was lodged, and whom he conversed withal, but these people only; and that they should see him, who were not his intimates, and none else in the world, is to me one of the most strange things that can be conceived.

Now, Gentlemen, when he has given no manner of satisfaction that he was here, and is by twenty witnesses sworn not to be here; what is it that he says to all this? why he doth insist upon it, that his credit must not be now impeached, because that once he had the fortune to be believed, and some men have died and suffered for it; as if no perjury were to be punished, but that which is unsuccessful; whereas the reason why perjury is taken notice of in the temporal courts, is only because of the mischief that it may do. Shall it then be no crime when a man has done the mischief, when the fear of that mischief was the ground of making it a crime? That is a most monstrous way of arguing. And yet this would Mr. Oates have look like an argument, that because he has been believed in his false oaths, and men have suffered by his perjury, and he has been successful in his crime, that success has protected his wickedness from punishment. This I confess is a new way of arguing; and such as none but Mr. Oates could certainly have invented.

But, Gentlemen, to contradict this, we have shewn you, that as he has had the fortune to be believed; so he has likewise had the fortune to be disbelieved. For there have been produced as many records of acquittals, where he

was an evidence, as there have been produced variations upon his testimony; so that he has been as often disbelieved as believed.

Whether then does he betake himself next? he has called a great many witnesses to give you, as evidence for him, an account what opinions at that time the Houses of Parliament, the courts of justice, and the juries had of his evidence; and then insists upon it, that now to all his credit in question, is to arraign the justice of the nation, the wisdom of both Houses of Parliament that believed him, the honesty of the juries that convicted those whom he accused, and the integrity and understanding of the Judges, who were learned, wise, and just men; and with great earnestness he asks the question, why now at this time of day should his be called in question, which received of such credit and approbation so long ago, by the good opinion that all sorts of men had of it at that time? and now to question this, he would have thought to be a casting a blot upon the wisdom of the nation, and an arraigning the justice of it: when, if the thing be duly considered, the not punishing this heinous offence with the utmost severity that the law will allow of, now that these circumstances appear to make it plain and evident, would be a greater piece of injustice and reproach, rather to our nation, than any way a reflection on the justice of it.

Gentlemen, when we consider the circumstances of this case now, I do verily think it will appear to be a very strange and wonderful thing to us, that ever any man should have believed him. And it is a strange consideration to reflect upon, to think what credit he had at that time. But withal, consider, gentlemen, could any one imagine, that it were possible for any man on earth to become so impudent, as to dare to expose himself before the high court of parliament, the great courts of justice, and there tell a most infamous lie for the taking away the lives of men? the greatness of the attempt was a great inducement to the relief of it, because no man could be presumed to dare the doing of such a thing, if he had not a foundation of truth to build upon. And when he had thus made his discovery, and that of such a nature too, a most horrid, bloody, and notorious conspiracy to murder the king, and to return the government, to massacre all the protestants in the kingdom, and to deface the very name of the Protestant religion; what was more natural than that the parliament should take all imaginable care to prevent the accomplishment of so great a mischief? and consider too, how much easier it was for him to state his evidence in a continued story, than afterwards it was to maintain it, when it came to be examined and opposed by them that were accused, who best knew wherein, and by what means to prove him false.

Gentlemen, the care the parliament took to disappoint any designs of this nature, and the means they used for the security of the kingdom, and the preservation of our reli-

gion and lives, (which I cannot but observe, was previous to the trial of any one offender that was tried and convicted upon this evidence) must needs put the whole nation under great apprehensions of danger, and make the way much easier for him to be believed, as by sad experience we found it did. Under these circumstances came those men to be tried, with this further, (as we cannot now but think) that there were ill men at work, that laboured to improve those fears and jealousies that had already possessed men's minds; the wonder then will be the less, if men, under such disadvantages, tried by men under those fears and apprehensions, had the ill fortune to be convicted. But when men had a little overcome their fears, and began to consider his evidence more calmly, the scene was changed, Oates lost his credit, and the men were all acquitted. Nor is this prosecution any reflection on the Protestant religion, whose cause he falsely assumes to himself. No, gentlemen, the Protestant religion had no share in that invention. It needs not the support of a lye, no, not the most plausible lye, much less of one so infamous as this does now appear to be. It is rather a vindication of our religion, to punish such offenders as they deserve, and the proper way to maintain the justice of the nation, and wipe off that reproach this man's perjury has brought upon it.

L. C. J. Then, gentlemen of the jury, the evidence has been very long, and it cannot be expected, after so much time has been spent in this cause, and such a difference of testimony, and especially considering that the testimony has met with frequent interruptions, and I may say some part of it delivered in great confusion, it cannot be thought or imagined, I say, that I should be able to remind you of the several particulars that concern this case, and may be necessary to be observed about it. But, gentlemen, I am sure, by the knowledge I have of most of you, you are persons of great understanding; so that what may be omitted by me, I question not but your own abilities will supply. I confess I am much shortened in my labour, by the pains that Mr. Solicitor has taken to sum up the evidence to you, and without all doubt, has done it with all faithfulness to his master, and with great right to himself. I could not hear much of what he did say; but you who were nearer and did hear all, which I could not do, your judgments will direct you to lay that weight upon it which it deserves, and which the law will allow; for, gentlemen, I am bound to tell you, that you are to lay no weight upon any allegations on the one side, or on the other, or what is observed to you by the court, further than is supported by the testimony that has been offered.

Now, gentlemen, I think it not amiss for me (before such time as I enter upon the consideration of the particulars, and reminding you what I take to be the evidence in this case, and what not) to clear one point, that this person, Oates, the defendant, against whom this indict-

ment of perjury is brought, has endeavoured to insinuate, on purpose to gain himself a reputation; which if he could acquire this way, would add a greater reproach to the justice of the nation, than it has contracted already, by giving too much credit to such profligate wretches, as have too lately appeared among us. The objection he makes and insists so much upon; says he, I was believed very much before, I can produce you the opinions of the judges, that declared themselves very well satisfied with my evidence, and the verdicts of juries, two or three, that convicted men upon my testimony; and not only that, but here were likewise three or four parliaments that did not only believe that testimony (or rather Narrative, for I cannot call that testimony, which was given before the House of Commons) that I gave, but did declare their satisfaction of the truth of what I said; which satisfaction and belief of theirs did produce thanks from both Houses to me for giving this testimony.

But all this while, what Mr. Solicitor said upon this point, is a plain and a full answer to it: if in case upon a sudden information, the king, the parliament, the courts of law, and juries, were surprized into this belief, as not imagining there could be a pack of such villains, that could be wound up to that height, as these fellows have been; that there could be such an horrid impostor as this fellow, that should make such attempts, unless there had been some truth in it,

Therefore the surprize of the thing, at that time, might obtain a belief; but God forbid, that that belief, which was so obtained, should protect the party believed from being called in question for the falshood of that testimony, which was the ground of that belief. It was hardly credible that any person could be so wicked as to declare such impudent falsities as these; but God forbid, that we should continue longer under the same blindness and delusion, the whole matter is now laid open and detected. Therefore, gentlemen, if you are satisfied in your consciences, and do believe upon the testimony and evidence that has been given here this day, that those very things that were so much believed before, were credited upon the surprize of a sudden discovery, or the boldness of the undertaking, yet now do plainly appear to be false; then be it, I say, upon your consciences, if you let this falshood go unpunished. It is a charge upon us who are upon our oaths as judges, and who must answer to the great Judge of all the world for our judgments; and it is likewise a charge upon you that are sworn to try this cause, and must answer, as well as we, for what you do in it, not to have regard to any thing, that was done before upon that hurry and surprize, but seriously to weigh and consider what is sworn now, and from thence make a conclusion, whether you are not satisfied that innocent blood has been spilt by the means of this fellow. Nay, in this case, it is a contracting of much more guilt than ordinary, as it is

murder done under the forms of law, and common methods of justice. That men should take away the lives of their fellow-creatures, by perjury and false accusations, is of such dreadful consequence, that if the justice of the nation shall be afraid to have such matters detected, there would be an end of all the security we have of our lives, liberties, and whatsoever is dear to us.

Gentlemen, the justice of the nation lies under a very great reproach abroad, for this particular thing; and we must be, all of us, that have any concern for the honour and good of our country, uneasy, till this matter be thoroughly searched into, and impartially determined; and I take it to be a case of the greatest importance to the settlement of the kingdom, for the credit of our laws, for the honour and justice of our kingdom, that ever came in judgment in any of our courts of justice. And therefore, as you respect your own consciences, and the obligation of that oath you are now under, and as you would be thought to bear any regard to the peace, honour, and good of your country, take care to examine strictly and impartially into the merits of this cause, and weigh the evidence which has been given on all sides: be not at all dismayed with the apprehension of clamour or calumny, from any sort of people whatsoever, for doing your duty; neither be led away by the insinuations of what was believed formerly; for you hear the reason which might make Oates be believed then; but it is incumbent upon you to enquire, whether you have not sufficient reason to be satisfied what the truth now is.

And, gentlemen, I take myself to be the more obliged to take some pains in the pressing a serious and impartial consideration of these things upon you, because I cannot but say, my blood does curdle, and my spirits are raised, that after the discoveries made, I think, to the satisfaction of all that have attended this day, to see a fellow continue so impudent, as to brazen it out, as he has done this day; and that there should appear no shame and confusion than what was seen in the face of that monstrous villain that stood but now at the bar. The pretended infirmity of his body made him remove out of court, but the infirmity of his depraved mind, the blackness of his soul, the baseness of his actions ought to be looked upon with such horror and detestation, as to think him unworthy any longer to tread upon the face of God's earth. You will pardon my warmth, I hope; for it is impossible that such things should come before any honest man, and not have some extraordinary influence upon him.

Gentlemen, as to the merits of the cause, you have the positive proof of many witnesses, whose testimony I shall by and by, as well as I can, repeat to you; but, pray you, first give me leave to observe somewhat, as to some points that have been started at the bar, as, Whether a Papist can be a witness? Now,

suppose all these persons that come here to testify this matter against the defendant were Papists, as they are not, except you can take it upon your oaths and consciences, that all these men are guilty of voluntary and wilful perjury, you must find the defendant guilty.

As to their difference in religion which Oates so much hung upon, I must tell you, every Papist or Roman Catholic, call them how you will, except the contrary be made appear by a legal exception, I mean such as would take off the testimony of one that were not a Papist, is as good a witness in a court of justice, as any Protestant whatsoever: we are not come here to controvert points of religion, but to try a bare matter of fact; so that all that stuff that you have heard here this day from the defendant, and those insinuations that he made about their religion, on purpose to cast dirt and filth upon all the testimony that they have brought against him, must signify nothing with you at all. If in case such doctrine happen to prevail as he has this day preached, then it is in the power of any villain to swear any mischief whatsoever against a Roman Catholic, and that Roman Catholic has no way to vindicate himself, nor to make the truth appear. We have no such exceptions to witnesses in our law; every man, till it is made to appear that his credit is forfeited, may and ought to be received as a witness to give testimony in any cause; so that all that matter is of no import at all.

And, gentlemen, I am the rather minded to hint this unto you, because he has insinuated something out of the trials of Grove and Pickering, and Ireland, which was in December, in the year 1677, at which trial Whitebread and Fenwick, who had pleaded to the same indictment, were brought on to trial; but because there was but one witness against them, the court discharged them for that time, and they came not again to trial till the month of June or July thereafter, when they were convicted and executed. Now between that time of Ireland's trial, and the time when Whitebread and the rest came on to trial again, says Oates, they had sufficient time to have brought all their witnesses from St. Omers, to testify this business of my being there, having notice by the former trial, what evidence was against them: but all the witnesses they did bring, which were about fifteen or sixteen, were not sufficient to countervail the testimony that Oates gave of his being here in town; and thereupon they were convicted, condemned, and afterwards (I am sorry to say it) executed.

This is the objection he makes; but at the same time I must repeat what I said before, when such a dismal story as this was told, when he had the confidence to relate it before, in the Houses of Parliament, and there obtained credit; no wonder if, in that hurry, all of that persuasion were looked upon with an evil eye; and the conviction of those that were at that time accused were too easy.

We must remember the apprehensions some were under of our religion being to be subverted,

our government to be destroyed, our king to be murdered, our throats to be cut by the Papists, to that height, that this very fellow, Oates, was so much credited, that all other people almost were below him, and greater respect shewn to him, than to the branches of the royal family. Nay, it was come to that degree of folly, to give it to no worse name, that in public societies, to the reproach and infamy of them be it spoken, this profligate villain was caressed, was drunk to, and saluted by the name of the Saviour of the nation. O prodigious madness! that such a title as that was, should ever be given to such a prostitute monster of impiety as this is!

Good God, whither were we running, when many easy people were so strangely wrought upon by this impostor, and when the villainous and black designs of some evil instruments amongst us, could prevail so far, as to deceive almost a whole nation into the belief of so horrid a falsehood; even at the same time that a hidden treason too deeply contrived, was carried on amongst us, but, God be thanked, was not too lately discovered? The conspirators had a fair game of it whilst this fellow was believed, and they needed no other means to accomplish their design: but when he was found false, and the pretended Plot had lost its credit in the world, what is their next step? Why, then they enter into that black and bloody conspiracy, from which it hath pleased God lately to deliver us.

I speak this the rather, because I know there are in my eye several persons, whose fears of Popery made them give credit to such villains as these before: but when it pleased God to open their eyes, and the false mist vanished, they found a real conspiracy against the persons of that blessed king, lately dead, and of our gracious sovereign, now living, carried on under the pretence of that false, but so much credited discovery; and now, God be thanked, all our eyes are open. And I hope, as we are secured from what we so vainly dreaded, so we shall not be afraid to have villainy detected, and the greatest mark of infamy that can be put upon it.

Yes, gentlemen, there was a consult, and there was a conspiracy against the life of our king, our government, and our religion: not a consult at the White Horse in the Strand, but a cabal and association of pertidious rebels and traitors, who had a mind to embroil us in blood and confusion; but, God be thanked, it had not its desired effect. The same sort of villains were parties in this conspiracy, that had too great a hand in the late great rebellion, which we to this day feel the smart of, and they had a mind to make use of the like instruments, as they did before, to bring us into the like misery, as we were before involved in.

And is it not a prodigious thing, to have such actions as these to-day defended in a court of justice, with that impudence and unconcernedness, as though he would challenge even God Almighty to punish his wickedness, and

blasphemously blesses God, that he has lived to do such wonderful service to the Protestant religion; and is so obstinate in his villainy, as to declare he would venture his blood for the confirmation of so impious a falsehood: and, indeed, to speak the truth, he makes no great venture in it; for when he had pawned his immortal soul, by so perjured a testimony, he may very easily proffer the venturing of his vile carcase to maintain it?

Gentlemen, having thus said, (and I could not forbear saying of it) give me leave to put you in mind of what lies before you now to be tried. First, this indictment takes notice, that there was an indictment taken before the commissioners of Oyer and Terminer, and gaol-delivery at Hicks's-hall, of high treason against Whitebread, Fenwick, Ireland, Pickering, and Grove, and that indictment and the whole record is proved to you by Swift. For I must tell you as I go along, what proofs there are of all the particulars, and you, upon consideration of all that is alleged, are to be judges what is sufficient proof to convict the defendant of the crime that is laid to him; which is wilful and corrupt perjury. The indictment, gentlemen, sets forth the oath that Oates did make at Ireland's trial, and then avers it to be false: for the oath that he did take, that stands thus: that he did swear he was present at a consult, held at the White Horse tavern in the Strand, the 24th of April 1678: that he did swear, that it was there resolved to murder the late king: how that that resolution was carried by him from chamber to chamber, that is, to Whitebread's and Fenwick's, and Ireland's chambers, and saw them sign this resolution there: and the assignment of the perjury is, that he was not present at any consult, 'tis not that there was not any such consult, though it appears by the evidence that there was none such, but that he was not present at any consult at all held there at that time.

Now, that he did make such an oath, is proved by a worthy gentleman, Mr. Foster; a gentleman known to you all that live in the city of London; and he did truly make that remark in the beginning of his testimony, that any honest man in his place would have done, that he was one of those unfortunate men that tried Mr. Ireland; for though a man do go according to his conscience, as to be sure there is no question to be made of it, but all these juries did in finding that verdict; yet when I come to find, that the evidence upon which I convicted those men, is detected to be false, and that upon my verdict the persons were executed; though no guilt of their blood is really contracted by me, yet I cannot but think myself unfortunate, that I was, though innocently, an instrument of their death; and there is never an one of you, but would have thought yourselves unfortunate, if you had convicted men upon such a testimony, which though you believed then, yet afterwards you should have reason to conclude was false. And yet Oates would have you think, that because they be-

lieved him when he was a villain, and not known to be so, you must believe him, notwithstanding his villainy is now discovered; for that is all the argument this learned doctor has a mind to impose upon you by.

Gentlemen, Mr. Solicitor has been very particular, in giving an account of the whole evidence, and then it comes to this, which is the natural question in the case; whether upon the testimonies that have been given to you, there does remain so much as a doubt, what verdict you ought to give? For I confess, were it a thing in the least doubtful, matters of perjury are so nice and tender, that we and you ought to be cautious how you convict people for perjury in doubtful matters; but if it be a thing without doubt, and plainly evident, that there was a verdict thereupon, it adds to the guilt, because the justice of the nation is imposed upon. The God of Heavens deliver every honest man's soul and conscience from such guilt! For my part, I would not for the universe have the least guilt of innocent blood lie upon me.

Then, Gentlemen, to prove what Oates swears is not true, you have no less than twenty-two witnesses, that swear directly he was not here in London the 24th of April 1678. But it may be, that it is not such a positive testimony as the law requires to prove a perjury: but then to swear directly that he was in another place at that time, is a positive contradiction to his evidence, and this has been testified by the oaths of twenty-two persons, against the credit of whose testimony there is no objection at all really made, but only impudence; and that shadow of an objection, they are all Papists, and I am a Protestant: and truly a wonderful credit it is, I must needs say, for the Protestant Religion to have such a learned and pious supporter, as Mr. Oates, to be of that persuasion; but it is certain there was a Judas amongst the twelve apostles, and there are rascals of all persuasions. And truly I take it makes never the more for his advantage, nor the honour of our church, that he is pleased to call himself by that name, which he, and such as he, have brought into some scandal and reproach, by setting themselves up, as the great pillars of it; but we know Dr. Oates has been very liberal to himself, he has given himself baptism, and given himself the doctor's degree, and now he gives himself the title of the reforming Protestant, Mr. Oates. We have Protestant shew-makers, and Protestant joiners, and Protestant Atheists, and all sorts of true Protestantrascals; but it becomes us and you to assert the honour of our religion, by disowning any fellowship with such villains, or their actions.

Gentlemen, the method that was taken, gives you an exact account in point of time, as to this whole business. First, says Mr. Hibley, I left him, in time the 29d of April New Style, at St. Omers, and I am sure I saw him there then, which is the 19th Old Style; the 24th of April New Style; which is the 14th Old Style, I came from St. Omers, I did not see him there

last morning, but I myself came to Calais, it being Sunday, and I staid there till Sunday in the afternoon, and all night. I came on Monday in the afternoon to take water at Calais, and from thence went to Dover. And from thence the next day I went towards London; but I staid four or five days by the way before I came to London; but then there is this circumstance that you must take along with you, gentlemen, that at this time, one Mr. Burnaby was coming from London, and going to St. Omers, and met with Mr. Hilsley in his way towards London: says Hilsley, I came afterwards to town, and that was upon the Monday following, which happens to be the 21st or 22d of April, our stile: but this I do remember very particularly, which makes his testimony to be true, and not dressed up for this occasion; says he, I told one Osburn at that time, that we had a pretty fellow at St. Omers, that went sometimes by the name of Lucy, and sometimes by the name of Oates, a minister of the church of England; and there he comes and gives an account of his ridiculous childish actions, and what a remarkable fellow he was; and this, says he, I told to Osburn.

Now, to make this good, you have one Mr. Dorrel, who tells you there happened a discourse, where he was present, between his mother and Mr. Osburn, about religion; and amongst other things Osburn did say, Mr. Hilsley had told him he left Oates at St. Omers when he came away from thence; and Mr. Osburn, he comes and says, I remember I did tell Mr. Dorrel and his mother, at that time that Mr. Hilsley did tell me this story: so that here are these two witnesses which support Mr. Hilsley in that circumstance of the time of his coming away, and his relation of Oates being left behind him, and that this was related about the 21st or 22d of April.

Burnaby is the next person that was produced, and he swears he met Hilsley by Sittingburn; and he happens to set out for St. Omers the 18th of April, our Stile, and to come thither to St. Omers the 21st; and he swears positively that he was there the 21st, 22d, 23d, and was there the 25th day of April, our Stile; and he does positively affirm, that all those days he saw Oates there at St. Omers; that Oates intruded into his company at his first coming; and that he and all the others scholars wondered at the confidence of the man; and he particularly remembers that he was with him at a public entertainment that was there the 25th: and if so, then it is impossible that what Oates has sworn of his being at the consult the 24th of April, our Stile, can be true. And except you can imagine Mr. Oates to fly from St. Omers the 24th day in the morning and be at the consult and back again at night, which is more than he would have believed, because he swears the contrary, you must conclude that what he swore was false.

The next witness is Mr. Pool, and he comes and says, he was there at St. Omers, and he came over from thence the 25th of April, and

that was the day after Oates swears the consult of the plot to be here; and all the rest of the witnesses do directly swear, That at the time that Pool went from thence Oates was there: so that the testimony of Pool is fully and positively confirmed; and Pool gives you a reason why he came over, which was the death of a brother of his, and upon a prospect of an estate he came into England, which likewise is a reasonable circumstance why he should remember the time, because he had such inducement to come over hither.

The next, Gentlemen, is one Thornton, and he comes to the month of May, to the 1st and 2nd of May, their Stile, which was the 21st and 22nd of April, our Stile; and particularly he is sure Oates was there upon the 22nd of April, our Stile, that is, the 2nd of May, their Stile. For, says he, there was an action or play of the scholars; and I can tell you how I remember Oates was there; Oates had a mind to have a place to see the play, which he had no pretence or title to, and he had a scuffle with somebody about it; and therefore I remember, by that token, that he was there at that time.

Now, Gentlemen, it is not easy to be imagined, that six or seven men should agree in their testimony in all those circumstances, which in themselves are but minute; yet when offered as reasons to induce men's remembrance, must be allowed as good reasons; and yet this is to be thought but a made story. If sir Richard Barker's coach-man and Mrs. Mayo had had any such circumstances to support their testimony, they would have had much more credit.

Then there is one Conway; and it is very observable what he speaks of; for he was there all the while that they say Oates was there, and he gives you an account that he saw him with Burnaby the first time he came over, and agrees with Burnaby in this, that he wondered much at his confidence, and did think that he was very well known to him before: he swears Oates came in thither about the beginning of December 1677, and he was not absent, says he and several more, any one night, except in January once at Watton, till he went away in June 1678. Nay, they are so precise in their memory for very good reasons, because they are so regular in their societies, and keep a strict order, each has his fixed place in the refectory, where all the Socii, or the members of the college do meet; and because this fellow was an old fellow, older than the rest, and likewise was a dunce, therefore he was set at the dunce-table in every body's view, because he was a blockhead, and too old to keep company with the boys: so that though perhaps one of those young fellows in a mixt society may escape the view, and be absent without being missed, yet remarkable Mr. Oates is not so easily forgotten, that used to sit by himself. And as that noble lord, my lord Gerrard of Bromley, says, he has a particular face, and a particular tone; and there was more reason to remark him than any other,

both upon the account of his person and of his actions: so that I must needs say indeed, it is not a downright and positive swearing, but their testimony is given with deliberation and recollection of such particular circumstances, as may reasonably induce any unprejudiced person to give credit to it.

The next witness, Gentlemen, is Haggerstone, whose evidence is wonderful particular, and very material as to the circumstances that accompany it. For you are to observe, that in these colleges some are of the sodality, and some are not; and some are of such and such classes or forms, and others of other. Now this gentleman and Mr. Oates were of the same form, and he does particularly remember that he was setting up for a preacher, as he has an excellent knack that way; and he tells you, how ridiculous he made the late king in a sermon; that he halted between two opinions, and there ran a stream of Popery between his legs; and such like precious stuff he vented. And to fix it to be about the same time that is now in question, he says, he particularly remembers it was when he was reader, when Mr. Oates was, it seems, the buffoon to the society, or as I may call him, the jack-pudding to the college, that used to make them sport, and was guilty of so many ridiculous things, that they could not but put particular remarks upon him.

Next, I take notice, that this person says, there were two persons, Williams and Marsh, that were qualified to give suffrages in the congregation, that is, they were past eighteen years standing, and did go over: for that there was a consult, is not denied, nor that it was in London, nor that it was upon the 24th of April; but they say, it was a triennial meeting, which they used to have once in three years for the choice of some officers to manage the affairs of the society; as for the choice of a provincial, and other persons that they were to send upon their errands, in order to the support of their society: so that under the colour and countenance of what was in itself ordinary and usual, and that happened to be at that time, Oates, who had heard somewhat of it, and that it was the 24th of April, and that such and such were to be there, he upon that hearsay, as should seem, at St. Omers, does feign and contrive this pretended conspiracy.

The next is one Beeston; and it is very material too that he swears: for besides what he testifies, that from the time of his coming, which was in December 1677, he was not absent till the 23rd of June, when he went away; and for the time in question, he very well remembers his being there, by this circumstance: says he, I was chosen to be reader of the sodality in the month of March, but then Oates comes and gets the office out of my hands; but still with me there was that benefit reserved, that if he should at any time fail of reading there upon a Sunday or a holy-day, I was then to have read, and to have supplied his place.

Says he, I was there from March, till the time Oates went away in June; and Oates read there that very Sunday before the time in June that he went away. And I am sure I heard him read every time; and in case he had not read every time, I must have read in his absence: but I did not read at all during that time.

Now, Gentlemen, when a man is to succeed or to supply the absence of another in an office that is peculiar as to the charge incumbent upon the officer, and considerable as to the profit of it, that must needs make an impression upon the mind, and give a man a more exact remembrance of the thing; and therefore I recommend it particularly to your observation.

The next is one Mr. Smith; and he says, he saw Oates there all the time: and as to one part of it, when he himself was in the Infirmary, Oates went to visit him every two or three days; nay, and about such a time in May, says he, which was about the beginning of May, Oates being then in the infirmary, not well, the Doctor and he had a pretty dialogue together, and Oates spoke false Latin to the Doctor, for he said, 'Si placeat Dominatio vestra,' in the beginning of his compliment: this he did particularly say was the expression that this excellent scholar used to the physician at his first application to him, and all the whole college took notice of that piece of his learning.

The next is one Price, and he tells you, he was there all the time that the others speak of; he remembers him very well, and particularly says, I am sure Oates was there the 11th of May N. S. which will be the first of May O. S. because, says he, I know he was soundly beaten that day, upon a quarrel that he had there. This particularly he speaks of, besides his remembrance of the other circumstances in concurrence with the former witnesses.

Mr. Doddington swears the same, and Mr. Gerrard also swears the same, with that other particular circumstance that Mr. Solicitor repeated to you, which was of Oates's being there upon the day of confirmation, the 26th of May N. S. the 16th of May O. S. and he is sure of it, because he was confirmed along with him, and therefore it is impossible he should forget it: and my lord Gerrard, who was next, gives this reason upon his remembrance of all the fore-mentioned particulars, that he always took special notice of the man for his canting tone, his physiognomy, and remarkable behaviour.

Then there is Mr. Morgan, who is no Papist, but a minister of the Church of England; now Mr. Oates was angry with all the rest, because they were Catholics; but what has he to say to Mr. Morgan, who is a Protestant? Why the truth is, there are none of them to be believed, because they swear against him, and really he ought to be permitted to give that reason, or it is like to go very hard with him; for if in case you believe but a third part of the testimony that has been given, it is enough to

to his work. But what says Mr. Morgan? Truly he comes up to the 24th of April particularly, and he tells you how he remembers it; and the first occasion he had to look into it was, hey being all surprized at St. Omers at what Jates had sworn, and Mr. Morgan recollecting with himself, did remember that very day he was playing at ball within the college, and happened to toss his ball over the wall into the garden, and not being able to recover it in any other way, he spied Oates walking and looking into his book, and therefore he desired him to lend him his key, and by the help of that, he went in and fetched his ball; and this was the very day that Oates swore he was here.

Mr. Arundel says the same: the two Turveys say the same; and one of them is positive to have seen him there, either the 24th or 15th, or 23rd and 24th of April O. S. which is the 3rd and 4th, or 4th and 5th of May N. S. and if it were either of these days, it cannot be possible he should be here at the consult.

The next is Mr. Clavering, and I cannot but particularly take notice of what he has sworn: he says Mr. Oates was there all the time that he rest speak of; but it seems particularly about the time of the congregation in London: here comes in a stranger that was poor, and his gentleman, Mr. Clavering, made a collection for him: and it was talked of in the college is the reason why he had not success in his collection, because the fathers were gone to the congregation. Nay, and yet farther, says he, I do remember particularly that Mr. Williams and Mr. Marsh did go over to the congregation, but Oates did not; for I do remember when Williams and Marsh came back again, I had some discourse with Mr. Oates about the congregation: he came to me, and desired to know of me what account I was able to give of the matter of that meeting after the consult was over. Now had Mr. Oates been there, and been a person of that great trust that he had sworn himself into, he needed not sure have asked Mr. Clavering at St. Omers, what the business of the consult was at London, where he himself had been, but the other had not.

There is, besides Mr. Copley, another witness, Mr. Cooke, that speaks particularly of the 30th of April, that he was sure Oates was here then, because of the procession, and because he walked by himself in it; and Wright, the last witness, gives a general account, but speaks to no particular time.

And now, Gentlemen, after all this evidence, *in voce*, you must give me leave to hint *Testimonium Rei*, an improbable oath was that which Oates owns he made, if it be considered in all its parts. Can any man believe that fifty persons should meet together in a tavern in London, and these fifty persons should come to a resolution to kill the king and subvert the government, and alter the religion; and that this consultation being drawn up in the tavern (for so he swears it was), they should sever themselves into lesser clubs and companies, and take

care that none should sign when they were all together and among themselves, but must have it carried up and down from one man's chamber to another, and find no body to trust with this affair, that, if discovered, must subject them to present destruction, and ruin their whole party, but only Mr. Oates, who was none of their own order, nor does appear to be of such credit amongst them? Can you believe any men should be so void of sense and reason, that of fifty together, and those reputed as subtle as any sort of men whatsoever, there should not be one man of common understanding, that should take care for a more rational management of so great and hazardous an undertaking; when they were met together, and might have dispatched it in a quarter of an hour, they should separate themselves into several parts of the town, and trust a resolution of that nature in Mr. Oates's pocket, in whom if they had had more confidence than they seem to have, yet it was fully and madness to give him that opportunity of destroying all of them, and making himself? Were there no other evidence but the very testimony of the thing, it would go a very great way with me, I confess; but I must say withal, you are judges of this fact, upon a superadded testimony of 23 witnesses, *in voce*; I think it leaves the thing without any doubt.

Gentlemen, the answer given by the defendant to this charge is very fallacious; and though he puts such a countenance upon it, as though his witnesses were such persons of credit, that nothing could be objected against them, yet he is certainly very much mistaken in that: he has produced but two positive witnesses, and those two, as positive as they are in their proof, are likewise positive in their contradictions of one another, and what they have said is left to your consideration.

The one is a coachman, the other was sir Richard Barker's house-keeper; they indeed do say, sir Richard Barker's wife's sister, and his nephew, and his daughter, and his nieces, and a worshipful knight, and I know not who, that the old woman tells me are gone into my country, were all there at the same time, and nobody comes to testify it, but only this coachman and this old woman: these, gentlemen, are things fit to be thought of.

But now let us consider how they agree in their evidence. Says the woman, I saw him not till the beginning of May; but I am sure he was there before once or twice. And how does she know that? Because the coachman told her so; and he came there several times, but he did dine there but once; and when he came there the first time she saw him; he came in such a disguise, and he had a short periwig, and a kind of short white coat, and a white hat. But when the coachman comes to swear, he tells you, the first time he saw him, the woman saw him too; that he had his own hair, and cut close to his ears, that made him look, as the young fellow told her, like a Quaker. And when I asked the coachman,

Are you sure that Benjamin the young fellow did see him the first time you saw him there? He told me, No; but he was sure the old woman did look out of the window and see him; which she denies. I then asked him how often he dined there? He tells you several times, and there were such and such, and the old woman did see him dine there several times; which she denies that she ever saw him dine there above once. And I take notice of one of the evidence, the coachman, he gives but an odd sort of reason for his remembrance. In February, says he, my lady died, and my master was sick at Putney, and Oates came into the yard while I was cleaning my coach; and I am sure it was when the coat of arms hung over the door, because he ask'd me about my lady's death, and therefore it must be in May; when, for aught does appear to the contrary, it might be in any other month after the escutcheon was up; and in the other circumstances there is no certainty at all: so that it is plain, these witnesses swear according as their humour leads them, and not according to any remembrance they have of the thing.

And I rather believe it, because the third witness, that is Page the apothecary, that used to make up sir Richard Barker's medicines, gives an evidence contrary to both those; he cannot remember the year positively or particularly; but I'll tell you how he thwarts and contradicts the other people's testimony; for he remembers he came in such a disguise, but he believes nobody spoke to him but himself, because he found him walking in the place that was for the common reception of the patients; and he asked for Dr. Tongue, and he not being within, he went away very discontented: and so now these three witnesses seem to contradict one another; and the last witness Walker, who is the parson, he says nothing to the matter; for it does plainly appear, the time which he speaks of, which was about a year and a half before he was called to testify at the five Jesuits Trial, must be in the year 1677, and not in the year 1678, which is the question here, which must be before he went first to St. Omers.

Gentlemen, the other part of Mr. Oates's defence has been upon this topic: says he, I have been believed heretofore, the parliaments have given me credit; and to prove it, he has called several noble lords and persons of quality. The first was my lord of Devonshire, who says he cannot remember any particulars of his evidence, it is so long since; but he remembers the parliament, upon the evidence given of the plot, did make such votes as we do all know of. And there were a great many people that gave credit to his testimony, who, God be thanked, are of another opinion now. And my lord of Clare says, he was not in the House of Lords at the beginning of the discovery, and cannot remember any thing in particular. But my lord of Huntingdon was a little more particular; and Mr. Oates began to be angry with him, because he spoke so much: says he, I remem-

ber Mr. Oates was examined in the House of Lords, and was believed there, because they did believe he spoke truth at that time; but now upon consideration of the contradictions and falsities of his evidence, I cannot but say, I do believe him, says he, to be a great villain, and that he has been guilty of spilling innocent blood. And this noble lord speaks with great honour and consideration: and truly, I believe if every man that is here were to speak his mind, my lord has delivered the opinions of us all, and many thousands more in the nation.

Mr. Oates called next my Lord Chief Baron, my brother Gregory, my lord of London, sir George Treby, Mr. Williams, and my brother Dolben. But they all tell you, they are able to give no particular answers to his questions; and this was the sum of his evidence.

To this Mr. Attorney-General has given a reply of evidence, that truly is of very great moment. First, here is produced sir George Wakeman, whom Oates accused of high-treason, and he suffered his trial and was acquitted; so that as well as the jury had given credit to him in the former verdicts, so, says Mr. Attorney, I must speak likewise for the credit of that verdict that did disbelieve him, because though he did swear as roundly and briskly up to the matter as he had done before, yet when he had not the hurry and surprize of his discovery to support him, his villainy was detected, and the innocent acquitted. And besides the record of the acquittal, here is the person himself, who is now under no dread or danger, having stood his trial and being acquitted; and he takes it upon his oath, and in the presence of the great God, and the searcher of hearts, that whatsoever Oates swore against him at his trial, was every tittle of it false: and this acquittal of his, being after great and mature consideration, is an evidence of another quality, than the verdicts of the other convictions.

Next to him, is my lord Castlemain, a person of very great honour; and he gives an account he was arraigned of high treason at this bar, and upon his trial Oates was produced as a witness against him, and there he swore he met with my lord Castlemain in Lincoln's-Inn-Fields, and great familiarity there was between them, so that my lord could not trust him in a less affair than the plot; and away he goes with him to Fenwick's chamber, there to talk about the design of killing the late king; Mr. Oates, of all mankind, must be the great repository of this secret. But the jury then being persons of great understanding and integrity, did not believe Oates, but acquitted my lord Castlemain. And he does here take it upon his oath, backed with all the imprecations of evil to himself that a man can use, that there was not one word of truth in Oates's testimony; nor he did he ever see Oates in his life, till such time as he was taken up upon his accusation. Now are here two persons of honour and quality, that upon their oaths do per-

ticularly give you an account, as in the presence of Almighty God, that Oates has twice forsworn himself against them.

Gentlemen, there is notice to be taken of the Journal of the House of Lords; and though it is true for the sake of the precedent, and to secure the justice of the nation, we did keep them strictly to their proof, that it was upon oath. And as to the business of Smith, though we do believe the thing in our private judgments, yet we thought it not fit to be permitted, that persons should upon their own oaths confess themselves to be guilty of perjury, and afterwards give evidence against others; for such are not to have the countenance of ever being witnesses again: yet by the records of parliament, and other evidence there is enough to make the matter aimed at clear.

For it is clear by his Narrative, that Oates did first swear, as far as he could well swear to bring him into displeasure of the people: for that was his way to intimidate all he had to do with, and thereby force them to comply with his designs. And there was no more plausible accusation at that time, than to accuse a man for saying somewhat against the parliament, or being in a combination to subvert the Protestant Religion. But you see, when he comes to have his own turn served, then this man upon whom he had fixed such an odious character, is really no papist at all, but engaged in service for his king and country, and has Mr. Oates's passport, a thing of great advantage to him at that season. This the king's counsel made use of with great reason, as an evidence of tampering: for the man has altered his opinion of one he has before accused and now brings him as an honest man to give evidence for him. And this, say they, must be intended to be done by practice and by threats.

And the rather, gentlemen, for that you have an account by witnesses sworn, that there was one Clay a popish priest, that lay in prison at the Gate-House, and while he was there, Oates and sir William Waller came into the prison to him, and tampering with him, says Oates, I hear there are some St. Omers boys, that intend to testify that I was at St. Omers when I say I was at London; but you must swear, that you dined with me at Mr. Howard's in May 1678; or if you will not, you know I know you to be a priest, and I'll hang you. Says Clay, where is my silver and gold that was taken away from me? And we all know sir William Waller was wonderful good at the fingering of gold; he used to take away broad pieces as popish reliques, because of the crosses upon them. Says Clay, give me my gold again, I will swear for you; I have been a rogue before, and I may be a rogue again. And accordingly a contract is made for him to swear directly, that Oates and he were together at Mr. Howard's house in May 1678. This very fellow that tells you now the story, told it the next morning to another man, who has likewise sworn the same. Then is Clay conveyed by Oates to the Old-Bailey, and there swears,

being thus threatened and suborned, that in May 1678, he and Mr. Oates dined together at Mr. Howard's house, and you have Mr. Howard produced, who does swear that Clay did swear so; but indeed he was not there with Mr. Oates at dinner till July after.

This, gentlemen, is direct corruption and subornation; and if a man will be a corrupt knave, and endeavour to suborn witnesses to swear that which is false, he is the more likely to swear false himself. Besides that, you are to take notice, here is his own Narrative produced, where you have it sworn by himself, that he went back to St. Omers about the beginning of May, and was there all the month of May, and in June, till the latter end of it. Then all this while, either Mr. Oates, or his witnesses, are perjured in the case: He says, he staid but three or four days in England after the consult was over, and then went straight back again to St. Omers. Which must be the first week in May; but if you believe his two witnesses, he dined with them several times after that: And so it is apparent some of them are guilty of gross and foul perjury.

Now, gentlemen, I cannot but resort back to the objection that I made at first. It is strange to me, that a man that came upon such a design, should go publicly about the streets at noon-day, though in a disguise, yet he was known. But if you take the persons time to be in the year 1677, then it is easily reconciled what they did say of their seeing him in such a disguise; and so all their testimony may stand together, and perhaps they may mistake in a point of time, though not in the substance of their evidence: and I would out of charity conclude it to be so.

But I will say, if they are to be taken strictly to the year 1678, it is monstrous to imagine, that we should have nobody brought to let us know where he lodged, where he eat, with whom he conversed, for all that time.

Gentlemen, I have detained you the longer in this matter, because I take it to be of so great weight, wherein the justice and honour of the nation are so much engaged, and it was therefore fit this cause should be tried in the most solemn and public manner, in order to vindicate the nation from the reproach and calumny of injustice and oppression. And sure I am, if you think these witnesses swear true, as I cannot see any colour of objection, there does not remain the least doubt, but that Oates is the blackest and most perjured villain that ever appeared upon the face of the earth.

Cl. of Cr. Tipstaff, you must take care of the jury.

L. C. J. Gentlemen, if any of you have a mind to drink at the bar, before you go, you shall have some got for you.

Jury. No, my lord, we do not care for drinking.

L. C. J. Then we will stay for you.

Then the Jury withdrew to consider of their Verdict, and after about a quarter of an hour's stay, they returned and delivered their Verdict, 'That the Defendant was Guilty of the Perjury whereof he was indicted.' Which being recorded, the Lord Chief Justice spoke to the Jury to this effect :

L. C. J. Gentlemen, that we are not, God be thanked, in those times of disorder and confusion that we have been heretofore in, to have humming or hissings to declare the auditors approbation or dislike of Juries' Verdicts : But because there has been this day mention made of the opinions of judges about verdicts, I shall take the liberty to declare my mind to you now, That for my part, I am satisfied in my conscience you have given a good and a just verdict; and so I believe is every other judge upon the bench.

To which the rest of the Judges assented; and then the Court arose.*

* " 1683. There have been endeavours by

some persons to accuse Mr. Oates of sodomy, and in order thereto, two persons (one of which was formerly his man, but turned away for his rogue's tricks) applied themselves to an alderman of the city, who ordered them to go to Mr. Recorder, who accordingly took their examination, which was so very improbable (nay even incredible) that it discovered the falseness and maliciousness of the prosecution.

" June 1684. It has been very lately discoursed about town, that there are informations taking by Mr. Justice Guise, and Mr. Justice L'Estrange of High Treason against Mr. Oates, and that he would be indicted thereon the next sessions.

" Jan. 23, 1684-5. Mr. Titus Oates pleaded not guilty to an information for Perjury about a consult of Jesuits he swore to be at the White Horse Tavern in the Strand; and there was very hot words passed between the Lord Chief Justice and him." Narcissus Luttrell's MS. Brief Historical Relation, &c. in Allsoul's Library, Oxford.

323. The Second Trial of TITUS OATES, D. D. at the King's-Bench, for Perjury : 1 JAMES II. A. D. 1685.

May 9, 1685.

THIS day being appointed for the Trial of the other causes between our sovereign lord the king, and Titus Oates, for Perjury; the same began about nine in the morning, and proceeded after this manner :

First, proclamation was made for silence: Then the Defendant was called; who, appearing in person, was advised to look to his challenges: but he challenged none; only he desired, that they might be all asked, Whether they were of the grand jury that found the bill? * which was done. And all denying it, the twelve sworn were these: Sir Thomas Vernon, kt. † Nicholas Charlton, esq. Thomas Langham, esq. Thomas Harlop, Francis Griffith, John Kent, George Toriano, Henry Loades, John Midgley, John Pelling, Thomas Short, and George Peck.

Cl. of Cr. Gentlemen, you that are sworn, hearken to the Record.

Memorandum, 'That by a certain inquisition for our sovereign lord the king, at the Guildhall of the city of London, and within the same city, on Tuesday the 28th of October, in the 36th year of the reign of our late sovereign lord Charles 2, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. before sir Henry Tulse, knight, mayor of the city of

London; sir William Turner, knight; and sir James Edwards, knight, aldermen of the said city; sir Thomas Jenner, knight, one of his majesty's serjeants at law, and recorder of the same city; sir Robert Jefferies, knight; and sir John Peake, knight, other aldermen of the said city; and others their companions, justices of our said lord the king; by his majesty's letters-patents under the great seal of England, to enquire of several offences in the said letters-patents contained, and to hear and determine the same, according to the laws and customs of this kingdom, by the oaths of twelve jurors, honest and lawful men of the city of London aforesaid, who then and there being sworn, and charged to enquire for our said sovereign lord the king, and the body of the said City, upon their oaths present :

'That at a certain session of our said lord the king, holden for the county of Middlesex at Hicks's-Hall in St. John-Street in the county aforesaid, on Monday (to wit) the 16th day of December, in the year of the reign of our said late sovereign lord, Charles 2, by the grace of God, of England, Scotland, France and Ireland, king, defender of the faith, &c. the 30th, before sir Reginald Foster, baronet; sir Philip Matthews, bart. sir William Bowles, knight; sir Charles Pitfield, knight; Thomas Robinson, Humphrey Wyrley, Thomas Harriot, and William Hempson, esquires, justices of our said lord the king; to enquire by the oaths of honest and lawful men, of the county of Middlesex aforesaid, and by other ways, manners, and means, whereby they might, or could better know, as well within liberties as without; by whom the truth of the

* See a Note to the next preceding Case, p. 1081.

† See the Case of sir Samuel Barnardiston, A. D. 1684, vol. 9, p. 1385, of this Collection.

matter might be better known and enquired of, concerning all treasons and misprisions of treasons, insurrections, rebellions, counterfeittings, clippings, washings, false making, and other falsifying of the moneys of this kingdom of England; and of any other kingdoms and dominions whatsoever; and of all murders, felonies, manslaughters, killings, burglaries, and other articles and offences in the letters-patents of our said lord the king, to them, or any four or more of them, thereupon directed, specified; as also the accessories of the same, within the county aforesaid, as well within liberties as without, by whomsoever, boysoever had, made, done, or committed, and to bear and determine the same treasons, and other the premisses according to the law and custom of this kingdom of England, assigned by the oath of Ralph Wain, John Vaughan, Richard Foster, Thomas Paget, Robert Newington, Henry Tompkins, Robert Hayes, John Greenwood, Peter Stinyeson, Josiah —, Richard Richman, Augustine Bear, John King, Nathaniel Brit, Francis Fisher, Edward Foster, and Samuel Lynn, honest and lawful men of the county aforesaid, sworn, and charged to enquire for our said lord the king, and the body of the county aforesaid, upon their oaths; it was presented, That Thomas White, otherwise Whitebread, late of the parish of St. Giles in the Fields, in the county of Middlesex, clerk; William Ireland, late of the parish aforesaid, in the county aforesaid, clerk; John Fenwick, late of the same parish and county, clerk; Thomas Pickering, late of the parish aforesaid, in the county aforesaid, clerk; and John Grove, late of the parish aforesaid, in the county aforesaid, gentleman; as false traitors against the most illustrious and most serene and excellent prince, our said late sovereign lord Charles 2, by the grace of God, of England, Scotland, France and Ireland, king, defender of the faith, &c. their supreme and natural lord; not having the fear of the Lord in their hearts, nor weighing the duty of their allegiance; but being moved and seduced by the instigation of the Devil, the cordial love, and true, due, and natural obedience, which true and faithful subjects of our said lord the king, towards him our said lord the king, should, and of right ought to bear, utterly withdrawing and contriving, and, with all their might, intending the peace and common tranquillity of this kingdom of England to disturb; and the true worship of God, within this kingdom of England used, and by law established, to subvert; and sedition and rebellion within this kingdom of England to move, stir up, and procure; and the cordial love, and true and due obedience, which true and faithful subjects of our said lord the king, towards him the said lord the king should, and of right ought to bear, utterly to withdraw, put out, and extinguish; and our said sovereign lord the king to death and final destruction to bring and put, the 24th of

April, in the 30th year of the reign of our said late sovereign lord Charles 2, at the parish of St. Giles in the Fields aforesaid, in the county of Middlesex aforesaid; falsely, maliciously, subtilly, advisedly, and traitorously, did purpose, compass, imagine, and intend sedition and rebellion within this kingdom of England to move, stir up, and procure, and a miserable slaughter amongst the subjects of our said sovereign lord the king to procure and cause; and our said lord the king, from the regal state, title, power, and government of his kingdom of England, wholly to deprive, depose, cast down, and disinherit; and him our said lord the king, to death and final destruction to bring and put; and the government of the said kingdom, and the sincere religion of God, in the same kingdom, rightly and by the laws of the same kingdom established, at their will and pleasure to change and alter; and the state of this whole kingdom of England, through all its parts well instituted, and ordained, wholly to subvert and destroy, and war against our said lord the king, within this kingdom of England to levy.

And to complete and perfect the same their most wicked treasons, and traitorous imaginations and purposes aforesaid; they, the aforesaid Thomas White otherwise Whitebread, William Ireland, John Fenwick, Thomas Pickering, and John Grove, and other false traitors, to the jurors unknown, the aforesaid 24th day of April, in the 30th year aforesaid, with force and arms, &c. at the parish of St. Giles in the Fields aforesaid, in the county of Middlesex, aforesaid, falsely, maliciously, subtilly, advisedly, devilishly and traitorously did assemble themselves, unite, and congregate; and then and there falsly, maliciously, subtilly, advisedly, devilishly and traitorously did consult and agree, our said sovereign lord the king to death and final destruction to bring and put, and the religion within this kingdom of England, rightly and by the laws of the same kingdom established, to the superstition of the Romish church to change and alter. And the sooner to complete and perfect the same their most wicked treasons and traitorous imaginations and purposes aforesaid, the said Thomas White otherwise Whitebread, William Ireland, John Fenwick, Thomas Pickering, and John Grove, and other false traitors of our said late lord the king, to the jurors unknown; afterwards (to wit) the same 24th day of April, in the 30th year aforesaid, at the aforesaid parish of St. Giles in the Fields, in the county of Middlesex aforesaid, falsely, subtilly, advisedly, maliciously, devilishly, and traitorously between themselves did conclude and agree that they the said Thomas Pickering and John Grove, him our said late lord the king should kill and murder; and that they, the said Thomas White otherwise Whitebread, William Ireland, John Fenwick, and others, false traitors, to the jurors unknown, a certain number of

masses between them then and there agreed, for the health of the soul of him, the said Thomas Pickering, therefore should say, celebrate, and perform; and therefore should pay unto the said John Grove a certain sum of money between them then and there agreed.

And the Jurors aforesaid, upon their oaths aforesaid, did further present, That the said Thomas Pickering and John Grove, upon the agreement aforesaid, then and there falsely, subtilly, advisedly, maliciously, devilishly and traitorously did take upon themselves, and to the same Thomas White otherwise Whitebread, William Ireland, John Fenwick, and other false traitors against our said lord the king, to the jurors aforesaid unknown, then and there falsely, subtilly, advisedly, maliciously, devilishly and traitorously did promise, that they the said Thomas Pickering and John Grove him our said late lord the king would kill and murder: And that they, the said Thomas White otherwise Whitebread, William Ireland, John Fenwick, Thomas Pickering, John Grove, and other false traitors against our said lord the king unknown, afterwards (to wit) the same 24th day of April, in the 30th year aforesaid, at the aforesaid parish of St. Giles in the Fields in the county of Middlesex aforesaid, falsely, subtilly, advisedly, maliciously, devilishly and traitorously did give their faith each to other, and upon the sacrament then and there traitorously did swear and promise to conceal, and not to divulge their said most wicked treasons and traitorous compassings, consultations, and purposes so between them had, him our said late lord the king traitorously to kill and murder, and the Romish religion within this kingdom of England to be used, to introduce, and the true reformed religion within this kingdom of England, rightly and by the laws of the said kingdom established, to alter and change. And that the said Thomas Pickering and John Grove, in execution of the traitorous agreement aforesaid, afterwards (to wit) the same 24th day of April, in the 30th year aforesaid, and divers days and times after, at the aforesaid parish of St. Giles in the Fields, in the county aforesaid, muskets, pistols, swords, daggers, and other offensive and cruel weapons, him the said late lord the king to kill and murder, falsely, subtilly, advisedly, maliciously, devilishly and traitorously did prepare and obtain, had, and kept for themselves; and that they the said Thomas Pickering and John Grove, afterwards (to wit) the same 24th day of April, in the 30th year aforesaid, and divers days and times after, with force and arms, &c. at the parish aforesaid, in the county of Middlesex aforesaid, and in other places within the county of Middlesex aforesaid, falsely, subtilly, advisedly, maliciously, devilishly and traitorously did lie in wait, and endeavour our said late lord the king traitorously to kill and murder;

and that the said Thomas White otherwise Whitebread, William Ireland, John Fenwick, and other false traitors to the jurors aforesaid unknown, afterwards (to wit) the same 24th day of April, in the 30th year aforesaid, at the parish aforesaid, in the county of Middlesex aforesaid, falsely, subtilly, advisedly, maliciously and traitorously did prepare, persuade, excite, abet, comfort and counsel four other persons, to the jurors unknown, and subjects of our said lord the king, him our said late lord the king traitorously to kill and murder, against the duty of their allegiance, against the peace of our said lord the king his crown and dignity, and against the form of the statute in such case made and provided; and thereupon it was so far proceeded, that afterwards, at the court of gaol-delivery of our said lord the king, at Newgate, at Justice-Hall in the Old-Bailey, in the suburbs of the city of London, in the parish of St. Sepulchre, in the Ward of Farringdon without, London, the 17th day of December, in the 30th year aforesaid, before the justices of the said lord the king, of the same gaol-delivery, then and there held by adjournment, of the county of Middlesex aforesaid, came the said William Ireland, Thomas Pickering and John Grove, under the custody of sir Richard How, knight, and sir John Chapman, knight, sheriff of the county of Middlesex aforesaid; into whose custody, for the cause aforesaid, they were before committed: Being brought to the bar there, in their proper persons, and presently being severally asked concerning the premises above-charged upon them, how they would acquit themselves; the aforesaid William Ireland, Thomas Pickering and John Grove did severally say, That they were not thereof guilty; and for the same, for good and bad, they did severally put themselves upon the country; and by a certain jury of the country, in that behalf duly impannelled, sworn and charged then and there in the same court, before the justices of gaol-delivery aforesaid, were tried: And that upon that trial, between our said late lord the king, and the said William Ireland, Thomas Pickering and John Grove, at London aforesaid, to wit, at the Justice-Hall in the Old Bailey aforesaid, in the parish of St. Sepulchre, in the Ward of Farringdon, without, London aforesaid, the defendant (Titus Oates) late of the parish of St. Sepulchre aforesaid, in the ward aforesaid, Clerk, was produced as a witness, on the part of the said late lord the king, upon the trial aforesaid; and before the said justices of gaol-delivery, in the court aforesaid, then and there held, upon the Holy Gospels of God, was duly sworn to speak and testify the truth, the whole truth, and nothing but the truth, of and in the premises between our said lord the king, and the said William Ireland, Thomas Pickering and John Grove. And that the said Titus Oates then and there, in the court of gaol-delivery aforesaid, upon his oath

aforsaid, upon the indictment aforsaid, at the parish and ward aforsaid, by his own proper act and consent of his most wicked mind, falsely, voluntarily and corruptly did say, depose, swear, and give in evidence to the jurors of the jury aforsaid, then and there sworn and impannelled, to try the issue aforsaid between our said late lord the king, and the said William Ireland, Thomas Pickering and John Grove; that the said William Ireland, in the indictment aforsaid mentioned, was in town (within the cities of London and Westminster, or the places adjacent to the said cities meaning) upon the 1st or 2d day of September, in the year 1678.* Whereas in truth and in deed the said William Ireland, in the indictment aforsaid mentioned, was not in town nor within the cities of London and Westminster, or the places adjacent to the same cities, or either of them, upon the 1st or 2d day of September, in the year 1678. And so the aforsaid Titus Oates, the aforsaid 17th day of December, in the 30th year aforsaid, at the Justice-Hall aforsaid, in the court aforsaid, upon the trial aforsaid, upon the indictment aforsaid, between our late lord the king, and the aforsaid William Ireland, Thomas Pickering and John Grove, so as aforsaid had, by his own act and consent, and of his most wicked mind, falsely, voluntarily and corruptly, in manner and form aforsaid, did commit voluntary and corrupt perjury.

And the jurors aforsaid, last sworn to enquire for our said lord the king, and the body of the city of London aforsaid, upon their oaths aforsaid, do further present, that at another session of our said late lord the king, held for the county of Middlesex, at Hick's-hall in St. John street, in the county aforsaid, on Thursday (to wit) the 12th day of June, in the 31st year of our said late lord king Charles 2, before sir Philip Matthews, baronet, sir Thomas Orby, knight and baronet, sir William Pultney, knight, sir William Bowles, knight, Thomas Robinson, Thomas Harriot, esquires, and others their companions, by letters patents of our said late lord the king, to the same justices afornamed, and others, and to any four or more of them, under the Great Seal of our said late lord the king made, to enquire, by the oaths of good and lawful men of the county of Middlesex aforsaid, and by all other ways, manners and means, by which they might or could better know, as well within liberties as without by whom the truth of the matter might be best known and enquired, of all treasons, misprisions of treasons, insurrections, rebellions, counterfeittings, clippings, washings, false-making, and other falsifyings of the money of this kingdom of England and of other kingdoms and dominions whatsoever; and of all murders, felonies, manslaughters, killings, burglaries, rapes, meetings, and unlawful conventicles; speakings of words, combinations,

misprisions, confederacies, false allegations, trespasses, riots, routs, retainers, escapes, contempts, oppressions; and of other articles, and offences in the same letters patents of our said lord the king, specified: as also, the accessories of the same, within the county aforsaid, as well within liberties as without, by whomsoever and howsoever had, done, perpetrated or committed; and of other articles and circumstances concerning the premises, howsoever, and the same treasons and other the premises to hear and determine according to the law and custom of this kingdom of England being assigned by the oaths of Henry Ashurst esq. Edward Gravel, John Radford, John Warrel, William Hanmer, Robert Pritchard, John Tredder, Gilbert Ureweyn, David Collixer, Abraham Harrison, Charles Morgan, Philip Trehearn, John Collier, Robert Whiterod, William Webb, Thomas Edwards and Abraham Tillent, honest and lawful men in the county aforsaid, sworn and charged to enquire for our said lord the king, and the body of the county aforsaid; upon their oaths, it was presented, That Thomas White, late of the parish of St. Giles in the fields, in the county of Middlesex, clerk, otherwise called Thomas Whitebread, late of the parish aforsaid, in the county aforsaid, clerk; John Fenwick, late of the parish aforsaid, in the county aforsaid, clerk; William Harcourt, late of the parish aforsaid, in the county aforsaid, clerk, otherwise called William Harrison, late of the parish aforsaid, in the county aforsaid, clerk; John Gavan, late of the parish aforsaid, in the county aforsaid, clerk; and James Corker, late of the parish aforsaid, in the county aforsaid, clerk; as false traitors against the most illustrious, most serene and excellent prince, our late sovereign lord king Charles 2, by the grace of God, of England, Scotland, France and Ireland, king, defender of the faith, &c. their supreme and natural lord; not having the fear of God in their hearts, nor weighing the duty of their allegiance; but being moved and seduced by the instigation of the devil, the cordial love, the true, due, and natural obedience, which true and faithful subjects of our said lord the king towards him our said lord the king should, and of right ought to bear; wholly withdrawing, and contriving, and with all their might intending the peace and common tranquillity of this kingdom of England to disturb; and the true worship of God within this kingdom of England used, and by law established, to overthrow; and the government of this kingdom of England to subvert, and sedition and rebellion within this kingdom of England to move, stir up, and procure; and the cordial love, and true and due obedience, which true and faithful subjects of our lord the king towards him the said lord the king, should, and of right ought to bear, utterly to withdraw, put out, and extinguish; and our said late lord the king to death and final des-

* See vol. 7, p. 134 of this Collection.

'truction to bring, and put, the 24th day of
 'April, in the 30th year of the reign of our
 'said late lord king Charles 2, &c. at the pa-
 'rish of St. Giles in the fields, and the county
 'of Middlesex aforesaid, with divers other false
 'traitors against our said late lord the king, to
 'the jurors aforesaid unknown, falsely, sub-
 'tily, advisedly, maliciously and traitorously
 'did purpose, compass, imagine, and intend
 'sedition and rebellion within this kingdom of
 'England to move, stir up, and procure, and a
 'miserable slaughter among the subjects of our
 'said lord the king, to procure and cause; and
 'our said late lord the king, from the regal
 'state, title, power and government of his king-
 'dom of England, utterly to deprive, depose,
 'cast down, and disinherit; and him our said
 'late lord the king to death and final destruc-
 'tion to bring and put, and the government of
 'the same kingdom, and the sincere religion
 'of God in the same kingdom, rightly and by
 'the laws of the said kingdom established, at
 'their will and pleasure to change and alter;
 'and the state of this whole kingdom of Eng-
 'land, through all its parts well instituted and
 'ordered, wholly to subvert and destroy;
 'and war against our late lord the king, within
 'this kingdom of England to levy: and to
 'perfect and complete the same, their most
 'wicked treasons and traitorous imagina-
 'tions, and purposes, they the said Thomas
 'White otherwise Whitebread, John Fenwick,
 'William Harcourt otherwise Harrison, John
 'Gaven, Anthony Turner, and James Corker,
 'and other false traitors to the jurors aforesaid
 'unknown, the aforesaid 24th day of April, in
 'the 30th year aforesaid, with force and arms
 'aforesaid, at the parish of St. Giles in the
 'fields aforesaid, in the county of Middlesex
 'aforesaid, falsly, maliciously, subtly, ad-
 'visedly, devilishly and traitorously did assem-
 'ble, unite and gather themselves together;
 'then and there falsly, maliciously, subtly,
 'advisedly, devilishly, and traitorously did con-
 'sult, consent and agree our said late lord
 'king to death and final destruction to bring
 'and put, and the religion within this king-
 'dom of England, rightly and by the laws of
 'the same kingdom established to change and
 'alter, to the superstition of the church of
 'Rome, and the government of this kingdom
 'of England to subvert; and that one Thomas
 'Pickering, and one John Grove, him our said
 'late lord the king should kill and murder: and
 'that they the said Thomas White otherwise
 'Whitebread, John Fenwick, William Har-
 'court otherwise Harrison, John Gaven,
 'Anthony Turner, James Corker, and other
 'false traitors against our said late lord
 'the king, to the jurors unknown, a cer-
 'tain number of Masses, between them,
 'then and there agreed upon, for the health
 'of the soul of him, the said Thomas Pickering,
 'therefore should say, celebrate and perform;
 'and therefore should pay upon the said John
 'Grove, a certain sum of money, between them
 'then and there agreed upon. And that the

'said Thomas White otherwise Whitebread,
 'John Fenwick, John Gaven, Anthony Turner,
 'William Harcourt otherwise Harrison, and
 'other false traitors against our said late lord
 'the king, to the jurors unknown, in the fur-
 'ther prosecution of the treasons and traitorous
 'consultations and agreements aforesaid, af-
 'terwards (to wit) the said 24th day of April,
 'in the 30th year aforesaid, at the aforesaid
 'parish of St. Giles in the fields, in the county
 'of Middlesex aforesaid, falsly, subtly, ad-
 'visedly, maliciously, devilishly, and traitor-
 'ously, did severally give their faith each to other;
 'and upon the sacrament, then and there tra-
 'itorously did swear and promise to conceal, and
 'not to divulge their said most wicked treasons
 'and traitorous compassings, consultations and
 'purposes aforesaid, so between them had,
 'him the said late lord the king traitorously to
 'kill and murder, and to introduce the Romish
 'religion, to be used within this kingdom of
 'England, and the religion within this kingdom
 'of England rightly and by the laws of this
 'kingdom established, to alter and change;
 'and that the said Thomas White otherwise
 'Whitebread, John Fenwick, William Har-
 'court otherwise Harrison, John Gaven, An-
 'thony Turner, James Corker, and other false
 'traitors to the jurors aforesaid unknown, in
 'further prosecution of the treasons and tra-
 'itorous intentions and agreements aforesaid,
 'afterwards (to wit) the said 24th day of April
 'in the 30th year aforesaid, at the parish afo-
 'said, in the county aforesaid, falsly, subtly,
 'advisedly, maliciously, devilishly and traitor-
 'ously, did prepare, persuade, excite, abet,
 'comfort and counsel four other persons to the
 'jurors unknown, and subjects of our said late
 'lord the king, him our said late lord the king
 'traitorously to kill and murder, against the
 'duty of their allegiance, and against the peace
 'of our said late lord the king, his crown and
 'dignity, and against the form of the statute
 'in that case made and provided. Whereupon,
 'it was commanded the sheriff of the county
 'aforesaid, that he should not omit, &c. but
 'should take them to answer, &c.

'Which indictment the said justices of our said
 'lord the king, afterwards (to wit) at the Gaol
 'delivery of our said lord the king, of New-
 'gate, holden by adjournment for the county
 'of Middlesex, at Justice-Hall in the Old-
 'Bailey in the suburbs of the city of Lon-
 'don, on Friday (to wit) the thirteenth day of
 'June in the 31st year aforesaid, before sir
 'James Edwards, knight, mayor of the city of
 'London; sir William Scroggs, knight, lord
 'chief justice of his majesty's Court of King's
 'bench; sir Francis North, knight, lord chief
 'justice of his majesty's Court of Common-
 'Pleas; sir Thomas Allen, knight and baro-
 'net, one of the aldermen of the said city of Lon-
 'don; sir George Jefferies, knight, recorder
 'of the said city of London; and other their
 'companions, justices of our said lord the king,
 'assigned to deliver his Gaol of Newgate of
 'the prisoners in the same being, by their own

proper hands did deliver there, in the court of record, in form of law to be determined : And thereupon, at the said gaol-delivery of our lord the king of Newgate, holden by the adjournment aforesaid, for the county aforesaid, at Justice-Hall aforesaid the said Friday the 13th of June, in the 31st year aforesaid, before the aforesaid justices of our said late lord the king last named came the said Thomas White otherwise Whitebread, John Fenwick, William Harcourt otherwise Harrison, John Gaven and Anthony Turner, under the custody of sir Richard How, knight, and sir George Chapman, knight, sheriff of the county aforesaid ; into whose custody, for the cause aforesaid, they were before that time committed ; being brought to the bar there, in their proper persons ; who were committed to the aforesaid sheriff, &c. And immediately being severally demanded concerning the premises aforesaid, in the indictment aforesaid specified, charged upon them as above, how they would thereof acquit themselves ; the said Thomas White, otherwise Whitebread, John Fenwick, William Harcourt otherwise Harrison, John Gaven and Anthony Turner, did severally say, that they were not thereof guilty : and thereupon, for good and bad, did severally put themselves upon the country. And thereupon, upon the indictment aforesaid last recited, at the session of our lord the king, at the Justice-Hall in the Old-Bailey, it was so far proceeded, that the issue aforesaid between our said late lord the king and the said Thomas White otherwise Whitebread, John Fenwick, William Harcourt otherwise Harrison, John Gaven, and Anthony Turner, afterwards (to wit) the aforesaid Friday the 13th day of June in the 31st year aforesaid, at Justice-Hall aforesaid, by a certain jury of the country in that behalf duly impannelled, sworn and charged, was tried ; and that upon the trial of the issue aforesaid last mentioned, between our said late lord the king, and the said Thomas White otherwise Whitebread, John Fenwick, William Harcourt, otherwise Harrison, John Gaven, and Anthony Turner, at London aforesaid, (to wit) at the Justice-Hall in the Old-Bailey aforesaid, in the parish of St. Sepulchre, in the ward of Farringdon without London aforesaid, the said defendant, Titus Oates, was also a witness produced on behalf of our said late lord the king, upon the trial aforesaid, upon the indictment last aforesaid : And he, the aforesaid Titus Oates, then and there at the session last aforesaid, at the Justice-Hall aforesaid, in the court of the same session (to wit) at the parish and ward aforesaid, was duly sworn upon the Holy Gospels of God to speak and testify the truth, the whole truth, and nothing but the truth of, and in the premises, in the issue aforesaid last mentioned, so as aforesaid joined between our said late lord the king, and the said Thomas White otherwise Whitebread, John Fenwick, William Harcourt otherwise Harrison, John

Gaven, and Anthony Turner. And that the said Titus Oates, then and there, at the session aforesaid last mentioned, in the Justice-Hall aforesaid, in the court of the same session upon his oath aforesaid, upon the indictment last aforesaid, by his own proper act and consent, of his most wicked mind, falsely, voluntarily and corruptly did say, depose, swear, and give in evidence to the Jurors of the Jury aforesaid last mentioned, so as aforesaid sworn and impannelled to try the issue aforesaid between our said late lord the king, and the said Thomas White otherwise Whitebread, John Fenwick, William Harcourt otherwise Harrison, John Gaven, and Anthony Turner ; That William Ireland (one William Ireland then before convicted and executed for high-treason against our late lord the king, meaning) took his leave of him the said Titus Oates and others, at the chamber of the said William Ireland, then being in Russel-street (a certain street called Russel-street, lying within the city of Westminster, in the county of Middlesex, meaning) between the 8th and 12th day of August, in the year of our Lord 1678.* Whereas, in truth and in deed, the said William Ireland did not take his leave of the said Titus Oates, or any other persons whatsoever, at the chamber of the said William Ireland, then being in Russel-street aforesaid, between the said 8th and 12th days of August, in the year of our Lord 1678. And so the said Titus Oates, upon the said Friday the 13th day of June, in the 31st year aforesaid, at the session last aforesaid, at the Justice-Hall aforesaid, in the court of the same session, upon the indictment last aforesaid, so put in issue, and tried as aforesaid, between our said late lord the king, and the said Thomas White, otherwise Whitebread, John Fenwick, William Harcourt otherwise Harrison, John Gaven, and Anthony Turner, by his own proper act and consent, and of his most wicked mind, falsely, voluntarily, and corruptly, in manner and form aforesaid, did commit voluntary and corrupt perjury, to the great displeasure of Almighty God, in manifest contempt of the laws of this kingdom of England, to the evil and pernicious example of all others in the like case offending, and against the peace of our sovereign lord the king, his crown and dignity. Upon this indictment he has been arraigned ; and thereunto hath pleaded, Not Guilty : and for his trial, hath put himself upon the country, and his majesty's Attorney-General likewise ; which country you are ; your charge is, to enquire, whether the defendant, Titus Oates, be guilty of the perjury he stands indicted, or Not Guilty. If you find him Guilty you are to say so ; if you find him Not Guilty, you are to say so, and no more : and hear your evidence.

L. C. J. (Sir George Jefferies.) Look ye, Mr. Attorney, my lord chief justice Jones has

* See vol. 7, p. 327, of this Collection.

sent to know, whether you have any thing to do with him to-day here ?

Att. Gen. (Sir Robert Sawyer.) Not at all, that I know of.

L. C. J. Mr. Oates, do you intend to make use of my lord chief justice Jones, or any of the judges of the Common-Pleas as witnesses ?

Oates. Yesterday, my lord, I did call for them, to have made use of them as witnesses.

L. C. J. But have you any thing to say to them to-day ?

Oates. I cannot tell as yet.

L. C. J. Then my Lord Chief Justice Jones must be told, that he does not know, whether he shall, or not. Go on, sir Samuel Astry.

[Then Proclamation was made for information, and Evidence was made in usual manner.]

Mr. Phipps. May it please your lordship, and you, gentlemen of the jury, this is an indictment against Titus Oates, clerk, for perjury : and this indictment sets forth, that William Ireland, Thomas Pickering, and John Grove, in the 30th year of the late king, were indicted of high-treason, and tried at the Old-Bailey ; and at that trial, the defendant, Titus Oates, was produced a witness for the king ; and being sworn to tell the truth, the whole truth, and nothing but the truth, did falsely, voluntarily, and corruptly, depose, and swear, and give in evidence to the jury that did try that cause, that the said William Ireland was in town (within the cities of London and Westminster, or the places adjacent, meaning) upon the first or second day of September, in the second year 1678. Whereas, in truth, the said William Ireland was not in town, nor within the cities of London and Westminster, or the places adjacent, upon the first or second day of September, in the year 1678 ; and so the said Titus Oates hath committed wilful and corrupt perjury. And the indictment further sets forth, that upon the 13th day of June, in the 31st year of the late king, Thomas White otherwise Whitebread, John Fenwick, William Harcourt otherwise Harrison, John Gaven, and Anthony Turner, were indicted and tried at the Old-Bailey for treason, and at that trial the said Titus Oates was a witness produced on the part of the king : and being sworn to testify the truth, the whole truth, and nothing but the truth, by his own act and consent, of his own most wicked mind, falsely, voluntarily and corruptly did depose and swear, and give in evidence to the jury, that William Ireland (one William Ireland, before that time convicted and executed for high-treason, meaning) did take his leave of him the said Titus Oates, at his the said William Ireland's chamber, then being in Russel-street, between the 8th and 12th day of August, in the year of our Lord 1678. Whereas, in truth, the said William Ireland did not take his leave of him the said Titus Oates, or of any other persons whatsoever, at his the said William Ireland's chamber, then being in Russel-street aforesaid, between the said 8th and 12th day of August, in

the year of our Lord 1678. And so the said Titus Oates did then and there commit wilful and corrupt perjury. And this is laid to be to the great displeasure of Almighty God, in contempt of the laws of this land, to the evil and pernicious example of all others in the like case offending, and against the king's peace, crown and dignity. To this he has pleaded, Not Guilty. If we prove it, we do not question, but you will find him Guilty.

Att. Gen. May it please your lordship, and you gentlemen of the jury ; Mr. Oates stands indicted for having perjured himself: the instances, gentlemen, that we charge him with, are these : first, what he swore at the trial of Ireland ; and we say, that at that trial he did swear Ireland was in town the 1st or 2nd of September, 1678. The second instance is, what he swore at the trial of the Five Jesuits : and there we say, he did swear, that Ireland was in town between the 8th and 12th of August, and that he took his leave of him here in town at his chamber in Russel-street ; and we do charge him by this indictment, that he has forsworn himself in both instances : and that Ireland, gentlemen, was neither in town between the 8th and 12th of August, nor the 1st or 2nd of September. And we shall make it out very evidently : for, gentlemen, as to the proof in this case, our case stands thus : we say, that the 3rd of August, 1678, Ireland went into Hertfordshire, to a house of my lord Aston's, and from thence went into Staffordshire. I will not stand to open the particulars where he was every day ; but we shall give you an account, in a method very easy to be remembered and observed, where he was till the 14th of September. But one remarkable instance, gentlemen, I desire to take particular notice of ; and that is, the time of Pancras fair, which is upon the 2nd of September always, a known day, and a known place in that country. Now we have among the rest, many witnesses to prove, that Mr. Ireland was there that day, and not in town. And when we have proved this, as we shall by a whole cloud of witnesses, I believe, you gentlemen of this jury, will no more doubt that Mr. Oates is forsworn in these particulars, than the jury yesterday did in that particular ; nor than, I believe, the whole kingdom does by this time.

Sol. Gen. My lord, we shall go to our evidence ; and first, we produce the Records of the two Trials of Ireland, and the five Jesuits. Swear Mr. Swift. [Which was done.] *Præ.* Sir, put in the Records. Are those true copies ?

Mr. Swift. My lord, I examined these Records with the originals, and they are true copies.

Att. Gen. Mr. Oates, will you have them read ? Or, to save the time of the Court, will you agree them ?

Oates. My lord, I consent to save the time of the court ; if they shall be made use of for evidence for me.

L. C. J. No doubt they are evidence for you as well as against you, when they are produced here.

Sol. Gen. If Mr. Oates does admit the Records, then shall we go on, and prove what he did swear at those Trials; and for the first part of the time, which is between the 8th and 12th of August, we desire that Mr. Thomas Harriot, and Mr. Rainsford Waterhouse may be sworn. [Which was done.]

Att. Gen. Mr. Harriot, pray, do you remember at the trial of the Five Jesuits, was Mr. Oates produced and sworn as a witness?

Harriot. Yes, he was, my lord.

Att. Gen. Do you remember what testimony he gave about Ireland's being in town, and when it was, he said, he was in town?

Harriot. My lord, he did positively swear, that Mr. Ireland, the late Jesuit, did take his leave of him, the said Oates and others, at the said Ireland's chamber in Russel-street, betwixt the 8th and 12th of August, 1678.

Sol. Gen. Were you of the jury that tried the Five Jesuits, Mr. Harriot?

Harriot. Yes, I was foreman of that jury.

Sol. Gen. What say you, Mr. Waterhouse? Were you present at that trial?

Waterhouse. Yes, I was of the jury too.

Sol. Gen. What did Oates swear at that trial?

Waterhouse. He said, that Mr. Ireland took his leave of him the 12th of August. My lord chief justice Scroggs then asked him, Are you sure it was the 12th? And then he said, he would not be positive it was the 12th, but between the 8th and 12th it was, I am positive upon my oath.

Att. Gen. It is so in the print too; but we will now go on.

L. C. J. But will the defendant ask these witnesses any questions?

Oates. My lord, if your lordship please, I will ask Mr. Harriot a question.

L. C. J. Ay, do ask him what you will.

Oates. Mr. Harriot, did I swear, that he took his leave of me, or I took my leave of him?

Harriot. You swore, that Ireland took his leave of you and others, between the 8th and 12th of August, 1678; between those two days, and in that year.

Just. Wilkins. It is a nice question that of your's, Mr. Oates, upon my word.

Oates. My lord, I know what reason I have to ask that question; I am sure in perjury, the court ought to keep up the witnesses strictly to what is laid in the indictment.

L. C. J. Well, you have his answer according to the indictment.

Oates. Pray, my lord, be pleased to ask Mr. Harriot this question, Whether he took notes of the trial?

Harriot. Yes, I did so, Sir.

Oates. My lord, I desire to know of Mr. Harriot, Whether he has those notes by him?

Harriot. No, Sir, I have them not here; but I have had them by me this four or five years, or more. It was my manner in all the trials, wherein I was concerned as a jury-man, to read the trials strictly over, when they were printed, especially where I happened to have

any notes that I took at the trial, and to compare the printed trial with my notes; and where I found any thing doubtful, I used to put a query upon it. And this and many other things, I found to be in the printed trial strictly according to my notes.

Oates. My lord, I desire to know, what trial he was foreman at?

Harriot. That of the Five Jesuits, in June; the 13th of June, 1679.

L. C. J. Have you any thing to ask Mr. Waterhouse?

Oates. Yes, my lord. Pray, Sir, let me ask you a question.

Waterhouse. - Ay, if you please, Sir.

Oates. Did you take notes of that trial you speak of, Sir?—*Waterhouse.* No, I did not.

Oates. How come you there to remember this, that I was so positive as to the time betwixt the 8th and 12th of August?

Waterhouse. Because I was one of the jury; and because my Lord Chief Justice made a stop, when you sail, 'twas the 13th of August, and had you consider: and you consider'd, and consider'd it; and did affirm positively, that it was between the 8th and 12th of August.

L. C. J. He gives you a plain reason for his remembrance.

Oates. My lord, I have done with him.

Sol. Gen. Then we desire Mr. Foster may be sworn. [Which was done.] Mr. Foster, pray will you tell what you remember Mr. Oates swore at Mr. Ireland's trial, about Ireland's being in town?

Foster. I was one of the jury at the trial of Mr. Ireland, Mr. Pickering, and Mr. Grove; and I did see Mr. Oates sworn, as a witness for the king, at that trial; and so was Mr. Bedloe: and Bedloe there gave evidence, that there was a meeting at Harcourt's chamber; and Ireland, Grove, and Pickering were there: and that this was the latter end of August. Mr. Ireland did make his defence, as much as he could, to prove, that he was not in town from the beginning of August to the middle of September; and brought divers witnesses. But upon his denying to be here the latter end of August, Mr. Oates did come and swear: 'I am certain,' says he, 'that the 1st and 2nd of September he was in town; for then I had of him 20s.'

Oates. Was I positive, that he was here in town the 1st or 2nd of September?

Foster. You were positive, Sir, to the 1st or 2nd; I have it in my notes in writing.

L. C. J. He tells you, it is in his notes; and therefore he's sure you said so.

Att. Gen. In the printed copy, if it be right, there is mention made of the word 'positive.'

L. C. J. I think, that is in August, between the 8th or 12th, he was positive.

Oates. Did I say these words, 'I was positive'?

Waterhouse. I say, you affirmed that he was in town the 1st or 2nd of September.

L. C. J. It is not necessary, that you should use the word 'positive;' the question is, Whether it was positively affirmed?

Just. *Wishin*. Was not that true that you said? Did not you affirm a positive truth?

Oates. My lord, I'll tell you the reason why I ask the question, because I have forgot myself, whether I used the word or no; and therefore I ask for my own information now.

L. C. J. Well, ask for what reason you will, you have received an answer to your question; and upon my word he gives a notable evidence: Says he, Bedloe had sworn a treasonable practice by Ireland, in the latter end of August. Then Ireland comes, and make his defence: Says he, 'That cannot be; for I was out of town at that time; I was not in London all August, nor the beginning of September.' Then come you in to support the testimony of Bedloe, and swear, that he was in town the 1st or 2nd of September; for then he gave you 20s. And so you come to rivet the matter that was sworn before by Bedloe.

Oates. My lord, what I swore was truth.

L. C. J. That is now to be tried.

Att. Gen. We have another of the jury here, Mr. John Byfield: Pray, swear him. [Which was done.]

Sol. Gen. Well, Sir, what did you hear Oates swear at that trial?

Byfield. I heard the same that they have testified before.

L. C. J. But you must tell us what that was.

Sol. Gen. Were you a jury-man at that trial?

Byfield. Yes, I had a summons to the Old Bailey—

L. C. J. But what did Oates swear? That's the question.

Byfield. Mr. Oates did positively assert, that Ireland was here in town the 1st or 2nd of September; and to confirm it, he said, he received of him 20s.

Att. Gen. Now, my lord, we shall go to our evidence to prove, that all this is absolutely false: for Ireland went out of town into Staffordshire, and did not return till after the 9th of September. And for this, we call Ann Ireland [Who was sworn.]

Sol. Gen. Mrs. Ireland, pray where did you take your leave of your brother, Mr. Ireland, who was executed in summer 1678, and when?

Mrs. A. Ireland. I took my leave of him the beginning of August.

Sol. Gen. What day in August, do you remember?

A. Ireland. The 3rd of August.

Sol. Gen. Where was it?

A. Ireland. In my own lodging?

L. C. J. Was your lodging?

A. Ireland. In Russel-street, Covent-garden.

L. C. J. Now tell us again the time when it was?

A. Ireland. It was on Saturday morning, as I remember, the 3rd of August, the Saturday after St. Ignatius's day.

L. C. J. How come you to remember so particularly, that it was then?

A. Ireland. Because upon St. Ignatius's day, we were invited to Mr. Gifford's, at Hammersmith; my brother, my mother, and I, were invited to stay all night: but my brother refused to stay, because—

L. C. J. Which brother? What was his name?—*A. Ireland*. William Ireland.

L. C. J. Did they stay there?

A. Ireland. No, my lord, my brother came home on foot, but we staid all night.

Att. Gen. Here is an almanack of that year: and the 3d of August was on a Saturday.

A. Ireland. He said he could not stay, because he was to go into the country upon Saturday. I asked him, 'Why he would set out on Saturday?' And says he, 'I'll go to Standen, there I shall meet with my lord Aston, and his family; and have an opportunity to go with him into Staffordshire.'

L. C. J. She says, he went out of town on Saturday after St. Ignatius's day; which was Saturday the 3d of August, but there being a discourse between her and her brother, why he should make choice of a Saturday; which she thought, it seems, was an inconvenient day to take a journey on: and upon that, her brother made answer again, That that night he would only go to Standen, to my lord Aston's house, where he should meet with company to go along with him into Staffordshire.

Att. Gen. What day of the week was St. Ignatius's day?

A. Ireland. St. Ignatius's day was on Wednesday.

L. C. J. What day of the month is St. Ignatius's day?

A. Ireland. It is either the last day of July, or the 1st of August.

L. C. J. Look on your almanack, if you have any one of that year, Mr. Attorney.

Att. Gen. We have no such Saint in our Almanack.

A. Ireland. It was, as near as I can remember, the 3d of August, that he went out of town.

Sol. Gen. The 3d of August, at that time, was on a Saturday.

Lord Petre. St. Ignatius's day is always the last day of July, my lord.

Att. Gen. In this almanack, another Saint has justled him out; and that is bishop German.

L. C. J. And in my almanack, a third has justled them both out: but my lord Petre says, it is always the last of July; and that was on a Wednesday that year.

A. Ireland. I remember it was on a Wednesday.

L. C. J. And you are sure he went out of town the Saturday after?

A. Ireland. Yes, I am sure he went out of town then; for I asked him, why he would go on a Saturday? And he told me he would go but to Standen that night.

Sol. Gen. And that does hold, according to the computation, to be the 3d of August.

Oates. My lord, she is not positive in this, that he went out of town the 3d of August.

Att. Gen. Yes, but she is; for she says, that she was the Wednesday before (which was St. Ignatius's day) with him a little way out of town.

L. C. J. And that it was Saturday after he went of town; and she gives the reason, that she entered into a discourse with him, why he would go on Saturday; And he made that answer which you hear.

Just. Withins. Mr. Oates knows what day St. Ignatius's day is upon, I presume.

Oates. It is the last day of July, I think.

Sol. Gen. In our Protestant Almanacks, it seems, we give another bishop place.

Att. Gen. Mrs. Ireland; when did you see him again?

A. Ireland. Just a fortnight before Michaelmas, and not before.

L. C. J. You were his near relation, I suppose?

A. Ireland. Yes, my lord, I was his sister.

L. C. J. Pray, when he came to town again, where did he lodge?

A. Ireland. He used to lodge at the same place where we did always; and in the mean time, while he was absent, my mother lent one Mrs. Eagleston his lodging.

L. C. J. Is that person, you lent his chamber to in his absence, here?

A. Ireland. No, my lord.

L. C. J. When did she enter upon his lodging?

A. Ireland. Truly, my lord, I cannot tell; her maid fell sick, and so she came down a pair of stairs lower into his lodging. It was in a short time after he went out of town, my lord, as I remember,

L. C. J. When did he come to town again, do you say?

A. Ireland. He came to town again a fortnight before Michaelmas; it was that day fortnight before Michaelmas, that Michaelmas-day fell on—

L. C. J. Have you any questions to ask her, Mr. Oates?

Oates. My lord, I desire to know, why she did not give this evidence before? Or whether ever she did give this evidence at any of the trials?

A. Ireland. Yes, I was at my brother's trial; and there I gave the same evidence.

Oates. Were you there at the trial of the five Jesuits? And did you give the same evidence then?

A. Ireland. No, I was not called.

L. C. J. But were you there?

A. Ireland. I was in the court at the same time, but was not examined.

Oates. What year is it you speak of, that he went out of town the 3d of August?

A. Ireland. The year 1678.

Oates. I desire, my lord, to ask this gentleman, what religion she is of?

A. Ireland. I am a Roman Catholic, my lord.

Oates. I desire to know, whether her name be Ireland or Ironmonger?

A. Ireland. My right name is Ironmonger; but because of his profession, he went by the name of Ireland; and for his sake we go by that name too.

Oates. By what name did you give evidence at Ireland's trial?

A. Ireland. By that name of Ireland.

L. C. J. Why, Mr. Oates, that is a good name enough to be called by; you may remember, you were called Titus Ambrosius, and Sampson Lucy, at St. Omers.

Att. Gen. Swear Mrs. Eleanor Ireland.

[Which was done.]

Att. Gen. When did your son go out of town?

Mrs. El. Ireland. The 3d of August.

Sol. Gen. Are you sure it was the 3d of August?—*El. Ireland.* Yes, I am sure it was.

Sol. Gen. What year was it?

El. Ireland. My memory is not good enough for that; I cannot tell what year, my daughter can.

Sol. Gen. Was it the same year he was tried afterwards?

El. Ireland. Yes, it was the same summer; at Michaelmas after he was taken up.

Sol. Gen. What time did he return again out of the country?

El. Ireland. The 14th of September after.

Oates. My lord, I would ask her, whether or no she gave this evidence at her son's trial?

El. Ireland. Yes, I was a witness there; but they would not permit me to speak half so much; they would hardly let me speak at all.

Oates. I desire to know, whether she was an evidence at the five Jesuits trials?

El. Ireland. No, I was not there then.

Att. Gen. Pray swear Mrs. Duddle, and Mrs. Quino. [Which was done.]

Sol. Gen. Come, Mrs. Duddle, do you remember when Mr. Ireland went out of town in the year 1678?

Mrs. Duddle. To the best of my remembrance it was the 3d of August.

Sol. Gen. Why do you think it was the 3d of August?

Duddle. He went for a recreation out of town three days before, which was upon an holiday, St. Ignatius's day; and he went out of town one night then, and he came and staid but two nights after; and went out of town upon the Saturday.

L. C. J. Did he stay out of town one night?

Duddle. Yes, he staid out of town all night.

L. C. J. Are you sure he staid there all night?

Duddle. I am sure he staid but one night.

L. C. J. But what say you to that, Mr. Attorney? this witness contradicts the other?

Just. Withins. Ay, plainly.

Duddle. Mrs. Ireland, and Mrs. Anne Ireland, and he went out upon a recreation out of town, it being holiday; and I remember well, that was of a Wednesday; and that Saturday he went away, and never came again till a fortnight before Michaelmas.

L. C. J. But mind my question, woman.

Duddle. Yes, my lord.

L. C. J. Did he come home that night he went on the recreation?

Duddle. I do not know.

L. C. J. But just now, you swore he staid out all night.—*Duddle.* No, my lord.

L. C. J. Yes, but you did though; prithee mind what thou art about.

Duddle. I do not say he, but I am sure his sister and she company staid out that night. I remember very well, he went the third day after, which was Saturday. And Mr. Jennison came to ask him for three weeks after; and there was a person of quality with him in the coach, I think it was sir Miles Wharton. And he asking for him, they gave him an account, that they had not heard from him since he went; which was then three weeks after he was gone. And I remember well, he did not come to town again till a fortnight before Michaelmas.

L. C. J. How can you tell that?

Duddle. My lord, I can tell it very well: for I was almost every night in the room where he used to lie; and there lay a gentleman there that I knew.

L. C. J. What was her name?

Duddle. Mrs. Eagleston.

L. C. J. How came she to lie there?

Duddle. Her maid fell sick, and she changed her own chamber, and lay there all the time he was out of town.

Oates. My lord, is this good evidence?

L. C. J. Ay, why not?

Oates. My lord, I think she contradicts the other witness: for she says he lay out two nights.

L. C. J. No, there you are mistaken too. But I tell you what I did observe before. Mrs. Anne Ireland swore, that they did stay all night; but Mr. Ireland refused to stay there, but would go home, because he was to go his journey on Saturday. Then this woman comes, and she said at first, that he went out of town on the Wednesday, and staid out all night, and lay at home but two nights, and then went away. But now, when I put her in mind to take care what she said, she swears, she is sure the sister lay out, but she is not sure of Ireland's lying out: but she is positive he went away on Saturday the 3d of August, and returned not till a fortnight before Michaelmas.

Oates. My lord, I humbly conceive, she having once sworn false—

L. C. J. Ay, but she immediately recollected herself.

Oates. By what token does she remember it to be the 3d of August?

L. C. J. She said before, it was the Saturday after St. Ignatius's day, which was on a Wednesday, the last day of July; and he went then out of town. She called it by the name of Recreation.

Oates. Was it the Saturday after St. Ignatius's day?

Duddle. Yes, it was: and I had not remembered it, but that it was upon that holiday.

Oates. This is a Roman Catholic, I suppose, my lord.

L. C. J. I cannot tell. What religion are you of?

Duddle. I am a Roman Catholic, my lord. Mr. Jenison knows what I say to be true.

Oates. Were you a witness in any of the trials at the Old-Bailey?

Duddle. I was in the court, but was not called.

Sol. Gen. What say you, Mrs. Quino? when did Mr. Ireland go out of town?

Mrs. Quino. I must say the same; it was the 3d day of August, on a Saturday.

L. C. J. How do you know that it was on a Saturday the 3d of August?

Quino. By the same reason that she speaks, I marked that other day he went out of town; and he came again, and his mother staid there that night: and he went on Saturday morning out of town. I know it very well; for my husband was his taylor, and he had somewhat to alter in his clothes; and I brought it immediately after it was done.

L. C. J. Are you sure he went out of town that day?

Quino. He went out of the house, and as I take it, went out of town.

L. C. J. Did he say he was to go out of town?

Quino. He had his boots on; and took horse at the Bull-Inn in Drury-Lane.

L. C. J. How do you know it?

Quino. Because his servant that was there has testified it.

Att. Gen. Now swear my lord Aston. [Which was done.] We will bring Ireland now upon the 3rd of August at night, to my lord Aston's house at Standen.

Sol. Gen. Pray will your lordship give my lord and the jury an account, when Mr. Ireland came to your house, and how far he travelled with you afterward?

Lord Aston. My lord, being in town, I was spoke to, and desired that Mr. Ireland might have the opportunity of going in my company down into Staffordshire; which I consented to. I went out of town, as I remember, the latter end of July 1678, and this same Mr. Ireland came to me at my house in Hertfordshire, at Standen, upon the 3rd of August, at night.

L. C. J. What day of the week was that, my lord?

Lord Aston. As I remember, it was Saturday, and in the evening.

L. C. J. How long did he stay with your lordship?

Lord Aston. My lord, I staid till Monday at Standen; and upon Monday he went into my company to St. Albans, which was the 5th of August.

Att. Gen. Whither then did you go, my lord?

Lord Aston. There I met with my brother and sister Southcoat.

L. C. J. Sir John Southcoat you mean, my lord.

Lord Aston. Yes, my lord. And thence, in four days we went to my house at Tixhall.

L. C. J. Did Mr. Ireland travel with you all the way?

Lord Aston. I cannot charge my memory, my lord, that he did, so as particularly to swear it: but there he came into my company sometimes at Tixhall; but I cannot tell the particular days: nor could I speak positively to those things that I have spoke to now, but that I find in my Note-book, that at that time he did come to my house at Standen, and did go with me to St. Albans.

Att. Gen. Pray, my lord, did he go that journey to Tixhall along with you?

Lord Aston. I cannot say positively that, Mr. Attorney; but I have a general notion that he did. Nor could I testify this so positively, I say, but by notes that I have of things at that time: where I have only writ down these things concerning Mr. Ireland, and that he came the 3rd of August to my house at Standen: that on Monday we went together to St. Albans; and there met us sir John Southcoat, and my sister his wife; and thence I went to Tixhall; and there I arrived the 8th of August, which was Thursday.

L. C. J. My lord, I ask you this question; you say, you have a general apprehension that he did go with you to Tixhall: pray, did he come with you to Standen for that purpose, to go with you to Tixhall?

Lord Aston. I had no business with him at all; but he desired the opportunity to go down in my company into Staffordshire.

L. C. J. Pray, my lord, do you remember you saw him within four or five days after at Tixhall?

Lord Aston. To name particular days, I cannot; but that I saw him several days at Tixhall, I am sure.

Oates. My lord, you say that sir John Southcoat went with you to Tixhall?

Lord Aston. Yes, he did so.

Oates. My lord, I would ask this noblerman, whether he was at the trial of the Five Jesuits? or the trial of Ireland?

Lord Aston. No, my lord, I was not.

Oates. Then I would ask my lord, if he saw Mr. Ireland executed?

Lord Aston. No, I did not.

Oates. Then I would ask him this question; whether the Ireland that was executed be the same Ireland he speaks of?

Lord Aston. Amongst those that knew him well, I have been told it was the same.

Oates. That is but hear-say, my lord; he does not speak of his own knowledge.

L. C. J. For that matter, I suppose you will produce some other Ireland, Mr. Oates, if it was not the same.

Att. Gen. Was it this Mrs. Ireland's brother that was here a witness now?

Lord Aston. He was so reputed, and so looked upon.

L. C. J. That is all one. If any body should ask me, if you were the same Mr. Oates

that was at St. Omers; I should say, I heard so; and it would be very good evidence, unless some one else were produced.

Oates. My lord, I submit; I will be directed by the court in any thing that is fair and not injurious to my defence.

L. C. J. We will not direct you in any thing that is foul; but pray keep to those questions that are pertinent.

Oates. Are you sure Ireland went the whole journey with you, my lord?

Lord Aston. I did answer that; I have but a general notion of it, he came to me for that purpose.

Oates. Then my lord is not positive he went with him into Staffordshire.

L. C. J. No, he is not; but I would ask you this question, my lord Aston, do you believe he went with you to Tixhall?

Lord Aston. I make no doubt of it, I would pawn all I have in the world upon it; only I cannot swear it, because I have it not in my notes, as I have those two other days.

Just. Withins. Do you like him the worse, because he is cautious, Mr. Oates?

Oates. No, Sir, I do not. But pray, my lord, ask him, because it is a question here about a point of time; whether he remembers, that within eight or ten days he saw Ireland at Tixhall?

Lord Aston. I cannot say any thing as to that.

Att. Gen. Swears sir Edw. Southcoat. [Which was done.]

L. C. J. I thought you had called him sir John Southcoat.

Att. Gen. Sir John is sick, and cannot be here.

Oates. I suppose my lord Aston is a Roman Catholic?

L. C. J. Ay, that all the world knows very well: but I tell you what, Mr. Oates, I observe he is not so easy in giving his oath; nay, he is wonderful cautious in swearing: I speak it for his commendation, not as his fault, he is not very forward at swearing.

Just. Withins. Well, what do you ask this gentleman, Mr. Attorney?

Att. Gen. We desire sir Edward Southcoat would give an account, whether he met Mr. Ireland at my lord Aston's? And when?

Sir Edw. Southcoat. I was with my lord Aston in his company.

L. C. J. When was that, Sir?

Sir E. Southcoat. The 4th of August I saw Mr. Ireland at my lord Aston's.

L. C. J. Was it the same Ireland that was afterwards tried and executed?

Sir E. Southcoat. It was the same Ireland that was commonly reported; I did not see him executed.

Att. Gen. Was it the same that was reputed to be this old gentlewoman's son?

Sir E. Southcoat. Yes, it was.

L. C. J. Pray, Sir, go on with your evidence.

Sir E. Southcoat. Upon Monday we began

our journey to Tixhall, and went that night to St. Albans, where we met my father and mother, and thence we continued on our journey the next day.

L. C. J. Was he with you there that day you went to St. Albans?

Sir E. Southcoat. He was with us, I remember very particularly. It was hot weather, and my lord Aston invited him into the coach; for before he was riding by the coach-side, and there I remember a particular discourse that he and my lord Aston had; from thence we went on to Northampton, and came there Tuesday night.

L. C. J. Was Ireland with you there?

Sir E. Southcoat. Ireland was with us there.

Oates. My lord, I did not well observe what this gentleman said.

L. C. J. Pray mind your business yourself, he speaks plain enough; go on, Sir.

Sir E. Southcoat. Mr. Ireland was with us, I say, my lord, all the journey; and I do remember it particularly by a pretty horse Mr. Ireland rode upon; and I had a dispute with my cousin, who should buy him: I took particular notice every day of him, as he rode by the coach, and conversed with him every night in the inn. We went, I say, from St. Albans to Northampton on the Tuesday; from Northampton we went to Coventry on the Wednesday, and from thence to my lord Aston's, at Tixhall, on the Thursday.

L. C. J. Come, let us go by degrees. Was Mr. Ireland with you, when you went from my lord Aston's at Standon to St. Albans?

Sir E. Southcoat. Yes, he was.

L. C. J. You say it was a hot day when you set out; and my lord Aston did invite him into the coach.

Sir E. Southcoat. Yes, my lord, he came into the coach on Monday, which was the first day we set out, and came that night to St. Albans.

L. C. J. You lay there that night?

Sir E. Southcoat. Yes, my lord.

L. C. J. Where did you lie there?

Sir E. Southcoat. At the great inn, at the Bull.

L. C. J. Ay, that is the great inn.

Sir E. Southcoat. The next night, my lord, we came to Northampton.

L. C. J. Where did you lie there?

Sir E. Southcoat. We lay at the sign of the George; it was sir William Farmer's house, but made use of for an inn, because the town was burnt down.

L. C. J. Was Mr. Ireland with you all that day?

Sir E. Southcoat. He rode with us all the day.

L. C. J. And you took notice of it, because of his horse you say?

Sir E. Southcoat. Yes, he had a very pretty horse, my lord; and my brother bought the horse of him after we came back again.

L. C. J. Whither went ye the next day?

Sir E. Southcoat. The next night we lay at the Bull in Coventry, and from thence on

Thursday, we arrived at my lord Aston's at Tixhall.

Att. Gen. My lord, the jury desires to know what he says? For they have not heard it.

L. C. J. He says, Mr. Ireland went with my lord Aston in the coach, it being a hot day, on Monday the 5th of August from Standon, my lord Aston's house in Hertfordshire, to St. Albans, and lay there at the Bull inn that night. That he went the next day, which was Tuesday the 6th of August, with them to Northampton; that he rode upon a pretty horse, which makes him remember it particularly; and that there was a dispute on the road, who should buy him; and when they came back, his brother bought him. He says they lay on Tuesday night at Northampton, at the George which was a gentleman's house, which was turned into an inn, because of the fire: That he went with them the next day to Coventry, which was Wednesday the 7th of August, and lay with them that night at the Bull in Coventry; and the next day, which was Thursday the 8th, they came, and Ireland with them, to my lord Aston's house at Tixhall, in Staffordshire.

Att. Gen. Pray sir Edward Southcoat, how long did he stay with you at Tixhall, at my lord Aston's?

Sir E. Southcoat. He staid with us there till the Tuesday after; and then we began our journey from my lord Aston's house, in Tixhall, into Wales, to St. Winifred's Well.

L. C. J. That is Holy-well, you mean.

Sir E. Southcoat. Yes, my lord.

L. C. J. You say he staid all Friday, Saturday, Sunday, Monday, and till Tuesday, after you came to my lord Aston's at Tixhall?

Sir E. Southcoat. Yes, my lord, he did so.

Att. Gen. So then, my lord, we are gotten to Tuesday the 13th of August, which is past the time of the perjury that is laid second in the Indictment; but in point of time, is the first that happened, for he swore that Ireland took his leave of him, and others here in town, between the 8th and 12th of August?

Sol. Gen. Where did you go on Tuesday, Sir?—*Sir E. Southcoat.* Towards Wales.

Mr. Jones. Was he at Tixhall the 12th of August?

L. C. J. He says, he was till Tuesday the 19th. Pray let us not have the same questions repeated over and over again.

Sol. Gen. Where did you go on Tuesday night?

Sir E. Southcoat. We went to Nantwich, and lay at the Holy-Lamb there.

L. C. J. Where were you the next night?

Sir E. Southcoat. The next day we reached to St. Winifred's Well.

L. C. J. Where did you lie there?

Sir E. Southcoat. At the Star, which is the great inn there.

L. C. J. It is so.

Att. Gen. Was Mr. Ireland there with you?

Sir E. Southcoat. Yes, he was.

Att. Gen. Whither did ye go then?

Sir E. Southcoat. We staid not but one day at Holy-well; for we arrived there pretty late at night, and all the morning we spent there, and went away in the afternoon, and came that evening to Chester, and lay there only one night, and came the next day to Tixhall again.

Att. Gen. Which was Friday the 16th of August.

Sol. Gen. Pray, my lord, be pleased to ask him, Whether this gentleman, Mr. Ireland, was with them all the while, in this journey to Holy-Well?

Sir E. Southcoat. Every day particularly; I remember it very perfectly.

Att. Gen. After he came to Tixhall again, how long did he tarry there?

Sir E. Southcoat. That I cannot so well say. I do remember truly, but he was afterwards at my lord Aston's at Tixhall, I remember some scambling days; but I cannot fix upon any two.

L. C. J. Which are they?

Sir E. Southcoat. I cannot tell what day of the month it was, or what day of the week; but one day that I remember him there, was Mr. Chetwind's race with sir Henry Gough; and one other day.

L. C. J. When was that horse-race?

Sir E. Southcoat. My lord, I cannot tell what day of the month it was.

Att. Gen. When was the other time you speak of?

Sir E. Southcoat. I remember him there one Thursday upon the Bowling Green at Tixhall, where there was a particular company.

Sol. Gen. My lord, we desire to know, when his brother did buy the horse of Mr. Ireland?

Sir E. Southcoat. When we came back; for he came home with us from my lord Aston's, and we began our journey, the 9th or 10th of September, from Tixhall to Kingston; and when we arrived at my father's house, my brother bought the horse of him.

L. C. J. Did you come home back again with Mr. Ireland, do you say?

Sir E. Southcoat. Yes, my lord, we did.

L. C. J. When did you set out from Tixhall?

Sir E. Southcoat. The 9th of September, my lord, I think it was; I am sure it was upon a Monday, the 9th or 10th.

L. C. J. When did you come home?

Sir E. Southcoat. We were four days on our journey.

L. C. J. And did you come straight to London?

Sir E. Southcoat. No, we went to my father's house in Surrey.

L. C. J. Which way did you come?

Sir E. Southcoat. The first night we came to the Bull in Coventry; and from thence, the next night, we went to the Altar-Stone at Banbury, and from Banbury, we came the third day to Agmondesham (I think, it is called) a little town in Buckinghamshire; and from thence the fourth day, to my father's house, by Kingston in Surrey.

Att. Gen. And then Ireland sold his brother his horse.

L. C. J. How long was he at your father's house in Surrey, sir Edward?

Sir E. Southcoat. My lord, we came on the Thursday; and as I take it, he went on the Saturday to London. My brother, after he had bought his horse, lent him the horse to town; and sent a man with him to bring it back again.

Att. Gen. That Saturday, my lord, makes it come just to the 14th of September: and is the very day fortnight before Michaelmas-day.

Oates. My lord, I desire to ask this gentleman, whether he saw Ireland all August, and till the 14th of September in Staffordshire, and elsewhere? And how long in Staffordshire?

Sir E. Southcoat. I cannot say as to any particular days of the months, after our coming from Holy-Well, till our coming from Tixhall to London.

L. C. J. Marry, if he did, he would contradict what he had said before: for, from the time of coming from Holy-Well, to the time of coming back to London, he could tell but of two days, and those uncertain: for he remembers not by the times, but by other particular circumstances.

Oates. Pray, my lord, be pleased to ask him this question, when was the first day he saw him in September?

Sir E. Southcoat. Truly, my lord, I remember not any day before we began our journey home.

Att. Gen. But, my lord, this is his testimony: he was in his company till the 16th of August. It is true, there were other times that he saw him at Tixhall; but he cannot particularly speak unto them: but, by and by, we shall go on to every day, and prove particularly where he was.

Oates. My lord, I desire to know, was sir Edw. Southcoat at the trial of Ireland a witness or no?

Sir E. Southcoat. No, I was not, my lord.

Oates. Were you at Whitebread's Trial, Sir?

Sir E. Southcoat. Yes, I was, and gave the same evidence I give now.

Sol. Gen. Then swear Mr. John Southcoat.

[Which was done.]

Att. Gen. This is sir Edward Southcoat's brother, my lord.

L. C. J. What, he that bought the horse?

Mr. J. Southcoat. Yes, my lord, I bought the horse of Mr. Ireland.

L. C. J. Well, what do you ask him?

Att. Gen. Pray, Sir, when did you meet Mr. Ireland in August 1678? and where.

Mr. J. Southcoat. My lord, I met with Mr. Ireland, upon Monday the 5th of August, at the Bull-inn in St. Albans, with my lord Aston; I came thither that day with my father and mother. And the next day we went to Northampton; and there we inn'd at the sign of the George, sir William Farmer's house, which is an house in the road, used for an inn since the town was burnt: and I conversed with him every day, as

our journey. And from thence, the next day we went to Coventry, to the Bull-Inn there; and from thence to my lord Aston's (on Thursday night) at Tixhall: there we staid all Friday, Saturday, Sunday, and Monday. Mr. Ireland was there; I was with him all the while. And then upon Tuesday we set out for Holy-Well in Flintshire, and went that night to Nantwich, to the Lamb there. And the next day we went through Chester to Holy-Well: we staid that night at Holy-Well; and the next day came back again towards noon to Chester; and there lay that night: and then the next night, which was Friday, we came back again to Tixhall.

L. C. J. Was Mr. Ireland with you both those journeys, all the while?

J. Southcoat. Yes, my lord, he was; I did see him, and rode with him every day.

L. C. J. Pray, Sir, how long were you at Tixhall, after you came from Holy-Well?

J. Southcoat. We staid there till we came away for good and all.

L. C. J. Was Mr. Ireland with you all that time?—*J. Southcoat.* No, he was not.

Att. Gen. Do you remember, that Mr. Ireland came to Tixhall the 9th of September; and came along home with you when you came?

J. Southcoat. Yes, I do remember it very well.

L. C. J. What day did you come home, Sir?

J. Southcoat. We came home in four days.

Sol. Gen. When did he leave you?

J. Southcoat. We came home upon Thursday and he went to London on Saturday,

L. C. J. Pray, Sir, can you recollect when you did first see him again at Tixhall, after you came from Holy-Well?

J. Southcoat. My lord, I cannot tell particularly any day, till the day we came away.

L. C. J. Do you remember the horse-match between Mr. Chetwind and sir Henry Gough?

J. Southcoat. I was there, my lord; but I do not remember Mr. Ireland was there.

L. C. J. How long did he stay at your father's house in Surry, Sir?

J. Southcoat. Two days, my lord.

Sol. Gen. You lent him your horse you bought of him, I think, Sir?

J. Southcoat. Yes, up to London, I did; and I sent my man with him to bring him back again.

Att. Gen. Has Mr. Oates any questions to ask this gentleman?

Oates. My lord, I desire to ask Mr. Southcoat, whether or no he is sure, that Ireland was in his company from the 5th of August to the sixteenth?

J. Southcoat. Yes, every day, I am sure of it; I remember it very well.

Oates. Pray, my lord, ask him, whether or no he testified this that he now swears at Ireland's trial?

J. Southcoat. My lord, I was not at Ireland's Trial.

Oates. Then I desire to ask him, whether or no he did testify this at the five Jesuits Trial?

J. Southcoat. No; I was not sent for to any of the trials.

L. C. J. I am sorry you were not, Sir: It was pity you were not there. It might have saved some innocent blood.

Att. Gen. Now swear Harrison. [Which was done.]

Sol. Gen. Pray will you give an account when you saw Ireland and where?

Harrison. In the year of our Lord 1678, my master sir John Southcoat, went with my lady, on Monday the 5th of August, to St. Albans; and we came with a coach and four horses; for my master had an old servant, that had a pair of horses, which my master made use of. And there we met my lord Aston, in the company of Mr. Ireland. And the next morning, my lord Aston went with my master and lady towards Tixhall: and I rode by, in Mr. Ireland's company; and came acquainted with him that day. That night we came to Northampton; and there we lodged at a stone-house, that was used for the inn, the town being burnt before. The next night we went to Coventry; and on Thursday we came to Tixhall: there we staid till Tuesday. After we went to Holy-well; and the Tuesday night we lay at Nantwich: and thence we went to Holy-Well, and staid there on Wednesday night: and on Thursday we came to West-Chester; and I parted with him upon the Friday at West-Chester.

Att. Gen. Pray, did you know this Ireland? Was it he that was tried and executed?

Harrison. I was at Mr. Ireland's trial.

L. C. J. Was it the same man that was tried?

Harrison. My lord, I saw him at his trial, the hair of his face was grown, and he was a little disordered; he did not look so well, because he was not so well dressed; but it was the same man, my lord.

Sol. Gen. Before this man goes, we have more questions to ask him: When did you see him again, after you left him in Chester, you say?

Harrison. I saw him several times at Tixhall; I saw him at the Bowling-green upon Thursday; and I saw him when the horse-race was between Mr. Chetwind and sir Henry Gough: I cannot tell what day it was; for I had no reason to keep an account of the particular days at that time.

Att. Gen. Did you come up with your master again the 9th of September?

Harrison. My lord, I did so; I have a note wherein I set down the charges at that time. It is in this bit of paper, which I have kept in my almanack ever since. My lord Aston sent his coach with us to Banbury, where my master's coach was to meet him; but came only to Coventry the first night. The next night, which was Tuesday, we came to the Akarstone at Banbury, and there we lay: From

theace, on Wednesday, we came to Agmonde-sham, where we were ill lodged. The next day we baited at Uxbridge, and came to Kingston, and so to sir John Southcoat's house upon the Thursday night. Upon the Friday Mr. Ireland sold his horse to Mr. John Southcoat, my master's son. Upon the Saturday morning, I came with him from my master's house towards London; he did ride upon the horse he had sold to Mr. Southcoat, and so we came up to town, and took water; and I took a little bag that belonged to Mr. Ireland upon my arm, and we landed at Somerset-house, and I came with him to his lodging in Russell-street; and when he came there, he went up stairs, where two women met him, and welcomed him home: Said they, We are glad you are come, we thought we had lost you, because we had never heard from you all this while. There I took my leave of him, and did not see him again till his trial at the Old-Bailey; and this was Saturday the 14th of September.

L. C. J. Pray let me see your paper you speak of. [Which was delivered in, and the Court looked upon it.]

L. C. J. Did you write this in your journey?
Harrison. Yes, my lord, I did it at that time.

Att. Gen. Are the particular days inserted there, my lord?

L. C. J. No, they are not, Mr. Attorney.

Harrison. I could not write well; it was only but memorandums for myself.

L. C. J. What day of the month was the Saturday he came to town?

Harrison. It was the 14th of September, my lord.

L. C. J. That agrees with all that the women said, that he came on Saturday, a fortnight before Michaelmas, being the same day of the week as Michaelmas-day was: Thus far it is as clear as the sun at noon-day.

Oates. My lord, there was a time when this was not believed.

L. C. J. Ay, Mr. Oates, we know there was a time, when there were Ignoramus juries, and things were believed, and not believed, as the humour went. What can you, Mr. Oates, say to it? I must needs tell you, *prima facie*, it is so strong an evidence, that if you have any sense in the world you must be concerned at it.

Oates. Not at all, my lord; I know who they are, and what is the end of it all.

L. C. J. Upon my faith, I have so much charity for you, as my fellow-creature, as to be concerned for you.

Oates. It is not two straws matter whether you be or no; I know my own innocence.

L. C. J. Thou art the most obstinately hardened wretch that ever I saw.

Oates. Pray, my lord, ask him, Whether he did not appear at Mr. Ireland's trial? And let it be remembered what credit he had then for all this story he tells now. These people come here to serve a turn only, and care not what they swear against me.

L. C. J. You must hold your tongue.

Oates. My lord, I must speak the truth, and I will speak the truth.

L. C. J. I think there is scarce a word of truth comes out of thy mouth.

Oates. You may think what you will, my lord: but these Popish Traitors, I am sure, will swear any thing, and suborn witnesses upon witnesses against me to overthrow the plot.

Just. Withins. If you cannot behave yourself better than you do, we must send you elsewhere; we must not suffer this behaviour: and therefore either be quiet, or get you gone.

L. C. J. Let him keep himself in order, and we'll hear him. If he thinks by boisterous impudency to outface justice, we will not suffer it. Go on, Mr. Attorney.

Att. Gen. Swear Mr. George Hobson.

[Which was done.]

Sol. Gen. Were you in the journey to Tixhall with Mr. Ireland, and my lord Aston in 1678?

Hobson. Yes, I was so, my lord.

Sol. Gen. Pray tell all your knowledge of the matter.

Hobson. From the 3d of August till the 16th at night, I was present with him every day.

L. C. J. How do you know you were?

Hobson. That is to say, the 3d of August he came to my lord's house at Standen, in Hertfordshire, in the evening, and there he remained till Monday the 5th of August; and that day in the morning he went, together with other company, to St. Albans, where we met sir John Southcoat and his lady towards the evening; and we all lodged there, because that was the appointed place to meet at: we lodged the 6th of August at night at Northampton; upon the 7th at Coventry; upon the 8th at Tixhall, my lord's house, where Mr. Ireland remained till Tuesday the 13th in the morning. And upon the 13th in the morning we set forth with my lady Aston, my lord's mother, sir John Southcoat, and Mr. Ireland, and the other company, towards a place called Holy-Well in Flintshire. That night, being Tuesday the 13th of August, we lodged at Nantwich in Cheshire; the Wednesday night we lodged at Holy-Well, where Mr. Ireland was with the rest of the company; and on Thursday night we returned back again to Chester, and lay there. Upon Friday we came back again to my lord's house at Tixhall. After that I did not see Mr. Ireland till Monday the 26th of August, when he came back again to our house: where he went in the mean time I cannot tell.

L. C. J. Whose house is it that this man means by our house?

Hobson. I mean my lord Aston's house, at Tixhall.

L. C. J. You know him very well, did not you?

Hobson. Yes, my lord, I knew him very well.

L. C. J. You say, he came back the 26th of August to Tixhall?

Hobson. Yes, as I remember, he did so.

Att. Gen. How long after the 26th of August was it, that you saw him at Tixhall?

Hobson. When he went away from London.

Att. Gen. When was that?

Hobson. The 9th of September.

L. C. J. Did you come along with him to London?

Hobson. No, my lord; I saw him go: he was not in the coach, but he was in the company.

Oates. My lord, I would fain ask him a question, when he was first acquainted with Mr. Ireland, that he speaks of?

Hobson. I never saw him till he came to my lord Aston's, at Standen.

Oates. Were you at the trial of Mr. Ireland, Sir?

Hobson. No, my lord, I was not; I was then in Staffordshire.

Oates. Then it is material, my lord, for me to ask him this question, it relating to a particular person; whether Ireland that was executed, was the Ireland he says he was with?

L. C. J. I will ask him, if you will. Was that the same man that was afterwards tried and executed?

Hobson. I believe it was, my lord.

Oates. I insist not so much upon the question, but only in reference to the witness, his acquaintance being so short with him.

L. C. J. Truly, I think it is not so very short, for he swears he was with him from the 3d of August till the 16th every day.

Just. Withins. I have no great acquaintance with you; but I know you, Mr. Oates, because I have seen you so often.

L. C. J. Is it the same Ireland that was at the trial? You, Harrison, you saw him then?

Harrison. The very same and no other.

Just. Withins. Certainly nobody doubts that.

L. C. J. It is fit he should have this question answered, if the witness can. Pray, go on, Mr. Attorney.

Att. Gen. Swear George North. [Which was done.] Pray, will you give an account where you met Mr. Ireland, and whether you was with him in his journey?

North. My lord, I saw him the 4th of August, which was Sunday, at Standen, my lord Aston's house, in Hertfordshire: upon the 5th he went with my lord to St. Albans; where my lord met with sir John Southcoat and his lady; and I was with them. And from thence we went on Tuesday to the George at Northampton: and from thence, on Wednesday the 7th, to the Bull at Coventry: and upon the 8th, we came to Tixhall, which was Thursday. And from Thursday the 8th, to Tuesday the 13th, I did see him every day at my lord's house at Tixhall.

L. C. J. Whether went he then?

North. He went with my old lady, and some other company, to go to Holy-Well.

L. C. J. When did you see him again?

North. I did see him several times after that at Tixhall, but I took no particular notice of him again till he went away for London.

L. C. J. When was that?

North. I did see him the 9th of September. He came to go with sir John Southcoat to London: Mr. John Southcoat, and he. I took my leave of him.

Oates. What religion are you of, Sir?

North. I am a Catholic, my lord.

Oates. I desire to know, how he comes to remember this so well?

North. I waited at the table; and he was every day at dinner with my lord.

Oates. Were you at the trial of Ireland, a witness?

North. No, indeed, my lord, I was not.

Att. Gen. Swear Richard Ingletrap. [Which was done.]

Sol. Gen. Pray, will you give an account, whether you knew Mr. Ireland, and where you saw him?

Ingletrap. The first of August, my lord, I was ordered to be at Standen in Hertfordshire, to wait upon my lord Aston, to go with him to Tixhall. And the 3d of August I saw Mr. Ireland there at Standen Lodge at my lord's house. The 4th day he rested there, being Sabbath-day.

Att. Gen. What are you, an hackney-coachman?

Ingletrap. Yes, my lord, I am so. And upon the 5th, which was Monday, he went with my lord Aston to St. Albans; upon the 6th, to Northampton; on the 7th to Coventry; and the 8th day to Tixhall lodge. He was in the company, and went all the way with him; and I was there too.

L. C. J. How long did he stay there?

Ingletrap. Till Tuesday the 13th.

L. C. J. Did you see him there till Tuesday?

Ingletrap. I do not say, that I did see him every day.

L. C. J. Did you go with them on Tuesday to Holy-Well?—*Ingletrap.* No, I did not.

Att. Gen. But, my lord, you observe, that is past one of the times that he swore Ireland was here in town; that is between the 8th and 13th of August.

L. C. J. It is so.

Att. Gen. Pray, what religion are you of, Mr. Ingletrap?

Ingletrap. I am a Protestant, my lord.

Oates. Were you at the Trial of the five Jesuits, or that of Ireland?

Ingletrap. No, I was not.

Oates. My lord, I desire you would ask him, he being a Protestant, how he came to be acquainted with Ireland, that was a priest?

L. C. J. Why, Mr. Oates, is there no conversation to be between Papists and Protestants?

Oates. Truly, very little, my lord: but that is not the point now. I desire to have an answer to my question.

Ingletrap. There was no great acquaintance between us, my lord; for I never saw him before that time.

Att. Gen. Swear Andrew Wetton. [Which was done.] Did you go that journey with my lord Aston to Tixhall?

Wetton. No; I went from Tixhall to Holy-well.

Att. Gen. What day did you set out from Tixhall?

Wetton. Upon Tuesday the 13th of August.

Sol. Gen. Where did you lie that night?

Wetton. At Nantwich at the Holy-Lamb. And next day we baited at Chester; and from thence we came the next night to Holy-Well. There we staid all night, and till next day at noon. We dined at Holy-well, and came that night back to Chester: and from thence, the next day, we came home to Tixhall.

L. C. J. Was Mr. Ireland there all the while?

Wetton. Mr. Ireland was there; I looked after his horse.

L. C. J. When did he come first to Tixhall?

Wetton. He came upon the 8th, and staid till the 13th; and then went to Holy-Well.

Sol. Gen. Pray, what religion are you of?

Wetton. I am a Protestant, Sir.

Att. Gen. And the 9th of September he came away from Tixhall to London, you say.

Wetton. Yes; I saw them take coach; and he did ride on horseback.

L. C. J. Did you see him often at Tixhall, between the time he came from Holy-Well and the time he went to London?

Wetton. Yes, he was there several times; but I cannot tell the particular days: but, my lord, if you please, I can tell you the very money he gave me, which was a shilling and two sixpences, when he came back from Holy-Well.

L. C. J. And the 16th, you say, he came back from Holy-Well?

Wetton. Yes, it was the 16th, upon Friday, that he came from Holy-Well.

L. C. J. And he says, the 9th of September he came back again from Tixhall to London; and that he saw him several times, in the mean time, at my lord Aston's house.

Sol. Gen. So, my lord, we are past one of the times; and have fixed him at Tixhall upon the 16th.

Att. Gen. We have a couple of witnesses more upon this point, and then we shall go on to the 17th; and so all along to the 9th of September.

Att. Gen. Swear Thomas Sawyer. [Which was done.] When came Mr. Ireland to Tixhall? can you tell?

Sawyer. He came the 8th of August to Tixhall, and continued there till the 13th: and then he went away; but whether he went I cannot tell: but, as I was told, it was to Holy-well.

Att. Gen. When did he come to Tixhall again?

Sawyer. When my old lady Aston came home, which was Friday the 16th.

Sol. Gen. Do you know when he left Tixhall for good and all?

Sawyer. The 9th of September, my lord, he went with sir John Southcoat to go to London.

L. C. J. Can you remember he was there at any time between the 16th of August, and the 9th of September?

Sawyer. He was once or twice there; but I cannot tell the particular days.

Sol. Gen. What persuasion are you of, as to religion, Sir?

Sawyer. I am one of the church of England, my lord.

L. C. J. Truth is the same in all persuasions.

Sol. Gen. But we would obvie Mr. Oates's objection, that they are all Papists.

Att. Gen. Swear Frances Allen. [Which was done.] Pray, will you give an account when you saw Mr. Ireland in Staffordshire?

Mrs. Allen. He came the 8th day of August to Tixhall, and continued there the 9th, 10th, 11th, 12th, and to the 13th in the morning, and then he did go to Holy-well.

Att. Gen. She will tell you one particular circumstance, how she remembers him about that time.

Mrs. Allen. The 10th of August was Saturday, and that which causeth me to remember it, is this: There was a woman, one Sarah Paine, I think her name was, which testified at the Trial, that he was in town at that time; but he was not: For he was at Tixhall upon the 10th, which was Saturday; and the 11th, which was Sabbath-day: and I saw him in the chamber those days.

Att. Gen. How came you to know him so well?

Mrs. Allen. I was a servant to my lord Aston, and looked to Mr. Ireland's chamber, and washed his linnen: and those days I saw him in his chamber.

Att. Gen. When he went from Tixhall to Holy-Well the 13th, when did he come back again?

Mrs. Allen. The 16th day, which was Friday.

Att. Gen. Did he come afterwards to Tixhall at any time?

Mrs. Allen. He went away the 17th, and I can tell you by a good token, that he did so: For the 17th I carried his clothes into his chamber, that he was to take with him.

Att. Gen. When did he come again to Tixhall?

Mrs. Allen. He came several times, but truly I cannot tell what days particularly.

Sol. Gen. Pray when did he go away for good and all?

Mrs. Allen. I remember his going away with sir John Southcoat, but I cannot tell the time.

Att. Gen. Pray what religion are you of?

Mrs. Allen. I am a Protestant of the church of England; so I was christened, so I have lived, and so I hope to die before you all.

L. C. J. Upon my word, she is very kind, she has a mind to die before us: It is a sign she lives a good life, she's so ready to die.

Att. Gen. So, my lord, you see, that the 17th of August he departed from my lord Aston's. Now we shall call Mrs. Harwell to

give you an account whither he went on the 17th. Swear Mrs. Jane Harwell. [Which was done.]

Sol. Gen. Where do you live, Mrs. Harwell?

Mrs. Harwell. I live now in town, my lord.

Sol. Gen. Where did you live in the year 1678?—*Mrs. Harwell.* At Wolverhampton.

Sol. Gen. Did you know Mr. Ireland, he that was executed?

Mrs. Harwell. Very well, my lord.

Sol. Gen. What time did he come to your house at Wolverhampton?

Mrs. Harwell. The 17th of August, 1678.

Sol. Gen. What day of the week was it?

Mrs. Harwell. Upon Saturday.

Sol. Gen. From whence did he say he came at that time?

Mrs. Harwell. I do verily believe it was from Tixhall that he came; I cannot positively say.

Sol. Gen. How long staid he there?

Mrs. Harwell. He came to my house the 17th of August 1678. He supped there that night, and I think he lay in my house every night till the 26th of the same month. Upon the 19th day, after dinner, I went with him a good part of the town of Wolverhampton; and upon Friday following, which was the 23d, he went a little way out of town, to a fair hard by, and returned the same day, and staid at my house the next day, being Bartholomew day. The next day being the 25th, being Sunday, he was at my house, and he staid, as I said, every night, and lay at my house; and went away on Monday the 26th of August. It was, to the best of my remembrance, in the morning.

Sol. Gen. Whither he did say he was going, when he went from your house on the 26th?

Mrs. Harwell. I think to Tixhall, he said.

Sol. Gen. When did you see him again after that?

Mrs. Harwell. He returned to me again the 4th of September following. That night he supped at my house, and lay there: and he staid at my house Thursday the 5th of September, Friday the 6th, and he went away on the 7th from me for good and all.

Att. Gen. Whither did he go then?

Mrs. Harwell. To Tixhall, I think, I cannot tell.

Att. Gen. Whence did he say he came, when he came last to your house; which was Wednesday the 4th of September?

Mrs. Harwell. Then he said he came from Boscobel and Black-Ladies and that way.

Sol. Gen. Can you tell any thing that makes you remember he was at Boscobel?

Mrs. Harwell. I have some circumstances that make me believe and remember it.

L. C. J. Ay, tell us what they are.

Mrs. Harwell. My lord, upon Monday the 9d of September, I heard Mr. Ireland would be at Boscobel, and I said to my friend that told me so, sure Mr. Ireland will not be there that night, and I so near him. Yes, said she, he will. Then, said I, I will write to him; and so I did. And I tell you, the 4th of Sep-

tember, which was Wednesday, he came to my house, and staid that night, and the two next days with me, and went away upon the Saturday after.

L. C. J. You say you did write to him upon the 2d of September?

Mrs. Harwell. Yes, I did so.

L. C. J. What was the occasion of your writing to him at that time?

Mrs. Harwell. One madam Dormer was then in those parts, and he being gone a visiting his friends at Black-Ladies, I writ to him, and desired him to give her a visit, for I knew she would be glad to see him.

L. C. J. He came back to you the 4th of September, you say?

Mrs. Harwell. Yes, he did so, my lord.

L. C. J. Did he own upon the 4th of September that he had received your letter?

Mrs. Harwell. He said he had been at the place, my lord, but I know not whether he had received my letter or no; but I am sure he waited upon my lady, for she told me so afterwards.

Oates. I desire to know, whether this gentlewoman was at Ireland's trial?

Mrs. Harwell. No, my lord; but I heard that upon the 17th of December following, Mr. Ireland was tried at the Old-Bailey for High Treason. Upon the 19th, I was informed by the post what was sworn against him; and particularly as to this time, which I knew to be false: And upon my own costs and charges I sent an express away to town here to a friend that I knew, upon reading the letter that was written to me, that Mr. Ireland was falsely accused; and by that express also I sent a petition, humbly beseeching his late majesty, that we might bring in witnesses to prove, that Mr. Ireland was in Staffordshire, when Mr. Oates swore he was in town; and upon that the king staid the execution about five weeks. We did hope for a second trial, but we could not obtain it; and he was executed. I did it at my own cost and charges: for I thought it my duty, if I could, to save his life, knowing that to be false which was sworn against him.

L. C. J. She speaks gravely and soberly upon my word.

Just. Withins. So she does indeed.

Att. Gen. We have abundance of them, my lord. Swear Mr. William Rushton. [Which was done.]

Sol. Gen. Tell my lord what you know of Mr. Ireland's being at Mrs. Harwell's in August 1678, at Wolverhampton.

Rushton. My lord, in the month of August 1678, I did see Mr. William Ireland, at Wolverhampton, in the county of Stafford; and it was upon the 18th of August, and I saw him there, from the 18th to the 25th, every one of the days but one, and that I cannot be positive in. He went that day to Litchfield, which was upon the 23d, as I take it, but I cannot be positive; but all the rest of the days I did see him there once, if not twice or thrice a day.

Att. Gen. Where did he lodge then?

Rushton. At Mr. Jyfford's or Mrs. Harwell's.

Oates. Were you at any of the Trials of Ireland; or the five Jesuits, Sir?

Rushton. No, I was never at one till now.

Oates. Pray, my lord, what religion is this gentleman of, I desire to know.

Rushton. Not of your worship's religion, Dr. Oates.

L. C. J. But answer his question.

Rushton. I am a Catholic.

Oates. A Roman Catholic he means, I suppose.

Rushton. Yes; I am a Roman Catholic, and a loyal subject.

Sol. Gen. Swear Mrs. Katherine Winford. [Which was done.]

Att. Gen. Mrs. Winford, pray did you see Mr. Ireland at Mrs. Harwell's in the year 1678?—Mrs. Winford. Yes, I did, Sir.

Att. Gen. Pray tell the court what you do know of that matter.

Mrs. Winford. I did hear at Wolverhampton, that Mr. Ireland came to town the 17th of August, and I did see him there the 18th, and I did see him there the 19th, and I did see him there the 20th; and I saw him there upon the 22d, 23d, 24th, and 25th, and that was the last time I saw him there.

L. C. J. At Mrs. Harwell's was it that you saw him?

Mrs. Winford. Sometimes at Mrs. Harwell's, and sometimes at my father's house, who lived in that town.

Oates. My lord, I desire to know how she comes to remember those days so particularly?

Mrs. Winford. I remember them, because St. Bartholomew's day was the 24th of August, and that was the Saturday after he came to town; and the first day I saw him was the Sunday before, and so I reckon it to be on those days I saw him.

L. C. J. Have you any other questions to ask her, Mr. Oates?

Oates. No, my lord, I have not: She was a witness before at Whitebread's trial, and was not believed there.

L. C. J. Well, make your remarks by and by, and let them now go on with their evidence.

Sol. Gen. Then swear Mr. William Stanley. [Which was done.]

Att. Gen. Pray, did you see Mr. Ireland at Wolverhampton, and when?

Stanley. Upon the 18th of August 1678. It was Sunday, I saw Mr. Ireland in Wolverhampton in the morning, and in the afternoon he was in my own house. Upon Monday the 19th I saw him twice that day at my own house; I positively speak that, and I verily believe I did see him on Tuesday the 20th, and Wednesday the 21st; but Thursday and Friday I cannot say I did see him those two days: For he went upon one of them to Litchfield. But upon Saturday and Sunday I am sure I saw him, and two or three times some days.

Oates. Pray, Mr. Stanley, did you know him before?—*Stanley.* No, I did not, Sir.

Oates. Was you at his trial?

Stanley. No, I was not.

Oates. Were you at the five Jesuits trial?

Stanley. No, I was not in London since, till the last term.

Oates. What religion are you of, Sir?

Stanley. What religion are you of, Mr. Oates?

L. C. J. Nay, do not ask questions, but answer the questions he asks.

Stanley. I am a Roman Catholic.

Att. Gen. Mr. Stanley, pray can you recollect any circumstance how you came to remember that it was such and such days that you saw him?—*Stanley.* Yes, my lord, I can.

L. C. J. What are they, tell them us?

Stanley. I buried a child that morning, being Sunday the 18th of August, and he came to my house in the afternoon, and I entertained him with those things that I had provided for to entertain my friends at the funeral. On Monday was a wake, and the young people went all to the wake, and left madam Harwell alone; and so she came with him to my house, and I entertained him with the same kind of entertainment that I did the day before.

L. C. J. That is a remarkable circumstance indeed.

Att. Gen. Swear Mrs. Dorothy Purcell. [Which was done.] What say you, Mrs. Purcell? When did you see Mr. Ireland at Wolverhampton?

Mrs. Purcell. I saw him the 18th, 19th, 20th, 21st, 22d, and 23d days of August, 1678.

Att. Gen. Where did you see him?

Mrs. Purcell. At a friend's house in Wolverhampton.

L. C. J. How come you to remember those days of the month?

Mrs. Purcell. I remember them by particular circumstances.

L. C. J. What are those particular circumstances? Let us hear them. How come you to name those very days, the 18th, 19th, and so on?

Mrs. Purcell. I can remember it as well as any thing in the world.

Oates. I desire, my lord, that she may tell how she does remember it.

Mrs. Purcell. That's enough, and as much as need to be said, I remember very well.

Oates. But I desire to know how you come to remember it.

Mrs. Purcell. I remember it, I tell you, very well; and I do affirm I saw him there.

Oates. But you do not tell what circumstances you remember it by.

Mrs. Purcell. No, there is no need of it, I am sure I saw him there then.

Att. Gen. Tell him some circumstances.

Mrs. Purcell. Those were the days before Bartholomew eve.

Oates. My lord, is this any thing of evidence?

L. C. J. The jury heard it, and they will consider of it.

Oates. What religion are you of, mistress?

Mrs. Purcell. Must I tell what religion I am of?

L. C. J. Yes, answer his question.

Oates. I dare say she is a Papist; she need not trouble her head to answer it.

Att. Gen. Swear Mr. Scott. [Which was done.] Were you at Wolverhampton when Mr. Ireland was there?—*Scott.* Yes, I was.

Att. Gen. Did you do any service for him there?—*Scott.* I looked to his horse.

Att. Gen. When did he come thither, do you remember?

Scott. I cannot tell just the time that he came in.

Att. Gen. What day of the week was it that he came thither?—*Scott.* It was of a Saturday.

Att. Gen. What month was it?

Scott. I cannot tell very well what month it was; it was in August I think.

Att. Gen. How long did he continue there?

Scott. The space of a fortnight off and on.

Oates. Is that evidence, my lord, that he has delivered?

L. C. J. It is but very small evidence. It is only circumstantial to confirm the other testimony.

Att. Gen. How long was it before Ireland was tried and executed, can you tell that?

Scott. No, I know nothing of it.

Att. Gen. Then swear Mr. John Stamford. [Which was done.]

Sol. Gen. Did you see Mr. Ireland at Wolverhampton, and when was it, I pray you?

Stamford. My lord, in the year 1675, I was sent beyond sea, to St. Omers, to fetch over two young gentlemen that were students there; and there I became acquainted with Mr. Ireland, who was then procurator of the jesuits at St. Omers. And in August 1678, I did see him in Wolverhampton, upon the Sunday after the Assumption of our Lady, which was the 15th of August, he came to see me, and I saw him there that day.

L. C. J. What day of the month is the Assumption of our Lady?

Stamford. That is always the 15th of August, my lord.

Att. Gen. How often did you see him there?

Stamford. I saw him Sunday and Monday, and till that day sevensnight; I saw him every day in that week but one, when he went to Litchfield.

Oates. My lord, I desire to know how he comes to remember that it was at that time.

L. C. J. He tells you a reason for it, because it fell out to be upon the Sunday after the Assumption of our Lady, which is always the 15th of August.

Oates. My lord, he says he came acquainted with Mr. Ireland at St. Omers.

L. C. J. Yes, he says, that was in the year 1675.

Oates. I desire to know, my lord, what business he had there?

L. C. J. He tells you, he went to fetch over two young men that were students there.

Oates. Pray, my lord, I desire to know what religion he is of.

L. C. J. What religion are you of?

Stamford. I am a Roman Catholic.

Oates. I desire to know what is his profession?

Stamford. I am a younger brother of a good and loyal family as any of the county of Stafford, and that suffered as much as any for the late king.

Oates. I believe, if it were looked into, he is somewhat else besides a younger brother.

Att. Gen. Yes, he says he is of a loyal family.

L. C. J. I am sure there is such a family in that county that were great sufferers for king Charles 1, and the late king; and were very instrumental in services for the late king, at his Escape from Worcester: but whether he be of that family or no, I cannot tell.

Stamford. The doctor thinks I am a jesuit, but I will assure him I have a wife and children.

Att. Gen. Mr. Oates was about to have made him a priest, but it seems he hath a wife and children, and so is out of danger.

Sol. Gen. Pray, swear Mrs. Katherine Fowler. [Which was done.]

Att. Gen. Did you see Mr. Ireland, Mrs. Fowler, at Wolverhampton, in 1678?

Mrs. Fowler. Yes, I did.

Att. Gen. When was it?

Mrs. Fowler. I did see him on Saturday the 17th of August at Wolverhampton; he came that day to my mother's house, where I was.

Att. Gen. How long did he stay there?

Mrs. Fowler. Till the 27th, which was Monday was seven-night after: I was in his company every day in that time unless it were Friday, which day they say he went to Litchfield to the fair.

L. C. J. Is Mrs. Harwell your mother?

Mrs. Fowler. Yes, my lord, she is, and I lived at that time with my mother.

L. C. J. How do you remember this? Have you any tokens that you can give us, why you remember it was then?

Mrs. Fowler. My lord, I recollected myself after Mr. Ireland's trial, in which Mr. Oates swore that he was here in town between the 8th and 12th of August, that that was the very month that Mr. Ireland was in Wolverhampton, and thereupon I concluded that Mr. Oates had not sworn true, by that recollection when it was fresh in my memory, being within half a year after.

Oates. Madam, are you Mrs. Harwell's daughter?—*Mrs. Fowler.* Yes, I am so, Sir.

Oates. Did you not know one Mr. Jennison?

Mrs. Fowler. Which Jennison?

Oates. Mr. Robert Jennison.

Mrs. Fowler. Yes, I do know him.

Oates. Are you not a-kin to him?

Mrs. Fowler. Yes, but I am sorry to own I have such a relation.

Att. Gen. Swear Mr. Gifford. [Which was done.]

Sol. Gen. Did you see Mr. Ireland in Staffordshire, and when, I pray you?

Gifford. I saw him there at Wolverhampton

the 17th of August 1678, and he continued there till the 26th; I saw him there every day.

Oates. Pray, my lord, be pleased to ask this gentleman, whether he were at the Trial of Ireland?

Gifford. No, I was not in court, nor examined as a witness.

Oates. Were you at the Trial of the five Jesuits, Sir?

Gifford. I was there, but was not examined.

L. C. J. Was it every day, say you, that you saw him at Wolverhampton?

Gifford. Every day.

L. C. J. They say, he was one day out of town at Litchfield.

Gifford. He was out of town that day, but I saw him.

Att. Gen. Swear Mrs. Elizabeth Gifford. [Which was done.]

Sol. Gen. You hear the question, did you see Mr. Ireland in Staffordshire in 1678, and when?

Mrs. E. Gifford. Mr. Ireland came to Wolverhampton the 17th of August, and continued there till the 26th.

Att. Gen. How do you remember it?

Mrs. Gifford. By a wake that was just hard by, that was at that time: and he came to my uncle's house upon the Sunday following the Assumption of our Lady.

Att. Gen. Did you see him every day till the 26th?

Mrs. Gifford. I remember I did see him every day but two days that I was abroad at the wake.

Oates. My lord, I desire to know, whether she was examined at any of the former trials?

Mrs. Gifford. Yes, at the five Jesuits Trial, I was.

Oates. Were you not at Ireland's Trial?

Mrs. Gifford. No, I was not.

Oates. There was one Gifford examined there.

Att. Gen. Swear Mrs. Elizabeth Keeling. [Which was done.]

Sol. Gen. Did you see Mr. Ireland at Wolverhampton, and when?

Keeling. Yes, my lord, I did see Mr. Ireland at Wolverhampton.

Sol. Gen. Pray tell when it was.

Keeling. It was the 17th of August he came to my mistress's house.

Sol. Gen. What August?

Keeling. August before the Plot.

L. C. J. Who was your mistress?

Keeling. Mrs. Harwell, my lord.

Sol. Gen. How long did he continue there?

Keeling. He came on the Saturday, and I saw him there till the Monday. When I was sent for to my mother's burying, I left him and madam Dormer at dinner, and came back on the Thursday. And in his chamber I heard him discourse, but I did not see him. Upon the Friday he went abroad, and returned again that night. Upon the Saturday I saw him, and he continued there till Monday morning, and then he went away, and returned on Wednesday the 4th of September, and staid

till Saturday the 7th; and then went away from Wolverhampton.

Oates. I desire to know what religion this woman is of?

Keeling. I am Roman Catholic, God be thanked.

Att. Gen. Mrs. Keeling, when did Mr. Ireland return again, do you say, after he went first to Wolverhampton?

Keeling. It was the Wednesday seven-night after, Sir.

Att. Gen. That was the 4th of September.

L. C. J. How long staid he there then?

Keeling. Till Saturday in the forenoon.

Att. Gen. Whither did he say he was going then?

Keeling. He said he went to Bellamour to dinner.

L. C. J. Did you see him at any time after?

Keeling. No, my lord, I saw him no more.

Att. Gen. Then swear Mr. Richardson. [Which was done.]

Sol. Gen. Pray, Sir, will you give an account when you saw Mr. Ireland, and where, in the year 1678?

Richardson. My lord, I saw a gentleman that I was informed was Mr. Ireland at Wolverhampton, at a wake; which was Monday the 19th of August.

Att. Gen. Where did he lodge?

Richardson. At Mrs. Harwell's.

Att. Gen. What are you, a tradesman?

Richardson. Yes, an apothecary in Wolverhampton.

L. C. J. How many days did you see him at Wolverhampton?

Richardson. I saw him only one day in the market-place.

L. C. J. You did not know Mr. Ireland before?

Richardson. But I was informed that was he.

L. C. J. What became of that Ireland that you were informed was at Wolverhampton then?

Richardson. I heard presently after that, upon Mr. Oates's Plot, he was secured and executed.

Att. Gen. What religion are you of, pray, Sir?

Richardson. I am of the church of England.

Oates. Pray, Sir, I would ask you this question.

Richardson. As many questions as you please, Mr. Oates.

Oates. Who told you it was Mr. Ireland?

Richardson. Mrs. Harwell.

Oates. When was it she told you it was Ireland?

Richardson. To the best of my remembrance, it was before he was apprehended as a traitor.

Oates. He is uncertain when he was told so.

L. C. J. Well, make what advantage you can of it by and by.

Att. Gen. Swear Mrs. Eleanor Graves. [Which was done.]

Sol. Gen. Pray, mistress, did you see Mr. Ireland at Wolverhampton at any time?

Mrs. Graves. Yes, I did, my lord.

Sol. Gen. When was it?

Mrs. Graves. The first time was six years ago in August, it is now going on seven years since.

Att. Gen. What time in August was it?

Mrs. Graves. The first day was the 20th or 21st, I am sure I saw him upon the 22d; for I dined with him, and was with him all the afternoon, and supped with him. Upon the 23d we went to Litchfield together, which was Bartholomew eve. And I saw him the 25th, which was Sunday after.

L. C. J. Are you sure it is the Ireland we are now speaking of?

Mrs. Graves. They said it was the same Mr. Ireland that was executed. They called him so.

L. C. J. Nay, there is no great doubt, but only for Mr. Oates's satisfaction.

Att. Gen. At whose house did he lie at Wolverhampton?

Mrs. Graves. At Mrs. Harwell's.

Att. Gen. Where was it you supped with him, I pray you?

Mrs. Graves. He dined and supped at a relation's house of mine.

L. C. J. Who was that? name him.

Mrs. Graves. It was at my uncle Winford's.

L. C. J. Did you go along with him to Litchfield, do you say, on the 23d?

Mrs. Graves. Yes; and so did my uncle; and at night we came back together.

Sol. Gen. What religion are you of, mistress?

Mrs. Graves. I am of the church of England.

Oates. My lord, I desire to ask her, how did she know it was the same Ireland that was tried?

Mrs. Graves. It was the same Ireland that they said was afterwards executed. I know no more.

Sol. Gen. Did you go back with him to Mrs. Harwell's from Litchfield?

Mrs. Graves. I did to my uncle Winford's house.

Att. Gen. Now we come, my lord, to another period of time, which is from the 26th of August, to the 29th; and for that, we first call sir Thomas Whitegrave, who is a justice of the peace, and a worthy gentleman, a member of the church of England in that county. Swear him. [Which was done.]

Sol. Gen. Pray, sir Thomas, will you be pleased to give the court an account, whether you saw Mr. Ireland in Staffordshire 1678, and what time it was?

Sir T. Whitegrave. I saw Mr. Ireland upon the 29th of August before the Popish Plot; it was upon a Thursday in the afternoon upon Tixhall bowling-green; and I discoursed with him: he told me he was to go home that night with sir James Simmons and Mr. Heveningham. They told me afterwards he went on

Saturday to Hildersham, and went thence on Monday following towards Boscobel: some time after that, a rumour came down that Mr. Ireland was accused with others, of being in a plot of the papists; and myself, and some others that were in commission for the peace in that county; did reflect upon the time that Ireland was in the country; and we were a little disturbed, because he had been at particular places among our neighbours, whom we knew to be catholics.

Att. Gen. Can you remember no day but that one, sir Thomas?

Sir T. Whitegrave. Only the 29th I saw him there, and discoursed with him; and afterwards there was word sent to me, to desire me that I would come up to London at his trial.

L. C. J. And did you come up, sir Thomas?

Sir T. Whitegrave. No, I did not; I had no subpoena; and being a justice of the peace, I did not think fit to leave the country at that time without a subpoena.

Oates. My lord, I desire to know of this gentleman, how long he had been acquainted with Mr. Ireland?

Sir T. Whitegrave. I never saw him before, nor since.

L. C. J. He goes no further than the 29th.

Att. Gen. No, my lord, he does not. Then swear Mr. William Fowler. [Which was done.]

Sol. Gen. Pray, will you give an account when you saw Mr. Ireland and where?

Fowler. I saw Mr. Ireland upon the 27th of August 1678, in Staffordshire, at a horse-race at Etching-hill. The race was run between sir Henry Gough and captain Chetwind.

Sol. Gen. Did you see him any other day in that month?

Fowler. Yes, the 19th of August I saw him at Tixhall bowling-green.

Sol. Gen. When else did you see him?

Fowler. I saw him the 10th of August before.

Sol. Gen. Where, at Tixhall, at my lord Aston's house?

Att. Gen. Do you remember sir Thomas Whitegrave was upon the bowling-green the 27th of August?

Fowler. Yes, he was, and did discourse with Mr. Ireland there.

L. C. J. What became of Mr. Ireland afterwards?

Fowler. He went about the country for some time, my lord.

L. C. J. Was it the same Ireland that was executed?

Fowler. Yes, it was the same.

L. C. J. You say you saw him the 29th at Tixhall bowling-green.

Fowler. Yes, I did so.

L. C. J. When you heard he was taken up for the plot, what did they say whether he was at that time?

Fowler. I think he went to Mr. Heveningham's, or thereabouts.

Oates. I would fain know this gentleman's religion.

Fowler. I am a Roman Catholic.

L. C. J. We ask it only because Mr. Oates desires to be satisfied in that point.

Att. Gen. Pray swear Mr. Howard. [Which was done.]

Sol. Gen. What time in August 1678, did you see Mr. Ireland in Staffordshire, and where?

Mr. Howard. I came out of Shropshire upon the 27th of August, to the horse-race at Etching-hill; and there I saw this Mr. Ireland upon the 28th. I dined at one Mr. Herbert Aston's house at Bellamore, and there I saw him again.

Att. Gen. What other time did you see him?

Howard. Never any other time.

Oates. How does he know it was the same Mr. Ireland?

Howard. I came up to town soon after, and they told me that knew him, that it was the same Ireland that suffered.

Att. Gen. Swear Mr. Drayton. [Which was done.]

Sol. Gen. Where did you see Mr. Ireland?

Drayton. At Etching-hill race.

Att. Gen. What day was that?

Drayton. That was the 27th of August 1678.

Att. Gen. When did you see him after?

Drayton. The next day following I did not see him; but the Thursday following I saw him at Tixhall, and he went home with Mr. Heveningham to Aston; and I saw him on Friday, he was with us there, and went a fishing, and we caught a great pike of a yard long, which was not ordinary with us. Upon the 31st, which was Saturday, my master went to kill a buck in the park, and Mr. Ireland went along with him; and they went to a little village hard by, and there I parted with him, and did see him no more that day. Mr. Gerrard of Hildersham was to meet my master a hunting, but he was sick, and did not: Then upon Sunday the 1st of Sept. I was sent to see Mr. Gerrard of Hildersham, and there I saw Mr. Ireland.

L. C. J. Who was your master, pray you?

Drayton. This lord Gerrard of Bromley's father.

Att. Gen. He was accused by Dugdale of the Plot, and died afterwards in Newgate.

Oates. Pray ask Mr. Drayton what religion he is of?

Drayton. I am a Roman Catholic.

Att. Gen. Swear sir James Simmons. [Which was done.]

Sol. Gen. When did you see Mr. Ireland, sir James?

Sir J. Simmons. Upon Tuesday the 27th of August 1678, I remember very well I saw Mr. Ireland at the horse-race at Etching-hill, between sir Henry Gough and Mr. Chetwind; and I remember particularly, that sir Henry Gough's horse distanced him. I did not see him before he came to the inn; but there we met, and drank together. And Thursday the 29th of August, being at Tixhall bowling-green, Mr. Ireland was there, and came home with my father Heveningham and me, and some

gentlemen in the country; and came to Aston, and staid there that night. I remember the next day was Pancras Fair, and I went to the fair, and did not come home.

Att. Gen. What day of the month is that fair usually kept?

Sir J. Simmons. It is an unconstant time; now and then in September; now and then in August; and that year we had a subscription to get it regulated to a certain day.

L. C. J. Did you see him after?

Sir J. Simmons. My lord I cannot swear to the Saturday, because I cannot so well tell whether I came back from the fair on Friday night; I think I did not.

Att. Gen. Swear Mr. Green. [Which was done.]

Sol. Gen. Did you know Mr. Ireland?

Green. Yes, my lord, I did.

Sol. Gen. When did you see him in 1678?

Green. The first time was Etching-hill race the 27th of August.

Sol. Gen. What other days do you remember?

Green. Thursday the 29th I saw him; I belong to sir James Simmons, and Mr. Ireland came home with him, and some other gentlemen, to Mr. Heveningham's at Aston, and was a setting with him on Friday the 30th in the afternoon. And Saturday the 31st he was a hunting with Mr. Gerrard. Nay, more than that I saw him drawn on the sledge, but not executed; and that was the same man that was there at that time.

Oates. What religion is this gentleman of?

Green. I was ever a Roman Catholic.

L. C. J. Pray, were they a fishing that day?

Green. In the morning he was, and they got a great pike; I saw the pike, and did eat part of it.

Att. Gen. Swear Mr. Fallas. [Which was done.]

Sol. Gen. When did you see Mr. Ireland, Sir?

Fallas. Upon the Thursday after sir Henry Gough's race, which was Thursday the 29th of August, Mr. Ireland came to Mr. Heveningham's, and I looked to his horse there. Upon Friday morning they went a fishing, and got a great pike; and I did see them go out a setting after dinner, he and Mr. Green, with my lady and the keeper; and I saw him come in again: and I saw him drink a glass of table-beer in the hall. Upon Saturday morning, which was the 31st of August, they went a hunting in Mr. Gerrard's park, and killed a buck; and afterwards my master asked him to go home with him again, but he would not; for he said he must go to Mr. Lowe's at four, and we parted at three. And I came here, and saw him executed; but while he was at my master's house, his horse was never out of the stable, but I brought it to him.

Att. Gen. When did you see him executed?

Fallas. It was the 24th of January afterwards, I think.

Oates. What religion are you of?

Fallas. I am for the church of England, a Protestant; I always was so.

Oates. Pray, my lord, ask him when he was acquainted with Mr. Ireland?

Fallas. The first time was the 29th of August, when he came to my master's house.

Oates. That does not come to my time, my lord.

Att. Gen. But it comes very close to it; it reaches to the 31st of August.

L. C. J. It is within a day of you, upon my word.

Sol. Gen. And I'll tell your lordship what is yet more considerable; this place is an hundred and twenty miles from London: but we shall not leave him there.

Oates. I desire to know whose servant he is?

Fallas. I am a servant to Mr. Heveningham, and I serve the king; I come to testify the truth. I was here before, but then we must not be heard; all the cry was against us, that we were rogues, and must be knocked on the head.

L. C. J. Were you here at any of the trials?

Fallas. I was at the council-table, and there I was in great danger of being knocked on the head.

Oates. Would they have knocked him on the head at the Council-table, does he say?

Fallas. I have been in the room by the council-table, where they have cried, Knock them down, hang them rogues; do they come to be witnesses against the Saviour of the World? And they came about me there, and asked me if I knew any of them, or was of their company? And I was glad to say I came thither about a suit of law I had with a brother of mine, and then they pitied me.

Sol. Gen. Now we have brought him, my lord, every night where he lodged from the 3d of August to the 31st.

Att. Gen. And then we shall prove that he went to Mr. Gerrard's at Hildersham that they speak of; there he was the 31st and 32d—

L. C. J. How Mr. Attorney, the 32d! I doubt you will hardly be able to tell us where he was then.

Att. Gen. The 1st of September, I mean, my lord.

L. C. J. Ay, we understand you very well.

Att. Gen. Swear Mr. John Proctor. [Which was done.]

Sol. Gen. When did you see Mr. Ireland in 1678?

Proctor. I saw him the 31st of August 1678.

Sol. Gen. Where?—*Proctor.* At Fulford.

Sol. Gen. At whose house?

Proctor. At Mr. Lowe's.

Sol. Gen. That was the place the other witness said Ireland told him he was to be at four of the clock, and therefore went away at three.

Att. Gen. When did you see him afterwards?

Proctor. I saw him the next day, the 1st of September.

Att. Gen. Where?

Proctor. At esquire Gerrard's.

Att. Gen. How far is that from Mr. Lowe's?

Proctor. It is a mile and an half.

Sol. Gen. Did you see him afterwards?

Proctor. Not there I did not.

Att. Gen. What religion are you of?

Proctor. I am a Protestant.

L. C. J. What did you hear because of that Ireland afterwards?

Proctor. I saw him executed at Tyburn afterwards, and it was the same man.

L. C. J. Where did you live then?

Proctor. I lived at Fulford then.

L. C. J. What, with Mr. Lowe?

Proctor. Yes, my lord.

Oates. It seems he was a servant to a Papist.

L. C. J. What then, what of that?

Oates. My lord, I desire you would ask him, whether he ever saw Ireland before the 31st of August which he speaks of?

Proctor. No, I did not.

L. C. J. But you are sure it was the same man you saw executed?

Proctor. Yes, I am sure of it.

Sol. Gen. What circumstance can you tell that he was the 1st of September at Mr. Gerrard's?

Proctor. I went to dinner thither that day; I rode before madam Brooke.

L. C. J. What day of the week was that 1st of September?

Proctor. It was upon a Sunday, my lord.

Att. Gen. Was that about Pancras fair-time.—*Proctor.* Yes, my lord, it was.

Sol. Gen. He can tell you another circumstance how he comes to remember him at Mr. Lowe's the 31st of August.

L. C. J. Ay, by what token do you remember that he was there the 31st of August?

Proctor. I went that day to ——— pay some money, and came home again in the afternoon; and just as I came in, he came thither.

Oates. How does he say he knows him to be the same man?

L. C. J. He has told you twice, he saw him executed.

Oates. What religion is he of, does he say?

L. C. J. He is a Protestant.

Att. Gen. Then swear Mr. John King. [Which was done.]

Sol. Gen. Pray do you acquaint the court and the jury where you saw Mr. Ireland, and when?

King. I saw Mr. Ireland at Mr. Gerrard's of Hildersham the 1st of September, that year that the plot broke out, which was in the year 1678. There I saw him on Sunday; and there he staid all night, and so did I; and on Monday morning I went to Mrs. Crompton's where I lived, and he came thither to Millage as soon as I, which is within a mile of Hildersham, and dined there the same day.

L. C. J. How far is that from London? pray you?—*King.* An hundred and ten miles.

L. C. J. And he was there at dinner, you say?—*King.* Yes, he was.

L. C. J. How long was it before dinner was done?

King. I believe he might go thence about two of the clock.

L. C. J. Where did he say he designed to go then?

King. He designed to go to Boscobel that night.

L. C. J. Do you remember any body else was at Mr. Gerrard's then when you saw him?

King. Yes, Mr. Jerman Drayton was at Hildersham at that time.

Oates. Pray, what religion is this gentleman of?

King. I am a Roman Catholic, Mr. Oates.

Att. Gen. Pray swear Mr. Francis Lee. [Which was done.]

Sol. Gen. Pray tell my lord and the jury where you saw Mr. Ireland and when.

Lee. I was a servant to Mr. Gerrard, and Mr. Ireland upon Saturday night came to my master's house, and staid all night and all day on Sunday, and went away on Monday to Millage.

L. C. J. What time and what year was it?

Lee. It was in 1678; but I am not certain of the day of the month: it was on a Saturday he came, and I have witnesses to prove I was there at that time.

L. C. J. What month was it?

Lee. It was in August, as I think, the last day; but I am not certain. And he went on Monday to Millage, and there dined at Mrs. Crompton's; and from thence he went to Pancrass, and thence he did go to Boscobel, and staid all night there.

Att. Gen. That was the 2d of September.

L. C. J. How do you know he went to these places?

Lee. I was told so.

Oates. My lord, I desire to know how long this man was acquainted with Ireland before?

Lee. I never saw him but at that time.

Oates. How does he know it is the same man then?

King. Here is a man that saw me with him, and was present at Ireland's execution.

L. C. J. Who is that? Proctor?

King. Yes, my lord.

L. C. J. Then call Proctor again. [Who came in again.] Who went along with you to dinner on Monday?

Lee. My lord, he did see me at Hildersham at Mr. Gerrard's.

L. C. J. What say you, Proctor, was this gentleman there at that time?

Proctor. Yes, my lord, I did see him there.

L. C. J. Was that the same man that was executed, which you saw at Mr. Gerrard's?

Proctor. Yes, it was.

L. C. J. Did you dine with Mr. Ireland on Monday at Mrs. Crompton's?

Lee. Yes, my lord, I did, and went afterwards with him to Pancrass, and staid there two hours, and then he went to Boscobel.

Sol. Gen. There are the two days gone which Mr. Oates swore to, and in which he was so positive that it was either the 1st or 2d of September.

Att. Gen. Then swear Mr. Biddolph.

[Which was done.]

Sol. Gen. Pray, Sir, when did you see Mr. Ireland, and where?

Biddolph. My lord, I was in Staffordshire the latter end of August and the beginning of September, and I was at Mrs. Crompton's house, which is my aunt, the 2d of September being Monday, where I saw Mr. Ireland, and dined with him that day; and after dinner he went with Mr. Gerrard's son, who was to go to school to Boscobel. And I will give your lordship a particular circumstance that may satisfy you that I am not mistaken in the time: as I came through Northamptonshire that summer, I was at my lord Cullea's, and he desired me to be at a horse-race at Newton-Slade, where there is a plate always run for upon the first Thursday in September, and that year it was the 5th of September. Now when I dined at my aunt Crompton's; she would have had me staid all night at her house; but I excused myself, and told her I had promised to come to my lord Cullen's to be at the race, and I must needs be there before, to be as good as my word to my lord; and therefore I went away to Pancrass, and so on my journey, otherwise I had staid with my aunt all night: and I am sure this was Monday before this horse-race.

Oates. My lord, this gentleman speaks to no year particularly.

Biddolph. It was in 1678, the year before Mr. Oates's Plot broke out.

Att. Gen. Now we will call Mrs. Crompton. Swear her. [Which was done.]

Sol. Gen. Pray, when did you see Mr. Ireland, Mrs. Crompton?

Mrs. Crompton. He was at my house at Millage in Staffordshire at dinner, the same day that my nephew Biddolph did dine there: as for the day of the month, I cannot so well tell it, because when my friends dine with me, I don't use to note down the day particularly; but it was, I remember, a pretty remarkable time, for it was about Pancrass-fair. Mr. Gerrard of Hildersham came with him, and Mr. Ireland being a stranger, I asked who he was, and they told me it was Mr. Ireland: he never was at my house before nor after; he was a mere stranger to me.

L. C. J. What day was it, say you?

Mrs. Crompton. It was the same day my nephew Biddolph dined there.

L. C. J. Was it Monday the 2d of September, do you remember?

Att. Gen. He says he was at her house at Millage that day, and she says it was the same day he dined there.

Mrs. Crompton. But I never note down the particular days when my friends dine with me, except I had particular occasion to do it, as I had none at this time.

Oates. My lord, I desire to know what religion this old gentlewoman is of?

Mrs. Crompton. I am a Roman Catholic, my lord.

Att. Gen. Swear Mrs. Palmer.

[Which was done.]

Sol. Gen. Mrs. Palmer, where did you see Mr. Ireland?

Mrs. Palmer. I was at dinner at Mrs. Crompton's at Millage, where there was a gentleman called Mr. Ireland that did dine there.

L. C. J. When was it?

Mrs. Palmer. I cannot tell truly what day it was.

L. C. J. Who was there besides you at dinner that day?

Mrs. Palmer. It is so long since, I cannot remember.

L. C. J. Was Mr. Biddolph there?

Mrs. Palmer. Not that I remember, my lord.

L. C. J. What do you bring her for, Mr. Attorney?

Att. Gen. She dined there that day it seems; but if she cannot remember it, I cannot help it.

L. C. J. But these kind of witnesses do but slack your proof.

Sol. Gen. My lord, I think we do over-do our business indeed.

Att. Gen. We have one more witness to this point, and that is, Mrs. Mary Holmes; swear her. [Which was done.] Where did you see Mr. Ireland in the year 1678?

Mrs. Holmes. I saw him at Millage, my lord.

L. C. J. When?

Mrs. Holmes. The first, or the beginning of September, I am sure.

Sol. Gen. What day of the week was it?

Mrs. Holmes. Monday.

L. C. J. You have proof enough of this, Mr. Attorney General.

Att. Gen. Truly, I think so, my lord.

Sol. Gen. Pray swear Mrs. Esther Gifford. [Which was done.] Mrs. Gifford, when did you see Mr. Ireland?

Mrs. Gifford. Upon the 2d of September 1678, I saw Mr. Ireland above a hundred miles from this place.

Sol. Gen. Where?

Mrs. Gifford. At Pancrass.

Sol. Gen. What time of the day was it?

Mrs. Gifford. In the afternoon about four or five o'clock.

Sol. Gen. Did he stay there all night?

Mrs. Gifford. I cannot tell indeed.

Att. Gen. Swear Mr. Pendrel.

[Which was done.]

Sol. Gen. Now, my lord, we are come to the 2d of September in the evening; we shall prove where he was that night and the 3d, and then we shall return to the 4th of September, when Mrs. Harwell swears he came back to Wolverhampton.

Mr. Hauses. When did you see Mr. Ireland, Mr. Pendrel?

Pendrel. I saw him upon the 2d of September.

Att. Gen. Where did you see him?

Pendrel. At Boscobel at my house, there he lodged with me that night.

Sol. Gen. In what year was it?

Pendrel. In the year 1678.

Att. Gen. Was it the September before the plot, and before Mr. Ireland was executed?

Pendrel. Yes, my lord, it was.

L. C. J. Did you know him before?

Pendrel. No, I did never see him before, as I know of.

L. C. J. How long did he stay there?

Pendrel. He staid that night and the next day, all day, and went away the 4th of September to Black-Ladies.

Sol. Gen. Whose house is that?

Pendrel. It is Mr. John Gifford's.

L. C. J. You say you live at Boscobel; did you hear any thing of a letter came to your house for Mr. Ireland?

Pendrel. Not that I know of, my lord, there was not any that I remember.

Att. Gen. Then swear Mrs. Pendrel.

[Which was done.]

Sol. Gen. Pray, mistress, will you give an account where you saw Mr. Ireland?

Mrs. Pendrel. I saw him at Boscobel, at the Royal Oak; he came there the 2nd day of September.

Sol. Gen. Can you tell what year it was?

Mrs. Pendrel. It was the first beginning of the plot.

Sol. Gen. How long did he stay there?

Mrs. Pendrel. He staid Tuesday, and Wednesday he went to Black-Ladies, and so away to Wolverhampton.

Sol. Gen. We have but one witness more, my lord, for Wednesday the 4th of September, and then we have done. Swear Mr. Charles Gifford. [Which was done.] When did you see Mr. Ireland?

Mr. C. Gifford. May it please your lordship, I saw Mr. Ireland at my father's house at Black Ladies—

Oates. My lord, I would ask Mrs. Pendrel a question before she goes: whether she was not a witness at the five Jesuits Trial?

Mrs. Pendrel. I was in court, but they would not suffer me to swear.

Oates. Did she not give evidence there?

L. C. J. She was examined, but she could not be sworn, because she came to testify against the king in a capital cause.

Att. Gen. Pray, what say you, Mr. Charles Gifford?

C. Gifford. My lord, I say I saw Mr. Ireland at my father's house at Black-Ladies, and he staid there an hour and an half, and went through Chillington, and said he would go to Wolverhampton.

Att. Gen. What day of the month was it?

C. Gifford. I am morally certain it was the 4th of September, and so he went to Wolverhampton, as I am informed. He came to our house to see a lady that was there.

L. C. J. What lady was it?

C. Gifford. It was one madam Wells.

Att. Gen. Thus, my lord, we have lodged him the 4th of September at Wolverhampton, when Mrs. Harwell says, he returned to her; and so, my lord, we have given an account where he was from the 3d of August to the 14th of September.

Sol. Gen. We have proved where he was every day in that time, but only the 8th of September, and for that we must leave it to the jury. We have proved that he came away from Mrs. Harwell's the 7th, and he said he was to go to Tixhall; and the 9th he did go from Tixhall in sir John Southcoat's company, and came to London the 14th.

L. C. J. Well, what say you to it, Mr. Oates?

Oates. Has Mr. Attorney done his evidence, my lord?

Att. Gen. We shall call no more witnesses, unless you go about to support your own credit, and then we have other witnesses to call.

Oates. I do not value any witnesses you can bring against my credit.

Att. Gen. Well, for the present, we do not desire to call any more witnesses.

L. C. J. Then let us hear what you say to it.

Oates. My lord, here is an indictment exhibited against me, which sets forth, that I should swear at Mr. Ireland's Trial, that Mr. Ireland was in town the 1st and 2d of September; and it sets forth, that in truth he was not in town: and likewise it sets forth, that I swore at the trial of the five Jesuits, that Mr. Ireland took his leave of me and others here in town at his lodging in Russel-street, between the 8th and 12th of August: whereas the perjury there assigned, is this, That he did not take his leave of me, or any other person, betwixt the 8th and 12th of August, at his lodging in Russel-Street. Now, my lord, I was not the only witness of Mr. Ireland's being in town in the month of August, nor the only witness of his being in town, about that time in September. My lord, my prosecutors have endeavoured to maintain this charge against me thus: the first thing they have gone upon, as far as I can remember in the indictment, is as to the 1st or 2d of September, or rather, they have endeavoured to prove both under one. Now, in answer to all this evidence, my lord, the first thing I shall offer to your lordship's consideration, and the consideration of the jury, is the great hardship I lie under, after six years time, to be put to disprove what the counsel here have now offered against me. My lord, I observe first, that this indictment, which is now upon trial, is founded upon the trial of Ireland, which was the 17th of December 1678, at the Old-Bailey, and it is now six years after that evidence of mine was delivered. A second thing is, that the indictment is found by special commission, as appears by the indictment itself. Now, I must recommend to the consideration of your lordship and this jury, why the prosecution of this pretended perjury has been

delayed so long, when it appears by the evidence which has been produced, that the witnesses to prove it were known six years since, as much as they are now; and there is no colour of evidence offered, that any new fact has been lately discovered which was not then known. There is no reason, my lord, that is assigned, or can be assigned for this delay, but only that the hardship might be the greater upon me: for now it is difficult, if not impossible for me to maintain the evidence I then gave, so many persons being since dead, or gone beyond the seas, and many things that were fresh then, are now grown out of memory; and I beg your favour to insist upon this, and I think it cannot be denied me. If such a practice as this be admitted, no witness is safe in giving his testimony against any conspirators whatsoever. For, my lord, I must desire leave to offer another thing to your consideration, before I speak to the particular evidence, and that is this: That here is nothing but a bare point of time upon which this perjury is assigned; when the substance of the testimony that I gave at the trials of Mr. Ireland and the rest, about the Popish Plot, is not assigned as any perjury at all; it is only a circumstance of time and place. And, my lord, I shall offer this to your further consideration, that Ireland was convicted for a treasonable resolution to murder the late king, and not for being in town in August or September 1678, or elsewhere; and he was not convicted for his being in his chamber in Russel-street, and taking his leave there in August, which is one matter of the perjury now assigned. Next, my lord, 'tis hard and unreasonable to tie up witnesses that come to discover plots and conspiracies, to speak positively as to circumstance of time and place, and every little punctilia in their evidence, to bind them up to such niceties in the delivery of their testimonies, as to time and place. It is usual to speak with latitude as to such kind of things, and 'tis probably my evidence which is now in question, was not that Ireland was the 1st or 2d of September positively here in town; but, my lord, I did, I believe, give myself a latitude, and would not confine myself to either the 1st or 2d, 5th, 6th, 7th, or 8th; but my lord, that he was in September there, I am positive. I must therefore beg your lordship's and the court's opinion, whether that Mr. Foster did prove that I was positive and precise to the days of the 1st and 2d of September 1678?

L. C. J. In my opinion it is a plain evidence that you did swear positively to those two days; and you spoke to a circumstance very material in your evidence, that either the 1st or 2d of September you had 20s. of him in town here: now that circumstance of his kindness to you, was not a circumstance either of time or place.

Oates. Then, my lord, I shall begin with my proofs: but, my lord, I desire I may have free liberty to mind my business; for here is a gentleman behind me that will not let me be

at quiet, but is either meddling with me or my papers.

L. C. J. Who is it? Let me know him, and I will take care to make him quiet, or set him farther off. You, gentlemen, that are at the bar should know better, one would think: he must have liberty to make his own defence; and if he complains and lets me know who meddles with him, they had better do somewhat else.

Oates. My lord, the first thing that I offer, is, that Ireland was convicted of treason, and for that you have the Record.

L. C. J. It is allowed of all sides, that Ireland was convicted and attainted of treason.

Oates. Then, my lord, the principal defence which, as near as I can remember, Mr. Ireland made at his trial, was an endeavour to prove that he was not in town between the 8th and 12th of August, nor the 1st and 2d days of September, which are the points now in issue; and he then produced one Mr. Gifford, and his sister and mother; and 15 or 16 witnesses were produced at Mr. Whitebread's trial, of which there is another record, that being six months after Mr. Ireland was tried: there Mr. Whitebread produces several witnesses, Mr. Gifford, I say, and several others, I think, to the number of 16, which were to prove Ireland's being out of town in these times that these witnesses speak of. Now, my lord; all those several witnesses being produced to prove Ireland then out of town, the very point that is now in issue, was then so; and notwithstanding all those witnesses, the jurors who tried Mr. Ireland, and the jurors who tried Mr. Whitebread and the other four jesuits, found them guilty; though they endeavoured with all their force imaginable to oppose my testimony, and it was left to the consideration of the jury what their witnesses had said. If your lordship pleases to remember, my lord chief justice Scroggs did observe to the jury, that the evidence of the prisoner at the bar did consist only in punctilios of time; which, as near as I can remember what he said, he called a nicety of time; and in Whitebread's trial he was pleased to call it catching in point of time. And it was observed at Ireland's trial, that his defence was so weak, that my lord chief justice Scroggs, upon the integrity of Bedloe's evidence and mine, uses these words to the jury (though he then endeavoured to do what these witnesses do now): It is most plain the Plot is discovered, and that by these men, and that it is a Plot, and a villainous one. Which shews not only the fullness and satisfactoriness of our proof that we gave, but does also take notice of the little shifts and catching tricks he made use of to prove himself out of town; which would not weigh with the court. Therefore, I observe, it is but the same objection that then was made, and is not a new one now. And my lord chief justice that then was, speaking of that proof he brought (which the court heard with patience, but could easily see through the vanity

of it), said, What arts they have of evading this, I know not; for as they have turned their learning into subtilty, so they have their religion too. All this is well remembered by those that were by, and heard that trial: and though Ireland laboured to disprove me in that circumstance of time, yet still the court did justify the evidence that Mr. Bedloe and myself had given. And the same chief justice said, I leave it to you to consider, whether you have not as much evidence from these two men as can be expected in a case of this nature? And whether Mr. Oates be not rather justified by the testimony offered against him, than discredited? This was after his plea was debated and considered: and I must further observe to your lordship, that though Mr. Ireland by his false witnesses pressed this matter as far he could then, and urged the court to believe it; yet when the jury brought in their verdict and found him guilty, the chief justice expressed the satisfaction of the court in these words: You have done, gentlemen, like very good subjects and very good christians: that is to say, like very good protestants: and now much good may their 30,000 masses do them. This, my lord, was the case of Mr. Ireland, at his trial; and the same point of his being out of town was again managed before a second jury at the Trial of the Five Jesuits; but the court saw the design of the popish party to blemish the evidence given of the Plot; but yet they looked upon it only as a trick. And my lord chief justice Scroggs, in summing up the evidence at that trial, says, They fall foul upon Mr. Oates, meaning myself; he appears to have been their agent, and whilst so, bad enough: but if he had not had a mind to become a good man, he would not have done us that good he has done, in the discovery of the design they had engaged him in. And if your lordship please to remember, that at that Trial of the Five Jesuits, when all arts were used to prove Ireland out of town, and me at St. Omers, in the same charge to the jury, my lord Scroggs did take notice that the jesuits were very exact at catching in a point of time; but now says, that is a thing that no man can precisely charge his memory withal; and therefore he does there persuade the jury, that that should not be too strictly the measure of their judgments about truth and falsehood, by the mistake of seven or eight days: for, said he to the jury, examine yourselves how often every day you do mistake things that have been transacted half a year ago, and err in point of time, taking one week for another, and one month for another; and therefore you are not to lay too great a weight upon the point of time. Now, if too great weight, my lord, be not to be laid upon a point of time, then this charge that is now brought against me is not of weight at all. And besides, my lord, this ought to be considered, if this were the great objection then, and then answered, it ceases to be an objection now. And, as the court did observe at the summing up of the evidence.

that they made their defence about the uncertainty of a point of time, which was no defence at all; so that, my lord, the whole course of my plea is this: 'Tis a hard case for a man, after six years, to be indicted for a circumstance of time. I will first offer the testimony of one witness that is dead, and that is Mr. Bedloe, who at his death confirmed all that he had sworn of the Popish Plot to be true, and affirmed that he had rather spoken less than the truth, than more; and for that I desire that my Lord Keeper may be called, who took his dying Examination.*

L. C. J. As for that, Mr. Oates, it is a thing very well known to the world, and particularly to a worthy gentleman that sits by you, [pointing to Mr. North] that Mr. Bedloe, when he was sick, did make some such protestation.

Oates. Then, my lord, I desire that Mr. Blaney may be sworn, to give an account, what Mr. Bedloe testified at Ireland's Trial.

Then Mr. Blaney was sworn.

Oates. Mr. Blaney, pray will you see in your Notes of Ireland's Trial, whether Mr. Bedloe did not swear that Mr. Ireland was in town, the latter end of August 1678, or the beginning of September?

Mr. Blaney. Whereabouts in the trial is it, Sir?

Oates. It is in the printed trial, folio 41.

Mr. Blaney. My lord, I do find these words in my notes, that Mr. Bedloe should say, about the latter end of August, or the beginning of September, but I believe it was the latter end of August, Mr. Ireland was at Harcourt's chamber, and being asked the question by my lord chief justice Scroggs, whether he said positively, it was the latter end of August; he said it was in August, he could not be positive to a day, but he thought the latter end.

L. C. J. 'Tis very well known too, that Bedloe did swear Ireland was in town the latter end of August, or beginning of September; and to confirm it upon Mr. Ireland's denial, you swore he was in town the 1st or 2d of September; and gave you 20s. that was the occasion of your oath.

Oates. Then, my lord, I desire to call some witnesses to testify to the Deposition that was taken of Mr. Jennison, about Ireland's being then in town.

L. C. J. When was that Deposition taken, and before whom?

Oates. It was taken in the year 1679, by sir Edmund Warcup.

L. C. J. But we cannot admit that in evidence, unless the king's counsel will consent.

Oates. My lord, I will then produce what he swore at another trial.

L. C. J. Why, where is he? Is he dead?

Oates. My lord, it has cost a great deal of money to search him out; but I cannot any more meet with him, and that makes my case so much the harder that I cannot, when I have

done all that men can do to get my witnesses together. I sent in the depth of winter for him, when I thought my trial would have come on before; but I could never hear of him.

L. C. J. We cannot help that.

Oates. Will what he said at any other trial be evidence here?

L. C. J. Look you, though in strictness, unless the party be dead, we do not use to admit of any such evidence; yet if you can prove any thing he swore at any other trial, we will indulge you so far.

Oates. Have you the Record of sir George Wakeman's Trial there, sir Samuel Astry?

Att. Gen. Here it is; if Mr. Oates have any use for it, we will lend it to him.

L. C. J. Put it in; and now prove what you can, what Jennison swore at that trial.

Oates. Mr. Blaney, have you your Notes of sir George Wakeman's trial here?

Mr. Blaney. No, Sir, the ticket of your subpoena did only mention Ireland, Whitebread, and Langhorn's trials. But I did formerly upon another occasion look for the trial of sir George Wakeman, but could not find it among all my notes.

Oates. Sir, can you remember then what Jennison swore at that trial, about Ireland's being here in town?

Mr. Blaney. Truly, my lord, I can never trust my memory at all when I take notes; and it is now so long since that trial, that I dare not undertake to say I remember any particulars of it.

L. C. J. He says it is so long since, that he cannot remember any thing. But there is sir Edmund Warcup now; is he sworn.

Crier. Yes, my lord.

L. C. J. What do you ask him then?

Oates. I would desire to examine sir Edmund Warcup, my lord, about the deposition of Jennison, that he took.

L. C. J. But we tell you that cannot be admitted as Evidence, without they will consent to it on the other side.

Oates. My lord, he proves Mr. Ireland here the 19th of August, and that contradicts these witnesses.

L. C. J. If they will admit it, well and good; else we cannot do it.

Att. Gen. My lord, we will be so fair with Mr. Oates, if he will admit Mr. Jennison's letter, that is under his hand, wherein he does own that he was mistaken in his whole Evidence about that matter, we will consent his deposition be read.

Just. Withins. If he will not consent to that, there's no reason you should consent to the other, Mr. Attorney.

L. C. J. Look you, Mr. Oates, Mr. Attorney makes you this offer; you desire to have Mr. Jennison's depositions read, which cannot be done without their consent; they tell you they will consent, if you will let them prove what he has owned since about that business.

Oates. My lord, I will consent with all my

* See vol. 6, p. 1493.

heart; let them read any letter under his hand.

L. C. J. Well, do it on both sides by consent; and now, Mr. Oates, do you produce his examination.

Oates. Pray, sir Edmund Warcup, will you please to give the Court an account what deposition Mr. Jennison made before you, about Ireland's being in town in August 1678?

Sir E. Warcup. If my lord commands me, I will.

L. C. J. Ay, you must answer his question.

Sir E. Warcup. This Mr. Jennison did make one information before me, and according to the duty that was incumbent upon me, I delivered it in to the king and council, and there it has lain ever since; for me to remember the particulars of it, is impossible.

L. C. J. Have you his examination here, Mr. Oates? If you have, shew it him.

Sir E. Warcup. If I see my hand to it, attesting it was sworn before me, I can say somewhat to it.

Oates. My lord, he says he delivered it in to the council; but it is printed.

L. C. J. That is no evidence, man.

Sir E. Warcup. I can say nothing to it, unless I saw it under my own hand.

Oates. That is impossible for me to have, my lord.

L. C. J. I cannot tell how to help it.

Sir E. Warcup. You have no more to say to me, Sir, have you?

Oates. No, Sir, I have not. Pray call Sarah Batten.

Att. Gen. Is that the same that was Sarah Paine?

Oates. I think so, Sir; I am not sure it is she, till she come hither.

Cryer. Here is Sarah Batten.

Oates. Pray swear her, and call Sir Thomas Doleman. [Which was done]. But Sir Thomas Doleman did not appear.

Oates. Pray was not your name Sarah Paine?

Batten. My lord, I desire my charges before I speak.

L. C. J. What is your name, good woman.

Batten. My name is Sarah Batty.

Oates. Was not your name Sarah Paine, once.

Batty. No, My maiden-name was Sarah Edmunds.

Oates. Was not you a witness at the trial of Mr. Ireland? *Batty.* No, Sir.

Oates. Did not you live with lord Arlington?—*Batty.* No, Sir.

Oates. Then I have been at all this charge for nothing. Are you sure your name was not Sarah Paine?

Batty. No, indeed, Sir.

Oates. They told me that she lived at Uxbridge, and thither I sent.

Batty. I do live at Uxbridge, Sir.

Oates. Upon your oath, were you a witness at any of the trials, or no?

Batty. No, my lord, I was not.

Oates. Then I have nothing to say to her.

L. C. J. What other witnesses have you to call?

Oates. We have laboured all we could to find her out, and searched for her with all the care imaginable; and here we thought we had had her, but it seems it is not she.

L. C. J. We cannot help it.

Batty. I hope, my lord, you will consider my charges in coming up hither.

Oates. I will take care of thee, sweet-heart.

L. C. J. Who do you call next?

Oates. Pray call Mr. Charles Clare.

Cryer. He is not here.

Oates. Pray call Mr. Percival, my lord, I desire Mr. Blaney may give an account what she swore about Ireland's being in town, seeing I cannot have her here.

L. C. J. That we cannot do neither, without Mr. Attorney will consent: for this as well as the other is an extraordinary thing.

Oates. You see by my bringing this witness, my lord, that I have done what I could to find her out.

L. C. J. What say you, Mr. Attorney, will you consent?

Att. Gen. No, my lord, it is so irregular, that we cannot consent to it.

Oates. Pray call Mr. Percival and Mr. Vaughan.

Cryer. They do neither of them appear.

Oates. Then I must lose the benefit of her testimony.

L. C. J. Have you done?

Oates. No, my lord, I will have done immediately.

L. C. J. Take your own time.

Oates. I desire sir Michael Wharton may be called.—*Cryer.* He is not here.

Oates. Pray call Mr. Charles Chetwind.

Cryer. He is not here.

Oates. Pray call Mr. Robert Bowes.

Cryer. He is not here.

Oates. Pray call Mr. John Saville.

Cryer. He is not here.

Oates. My lord, I have served all these with subpoena; and if they will not come, I cannot help it.

L. C. J. Nor we neither.

Oates. Mr. Jennison was used as a witness in the trial of sir George Wakeman, and so was Mr. Bowes, and Mr. Burnet, who was produced to prove the circumstance of Mr. Jennison's evidence: but, my lord, since I cannot have the benefit of his evidence, nor of Sarah Paine's, I must only stand up all I have to say in two or three words. My lord, besides that what I did deliver in evidence at those trials, I gave in upon oath; you have Mr. Bedloe's evidence at the trial of Ireland, testified by Mr. Blaney: and the testimony of him as a dying man, given in to my now lord keeper, wherein he averred, that what he had spoken of the plot, was all true. And you hear that he swore, Mr. Ireland was here in town in August, and so did Sarah Paine too; and I think upon myself as very hardly used, to have such a part of my testimony brought

in question, after witnesses are dead, or gone out of the way. As for Mr. Jennison, his evidence was formerly made use of; and his evidence was approved of too, as is well known to those that sat judges upon the late viscount Stafford. But this is that, my lord, I must needs say for myself, that as I hope to see the day of salvation in another world, whatever I have sworn about Mr. Ireland's being here in town betwixt the 8th and 19th of August 1678, and in the beginning of September, is true, as I shall answer it before God another day. And, my lord, as to the evidence this day brought against me, I desire you would but observe, though that there are many of those witnesses, yet a great part of them do not come up to the 8th or 19th of August: And I hope your lordship, will remember and remark to the jury, what little credit those of them had that came to testify in the behalf of Mr. Ireland at his trial, and at the Five Jesuits Trials, of which there are two records before you; and they do first justify this, that Ireland and the rest of them were guilty of what they were accused of; and then, that these witnesses did not testify the truth.

Besides these two trials, my lord, you have a third verdict, and that is at the trial of Mr. Langborn: now the whole Popish Plot almost was laid forth in those three trials; and, my lord, I believe verily I am the first precedent in all England, of any one's being indicted for perjury, that was a witness for the king in such a case, as this, after six years time elapsed; after verdict upon verdict, and judgment and execution upon these verdicts; and when no new objection is now offered, but what was then started; and no new circumstance occurs now, but was as forcible then, except it be the change of the season. And I desire it may be considered, when all the judges of England were commissioners of Oyer and Terminer at those trials, these matters were fully discussed and debated; and then they did look upon all the objections as fully answered and confuted.

My lord, I am confident if I had been a witness in any other cause, than of a conspiracy of the Papists, I might have had fairer quarter than I have now; and I do verily believe, that at this rate it is more safe for Papists to be traitors, than for any Protestant to discover a Popish Plot.

My Lord, and Gentlemen of the Jury, I beseech you to take my case in your serious consideration, as to the hardship of it; and since all my witnesses are in places unknown, or they are such as, considering the times, dare not appear, some of them being lawyers, and under fear they shall fare the worse in their practice; and others being persons that depend upon the law, and think they shall be looked ill upon, as I am now looked upon with a hard eye by the Popish Party and their adherents: yet I hope, you that are sworn to do justice, will not let me be ruined by a number of false witnesses, by the evidence of papists that are parties. For if your lordship please

to consider that Vote of the Lords House, which is a court of Record, wherein they do declare, that they are fully satisfied by the proofs they have heard, that there then was, and for divers years last past had been a horrid and treasonable plot and conspiracy, contrived and carried on by those of the Popish religion, for the murdering of his majesty's sacred person, and for subverting the Protestant religion, and the ancient and established government of this kingdom; which vote of parliament, my lord, does make the papists to be all parties in this case; and where they are parties I hope they shall not be admitted as evidence, or at least not be believed; because there is a turn to be served by them against me, and a revenge they are resolved to take upon me; for they have hopes now of bringing in their religion, and are to welcome that in with my ruin; and this is the cause of this prosecution. Their eyes do see now what their hearts so long desired, that is, the death of a great man, who died but lately, and against whose life they had conspired so often, and so long. My lord, if this had been the first conspiracy that ever the papists were guilty of, there might have been some more scruple and objection in the case: but if you cast your eyes upon Campian, and others in queen Elizabeth's time; of Garnet, and the Powder-Jesuits in king James's time; and the designs of the Popish party in the time of the late king Charles the first, discovered to the archbishop of Canterbury: if these things do pass for truth, and there is no averment against so many records as we have of their conspiracies, then my discovery is no such improbable a thing; and I hope then the gentlemen of the jury will take it into their considerations, who they are that are witnesses in this case; men whose very religion is rebellion, and whose principles and practices are pernicious to the government, and thereby they are to be looked upon as dangerous persons in church and state. But, my lord, if the letters of Coleman be well considered, they will justify me. That he corresponded with Le Chaise the French king's confessor, for the promoting of Popery in England, is notorious to all mankind that have either read or heard that trial: your lordship was of counsel for the king in that case, and heard how it was opened, and plainly proved upon him. And when his letters have been made so public, and proved under his own hand, nay, and confessed by himself; I think no man will doubt but that must be a plain proof of the plot, and enough to vindicate me.

My lord, I have one word more, and then I have done, and leave it to your lordship, and the jury. My lord, as they would now fling the Popish Plot upon me, so there is an evident design to fling the murder of Godfrey upon a Protestant Peer; and because an Indictment was, upon the testimony of the traitor Fitzharris, against that noble lord, they have resolved to have profligate villains to take his life for that murder: that is apparent; and so

they will go on step by step, if they be let alone; and think at length to wipe their mouths with Solomon's whore, and say, they have done no mischief. My lord, I leave these things to the consideration of the court and jury: I will not detain you any longer. I have called what witnesses I could get; but the distance of time has made it impossible for me to have those here now, that did give evidence in this matter before.

My lord, I have one favour to beg of the court; I had but a bad night last night, and am now in great pain; I desire that you would grant me one request, that I may have counsel assigned me, to argue the errors in yesterday's Indictment: my lord, I am but a poor man, and cannot be at the charge of seeing counsel.

L. C. J. We did assign you counsel before, you may have who you will for counsel.

Oates. Will your lordship be pleased to do me the favour to let me have some time to prepare and instruct counsel?

L. C. J. Ay, what time would you have?

Oates. A week's time, if your lordship please.

L. C. J. Give him till this day seven-night, there may be no hurt in that.

Oates. Till Monday come seven-night, if your lordship please, let me have.

L. C. J. No, no, we cannot do that; we give you a week's time, which is more than ordinary: for by the rules of the court there are but four days allowed, and those would be out Monday or Tuesday.

Oates. I thank your lordship for that time you have given me; but I hope you will be pleased to take the particulars I have mentioned into your consideration; and I desire I may have liberty to go home, because I am not well.

L. C. J. Ay, you may go, if you will.

Sol. Gen. May it please your lordship, and you, gentlemen of the jury, the question that you are to try, is a perjury, which is charged on the defendant Titus Oates, for swearing that William Ireland was in town upon the first or second of September 1678. And likewise, for swearing, that he took his leave of him at his chamber in Russell-street, between the eighth and twelfth of August 1678. And we do assign the perjury in both those points, that he is forsworn in both; and the evidence of that perjury is, that it is impossible to be true what Oates did swear, because Mr. Ireland was not in town between the eighth and twelfth of August, nor the first or second of September.

Gentlemen, you have heard the evidence that has been given, and there has been no less than between forty and fifty witnesses produced, to shew that it is really impossible what Oates did swear should be true: he tells you that this matter is in a circumstance of time, wherein it is difficult for a man to be positive to a day, and a man may be allowed some latitude in such a case; nay, it is usual with witnesses in points of time, to swear with a latitude. But,

my lord, to shew that, if we should grant the false doctrine to be true (and false most certain it is, and of mischievous consequence it would be, if, when things are charged upon men, that depend upon circumstance of time and place, the witnesses should not be strictly kept to those circumstances), yet, I say, granting that position, it is impossible it should do him any service in the case before you: for between the beginning of August, and the 14th of September, which includes both the times he swears to, (and the latitude of above twenty days to boot) there is not any one moment of time, wherein his oath could be true.

Gentlemen, you observe what the witnesses have said, how they have given you an account of every particular day of both months, from the 3rd of August, when he first left London, to the 14th of September, when he returned back again: we did ask the witnesses, that it might appear to be plainly true what they swear, if they had any particular circumstances that made them to remember it; and they have given a great many, and now it lies upon us to shew you that it is demonstration, that what they have said and testified must be true; and that those days they speak of, he was in the places they named.

For take the periods of time, and you will find you have him from the 3rd of August to the 16th, with my lord Aston, going from London to Tixhall; upon the 17th they give you an account of him at Mrs. Harwell's to the 26th; from the 26th to the 4th of September, there are others that give you a particular account, by remarkable circumstances, where he was every day in Staffordshire; from the 4th to the 7th you find him at Wolverhampton. For the 8th indeed, we do give no particular account where he was that day; but we prove that upon the 9th he was at Tixhall, and from thence he came away with sir John Southcoat towards London; and there you have a particular account where he was, every day till the 14th, when he returned to his lodging.

And now, gentlemen, I shall shew you, that if you believe these witnesses saw him in these months; that certainly it was upon those days they speak of that they did see him.

First, That he went out of town in August, you have these witnesses, Anne Ireland, Eleanor Ireland, Mrs. Duddle, Mrs. Quine, and my lord Aston. Well, how come they to remember it was upon the 3d of August? Why the four women remember it by this particular remark; three days before there was a holiday, which they keep in memory of Ignatius; and upon that day they remember Mr. Ireland went abroad to take a recreation, and came home again that night, though the rest of the company staid there; because he was to go out of town upon the third day after, which must be the third of August; for Ignatius's day, you hear, is always the last of July. And they do positively swear, that upon the 3d of August, he took his leave of Anne Ireland and Eleanor Ireland. Mrs. Duddle remembers

that he went out that day. Mrs. Quino, whose husband was his taylor, says, he did stay a litle to have somewhat in his clothes mended; and she saw him in his boots, and he said he was to go out of town. Mrs. Anne Ireland says, they took the liberty to lodge a gentlewoman in his chamber, and saw him not again till a fortnight before Michaelmas: And that he did go out of town upon the 3d of August, is further proved by my lord Aston, who noted it down in his book at that time, that Ireland came to his house at Standen in Hertfordshire; so that here is as strong an evidence as can be, that he did go on the 3d of August, and that they remember it to have so been, by all the circumstances that can be imagined.

Well, the third of August he went out of town. The 4th of August we give an account where he was: he staid that day with my lord Aston at Standen. The 5th of August he set out with my lord Aston's company, and went to St. Albans. The 6th he went to Northampton. The 7th to Coventry. The 8th to Tixhall; and the company that went with him proves it, which was Sir Edward Southcoat, and Mr. John Southcoat; and Harrison and Hobson who saw him go in the company; and Mr. North, who says he saw him every day; and Ingletrap, the coachman that drove the coach: all these remember it positively, and some of them speak of a remarkable pretty horse, which he rid upon.

Now when he comes from Tixhall, (for we have brought him hither by manifest proof, by men that could not forget, by men that saw him in the company,) there he remained (as they all testify) till the 13th of August, and that was the Tuesday after his arrival at Tixhall; and from thence he went that day a journey into Flintshire, to Holy-Well; and that is proved by the witnesses that were in his company in that journey. They tell you, the 13th he lay at Nantwich. The 14th at Holy-Well. The 15th at Chester. And the 16th he came back again to Tixhall. And so here you have abundance of witnesses, that give you a particular account where he was, in what company they saw him, from the 3d of August to the 16th. If he were then in this company from the 3d to the 16th, he could not be in his chamber in Russel-street, between the 8th and the 12th.

Then we came to the 17th, and then we find him to be at Wolverhampton, where he continued to the 26th; and that it must be between the 17th and the 26th, is plain: For after that time which Mrs. Harwell speaks of, the other witnesses give such circumstances, that it cannot be otherwise. You find him on the 27th at a horse race, which is a remarkable circumstance; and these are things that men do very well remember what days of the month they happen upon. We then give you an account of the 29th; that at Tixhall he was seen in company upon the bowling-green with persons of quality; Sir Thomas Whitegrave, and

others: so we give you an account where he lodged. The 28th he was at Bellamore. The 29th he went to Mr. Heveningham's, there he lodged till the 1st of September; and this is remembered by particular circumstances, that he went a fishing, and a setting, and a hunting. Then the next day, which is the 1st of September; and the next day after, the 2d of September, they saw him at Mr. Gerrard's; he dined upon the 2nd at Mrs. Crompton's, and lay at Boscobel; there he continued the 3rd, and the 4th he came to Wolverhampton again.

So that this shews, that what Mrs. Harwell did speak of, was true; for if Mrs. Harwell did see him; as it is not at all doubted but she did, it must be in that interval of time between the 16th and the 27th; where we give you an account of him by other undeniable circumstances, that he lodged at other places, and could not lodge at her house at Wolverhampton.

Besides, gentlemen, the particular circumstances that they do remember him by, proves it to be on those days. Mrs. Harwell gives her positive oath, that he did come there the 17th, and lay there every night to the 26th, which was on the Monday seven-night after; and that he came again the 4th of September after, and lay there till the 7th.

Then there is Rushton, another witness, that saw him at her house the 18th, 19th, 20th, 21st, 22d, and 25th. And, I say, it must be those days, because we have given an account, by other witnesses, of all the other days. and it must be that very time that Oates speaks of; for it was the summer before Ireland was apprehended and executed for the plot, which was Michaelmas 1678.

Mr. Winford, he remembers him at Wolverhampton, the 18th, 19th, 22d, and 24th.

Stanley remembers the 18th and 19th; and if you ask him how he remembers it, he tells you, by a circumstance that most men would remember; he buried his child that day, and entertained Ireland with the provision for the funeral. Now men usually remark such accidents as these: for that is a thing a man cannot forget, that has any concern in the world for those that are so nearly related to him; and therefore such circumstances must of necessity evince the truth of what he speaks, because it is brought to his mind, by an accident that cannot be forgotten.

Mrs. Purcell, which is the next witness; and she remembers to have seen him the 18th, 19th, 20th, 21st, 22d, and 23d; for she remembers the last of them was the day before Bartholomew-day, which was a remarkable day.

Then there is another man, that looked to his horse whilst he was there, but his memory will not serve him to speak to any particular time; he only evidences, that he was there; and the other witnesses speak to the time.

Mr. Stamford, he remembers it to be at that time, because he saw him on the Sunday after the Assumption of our Lady, which is always the 15th of August: and the like says Mrs.

Gifford. These circumstances verify her testimony.

And Mr. Gifford remembers, he came on the 17th day; and he saw him every day, till the 26th day.

And Mrs. Fowler, who is Mrs. Harwell's daughter, she remembers he came the 17th day; and she was in his company every day, till the 26th, except one day, when he went to Litchfield; that was the day before Bartholomew-day, which was Friday.

Mrs. Keeling, she swears, that upon the 17th day he came there, which was Saturday. She saw him on the Sunday, and on the Monday; and went on the Monday in the afternoon, to the funeral of her mother, which is another circumstance that she must needs remember; and, by that, has the remembrance of the day of the month when he was there: and she returned back again on Thursday, and heard him that day, but did not see him. But she saw him every day after, till he went away; and she remembers his going away was upon the 27th. And she remembers likewise, that he returned the 4th of September after.

Mr. Richardson, he proves, that he saw him upon the 19th day of August at Wolverhampton; as he was told, it was he: and being asked, when he was told so? He says, Mrs. Harwell told him so some time before he was apprehended; so that she could not tell it him then, to serve a turn. And he is a Protestant too.

So is likewise Eleanor Graves; who gives you an account that she saw him there on the 20th, 21st, and 22d; and on the 23d, she went to Litchfield with him; and upon the 25th, she suppd with him at Mr. Winford's.

Now, gentlemen, you have a full account of it, even to a demonstration, that he must be in these places at this time, if you will believe one thing, that is, that these witnesses saw him at all. And sure none can doubt but these witnesses did, upon the circumstances they have testified, see him in August and September: and then it must be those particular times, that they speak of.

At Wolverhampton then you have him to the 26th: The 27th day, you have an account of him at the horse-race at Etching-hill. The 28th, Mr. Howard gives you an account, he dined at Bellamore, at Mr. Aston's. The 29th, you find him at the Bowling-green at Tixhall; and from thence to Mr. Heveningham's, where he lodged that night, and staid there the 30th; which is proved by the circumstances of fishing in the morning, and setting in the afternoon. And the next day, which was Saturday the 31st, you hear he was at the killing of a buck, where Mr. Gerrard was expected, but sickness prevented his coming. And you have him the 1st of September, which was Sunday, at Mr. Gerrard's house, where several of the witnesses did see him.

And besides, one Proctor tells you, he saw him the 31st of August at Fulford, at Mr. Lowe's. And he very well remembers that to be the time, by a remarkable circumstance:

For (says he) the last day of August I went to pay some money, (which is a thing men are generally very punctual in) and when I came home again I found him there. And he swears he saw him at Mr. Gerrard's house, the 1st of September, the day after.

Mr. King remembers he saw him at Mr. Gerrard's, of Hildersham, the first of September; and that he dined at Mrs. Crompton's the second of September; and staid there till two of the clock in the afternoon; and went from thence, with an intent to go to Boscobel.

Lee says, he saw him at Mr. Gerrard's house and at Mrs. Crompton's: that he dined there, and went from thence to Pancrass, and from thence to Boscobel.

Mr. Biddulph remembers he dined with him on the second of September, at his aunt's, and that by this circumstance, he was desired by my lord Cullen to see a horse-race in Northamptonshire; and promised my lord Cullen to come: which horse-race is always on a certain day, the first Thursday in September; and that year it happened to be the fifth of September: and it was the Monday before, that he dined at his aunt's: and because of his promise to my lord Cullen, he would not stay all night. And so it must be the second day of September that he saw him there.

Mrs. Crompton says it was the same day that her nephew, Mr. Biddulph, dined there: for he was a stranger, and she never saw him before, nor after.

And there is another gentlewoman, Mrs. Palmer, that swears, he dined at Mrs. Crompton's: but she cannot tell the particular time when.

Mrs. Gifford saw him at Pancrass, between the hours of four and five in the afternoon, upon the second of September: and Lee went along with him to Pancrass; and from thence he went to Boscobel.

Mr. Pendrel says, he saw him the second of September at night; for he came to his house. Which agrees with all that the other witnesses say, which was, that he intended to go to Boscobel that night. He and his wife both testify, that there he lodged upon the second of September; and staid there the 3d of September; and went from thence the fourth to Black-Ladies; where Mr. Gifford tells you he dined.

And we have given you an account before, where he was the fourth at night: for then he was returned to Wolverhampton; and there he lodged to the seventh of September. And after the seventh of September, though we do not give you a positive evidence, That upon the seventh of September, at night, or upon the eighth, he was at my lord Aston's; yet we have given you that which amounts almost to a demonstration, that he must be there upon the eighth of September. For he went from thence with sir John Southcoat, to go towards London, on the ninth. And our evidence is the more credible, because they swear cautiously all of them: unless they remember some remarkable

circumstance, they will not take upon them to
ix upon a particular time.

Then, gentlemen, we give you an account, by
he persons that were in his company where
e was every day, all along from the time he
eft Tixhall, down to the time he came to sir
ohn Southcoate's house in Surrey. And this
ourney took up the ninth, tenth, eleventh, and
elfth of September: there are four days; and
e staid there one day. Then he sold Mr.
outhcoate his horse. Mr. Southcoate lent
im his horse to come to town; and the next
ay he did come to town; and so we have
ought him to Saturday the fourteenth of Sep-
ember.

And now, let all the world be judge, if there
e any possible room left, that any one word
fr. Oates has said can be true; even giving
im the latitude of time he himself desires,
nd says all witnesses must be allowed. No,
here is not one minute for him, wherein he
an be verified in any one tittle of his evidence,
s to Ireland's being in town. And this is that
hich I call (and sure, well I may so call it)
demonstrative proof, that what Oates did
wear is utterly false.

Gentlemen, the jury had not this evidence at
be trial of Ireland: some there were that went
ut of the town with him; and some, one or
wo of Wolverhampton, were at the five Je-
mits trials; but not above five or six in all
f these forty odd, that now appear. True in-
ded it is, all these were not there; and Ireland
pon that, unfortunately suffered; for so I may
ake leave to say, it was unfortunately.

Mr. Oates has said one thing unto you,
hich he lays much stress upon: he would
ave you look upon it as a great hardship, that
his prosecution comes so late; and that it is
trange after six years time spent, this should
ow be set on foot.

But, gentlemen, I cannot but with much
orrow remember to you, and I know you all
remember it too well; that there was a time,
hen the city of London was so far corrupted,
hat it was become a refuge and a sanctuary
r high-treason; when there was no justice to
e had for the king there; when men lodged
hemselves within those walls, as a protection
r their conspiracies: we all remember the
me, when indictments were preferred, and a
lain evidence given to a grand jury, even to
be public satisfaction of all that heard it; and
et they have refused to find the bill: And not
ply so, but were so abetted by the rabble, that
was scarce safe for the judges to sit upon the
ench. These are things none of us can for-
et, but must be perpetually remembered to
e shame of the authors and contrivers of
eim: And therefore it is no wonder an indict-
ment was not preferred against Mr. Oates at
at time, when the plainest proof against cri-
minals could not be admitted. And this will
ive every man satisfaction, why it has been
slayed; and I hope, at the same time, give
very man a caution, how they fall into the
ke circumstances again.

But, gentlemen, you have heard the evi-
dence that is now offered, to prove this matter
of fact; and it is a plain demonstration, if you
will believe that Mr. Ireland was seen by these
men at all, he was seen at those very times
they have particularly declared: For upon
consideration of the circumstances, it is impos-
sible it should be at any other times; and so I
leave it to you to judge upon the whole, whe-
ther the defendant be perjured or no.

L. C. J. Gentlemen of the jury, this case has
taken up a great deal of time; but it is a case
of that moment and consequence, that sure no
time ought to be thought too long, that is em-
ployed for the discovering of the truth, so ne-
cessary to be discovered, as the matter now in
question. For as I said at the beginning upon
this occasion, and I cannot but say it again
now; I confess, I cannot without horror and
trembling, reflect upon the many mischiefs
and inconveniences we have been run unto, if
the testimony given this day in this cause
against Oates prove true, as I cannot in the
least imagine where there should remain the
least objection against the truth of it; I cannot;
I say, but bewail, that so many innocent per-
sons (to the reproach of our nation be it spoken)
have suffered death upon this account.

God deliver me from having the least stain
of innocent blood imputed to me! And it is
more to be lamented, when we see that impu-
dence, which has brought that infamy upon
our land, continues with a brazen face, defying
all shame to this day. But by this we may be
informed, how some men's consciences are
seared, and that there are some people that do
indeed live without the fear of God in the
world. For if that man, who has assumed to
himself the habit and character of one that
should preach to others religion, virtue, and
the things that become true christians, shall
become such a monster of impiety and impu-
dence, in defiance of heaven and earth; what
greater and more manifest proof can there be
of a seared conscience?

I cannot but lament likewise the wickedness
of our age, when I reflect upon the testimony
of that other wretch, (indeed I cannot use
terms severe enough for him) that when he
was going into another world, should persist in
such gross falsities; I mean Bedloe, infamous
Bedloe; and let his name be for ever infamous
to all mankind, that have any regard or defer-
ence for the truth; that he should with his
latest breath dare to affirm, that every word
he had said of the Popish Plot was true; whereas
it is as clear as the sun, by the testimony of
this day, that every word he swore about Ire-
land was utterly false. Good God of heaven!
What an age have we lived in, to see innocents
suffer punishment, and impudent falsity reign
so long!

Gentlemen, I hope all eyes are opened, (I
wish they had been so long since;) let us lay
the burden, the infamy and reproach of these
things, upon them that deserve it; for we can-

not but know, we are reckoned as a by-word to all our neighbours, and shall remain monuments of ignominy to all succeeding ages and times, if we do not endeavour to discharge ourselves and our religion, and the justice of our nation from these scandals.

Gentlemen, I think I am obliged, in the first place, to take notice of what Mr. Solicitor-general has mentioned, concerning the insolency of those times, wherein the faction was grown to that extravagant height, that, in truth, a man durst not appear, with safety of his own life and fortune, to testify the truth. And, is it not a shame, that it should be remembered, what one of the witnesses this day testifieth? That when he came to appear at the Council-table, to attest a matter of fact, before this innocent blood was spilt, (for so I must call it, if that which has been sworn this day is true) the rabble should be so boisterous, as to cry out, 'Where is that villain, that dares come to give evidence against Oates, the Saviour of the Nation?' Oh, horrid blasphemy, that no less an epithet should be given to such a profligate wretch as Oates, than that which is only proper to our blessed Lord! As though Oates had merited more than all mankind; and so indeed he has, if we take it in a true sense: He has deserved much more punishment, than the laws of this land can inflict.

And I must needs say, Gentlemen, that this is an instance, why there seems not to have been punishment enough ordained in law for perjury, because our law-makers did not foresee, that there could ever be such villains, such miscreants, as these.

We have indeed another instance in the law, of a crime for which there is no adequate punishment; and that is in the case, where a child kills his father: Parricide has no peculiar judgment assigned for it; but we are forced, because these things have been sometimes practised, by a construction in law, to make that child as a servant to his father, and so punish him with the judgment of petty-treason; but take him immediately as he is a child, and not as a servant, and I say there is no particular provision in law to punish such an offence: And, what is the reason of it? Because it is so unnatural, and against the imaginations of mankind to believe, there ever could be such a wicked child in the world.

If that be not to be imagined, how could it be imagined, that there should be such horrid villains, as should attempt the destruction of the government of three kingdoms? Good Lord! What times do we live in! Surely, it is such an age, as was never known from the creation of the world to this day.

And to this must be added, what aggravates the mischief, that all this is done under the umbrage, countenance, and pretence of law; the proceedings of law, the usual methods of justice, are made the instruments of the most horrid injustice. The murder of our late blessed sovereign, king Charles the Martyr, of ever-happy memory, though a crime as high in

itself as the law knows of; yet I may say, it was aggravated very much, that that unfortunate, but glorious king should be brought to the block, by a pretext of law, and cut off by a colourable method of justice; it is that which makes that murder ten times more base and infamous. So, gentlemen, the destruction of poor innocent persons, by false accusations, by the pernicious evidence of perjured witnesses in a court of justice, makes their crime infinitely more odious, than common murder.

Gentlemen, I cannot but speak with warmth in a case of this nature; and I the rather speak so, because, at the time when those things were done, we all know the nation was in a hurry, and a sort of ill-minded men had crept in among us, who had blown us up to such a height, that nothing but what complied with their malicious and devilish designs was to be believed; when the king could not get common justice done against real traitors; but the very streams of justice were all corrupted, though the fountain (God be thanked) was preserved pure.

When the factions (by cabals and intrigues) had got sheriffs of their own party, and laboured to get all other officers of their own wicked principles, then came all those mischiefs we so long laboured under. When those fellows that had so great a share in the late Rebellion, were the only fit men to be trusted with the government; and all the while were designing to destroy it, and to bring us into the same miserable condition we formerly were in.

Was it ever (I speak to you, Gentlemen of the Jury, citizens of London, who know its ancient constitution, and have too well experienced its late convulsions) was it ever known, till justice was designed to be corrupted, that there was any labouring to be sheriffs? No, endeavours were always used to be excused, and fines paid to get off from that office: and the reason is plain; for never was there a wise and wealthy citizen, that had a mind, out of a principal part of his estate, to squander away so much as is necessary to defray the charge of that office: but it was the design that those rascals had upon the government, that made them so greedy of those places; and they thought they had now an opportunity to effect their design, upon these fellows pretended discovery. They believed, that because we were hurried into the mischiefs of the late times, by pretences of Popery, the same bait would be swallowed now: therefore the cry must be set up, 'Popery was a coming in.' They concluded, if they could but make use of the same engines, they should have the same effect; witness a peer, that is now dead, one that was a main instrument of our confusion in the late times, and thereby experienced in villainy, was made use of as the chief tool in these late contrivances.

But alas! when they found those pretences and projects would take no longer, then they fly to that, which was indeed the bottom of all; I mean, The Bloody Conspiracy. When they

found they could not overthrow the government by methods of law, they betake themselves to downright treason. For by this time the eyes of the honest citizens were opened; and they found what interest was driving on: and it was time to have them open, when a cause in Guild-hall was always tried according to the characters of the client, and not the merits of the cause; when if a man was blasted with the name of a Tory, he was sure to lose it: but if a whining rascal was sanctified with the name of a Whig, he was sure to have it go on his side: witness the famous cause of Mr. Loades about his lemons.

But when Sheriffs came to be elected in due manner, such as were fit to be trusted with the City business; what do they, but break out into a horrid conspiracy, to take away the life of that blessed king, that merciful prince, so lately deceased, to the grief and sorrow of all his loving and loyal subjects? and not only so, but to rob us of his sacred majesty, our present most gracious sovereign; whom I pray God to preserve long to reign over us. [To which, the Auditory gave a great acclamation, saying, Amen.]

Gentlemen, When these things are thought upon, you must give me leave to observe (let others think what they please) that was the real Plot, the true Plot: for there is one thing observable, that attends this whole affair, that every man who suffered for the plot, which the witnesses truly call Oates's Plot, to a man denied it, even to the last gasp; and took it upon their deaths and salvations, that they were innocent: nay when they had not those hopes Bedloe had of life, (for I cannot believe, that he could have been so egregious a villain, as to have attested such notorious lies, if he had not hoped to have recovered, and thereby increased his own reputation) yet not a man of the others but disowned it with their dying breath. Now, on the other side, there was not a man, that was concerned in the conspiracy, of which this was to be the blind and the colour, had the confidence to deny it, when they came to suffer for it. All this ought to be put in the balance, and duly weighed.

For, Gentlemen, because it is a matter that is not only public here, but all the world over, we must have the justice of the nation vindicated, and its disreputation wiped off. And having taken notice of these things, which I could not well omit upon this occasion, I must now put you in mind, what is necessary for you to take into your consideration, as to the particular case before you. And

First, You must observe, that this Indictment against Oates, is for committing wilful and corrupt Perjury; which is also said to be done maliciously. And if it were false, surely it was malicious; because by his false oath, have innocent men been convicted, condemned, and executed.

Secondly, You are to consider, how far the thing goes, to make it material to the issue: for if it were upon a nicety only, or a catch, or

any of those fine words, that he has been pleased to make use of, it were not fit to perjure him upon it. But it is certainly very material: for time and place are matters substantial to discover truth and falsehood by; as in the case of Susannah, the perjury of the Elders, as you may remember, was detected by those very circumstances. But I shall shew you the occasion of this oath; and that will manifest it to be a material part, in respect of the time. For,

First, Here was a consult held, as he testified, the 24th of April, 1678; and then he swears Ireland was in town, and present at the consult: But all that Oates swore would not do the feat, because that he was but one witness. Then comes Bedloe his worthy yoke-fellow (a brace of such witnesses, as the Lord deliver all mankind from,) and he assigns another fact upon Mr. Ireland, in the month of August, the latter end of it, or the beginning of September; which is material, and makes two witnesses against Ireland, which Oates knew well enough: For he is his arts-master; he knows all the tricks, and can tell the very nick that will do. And therefore, when he finds Mr. Ireland so positively affirming, that he was then out of town; and if so, Bedloe did not swear true; then does this Oates come in, (and thereby makes his testimony material to the point then in issue,) says he, the first of September, or (at least) the second, I will swear he was in town; for he gave me twenty shillings. And that is given as a token, why he does remember it. And thus he did prop up Bedloe's testimony, against Mr. Ireland's defence. This is proved to you by Mr. Waterhouse, who was one of the jury. And the same thing does the next gentleman swear, which is Mr. Byfield? They do both agree in that circumstance punctually, that he swore he had then of him twenty shillings.

Ay, (but says he for himself, because I would remove the objections out of the way, as they occur to me) it is very hard, this being now some six or seven years ago, that I should be called to question about such a thing; when they might have had a time to disprove it before.

Besides, Gentlemen, the answer that has been truly given to you, concerning the miserableness of the times; when the truth of it is, there was no justice to be had for Protestants, if we speak of the Church-of-England men under that name: For either they were Papists in masquerade, or Popishly affected; or the names of Tory and Tantivy, and I know not what, was enough to do their work for them: and nobody was reckoned of the sober, virtuous, godly party, but those that were under Associations and Covenants: as though there was no sanctity to be found in any but those who were bent to destroy all virtue and religion. I say, besides that, there is another answer, which I am sorry has so much weight in it: Could any man have believed that Oates should dare so impudently to swear

a falsehood, and that in a cause where life was concerned; and the man hanged upon his testimony? To what purpose then should his relations interpose to disprove Oates, after his death? That would not revive him. But you find there was an inclination that way, and I wish to God, with all my heart, it had taken effect: For what says the old gentlewoman? As soon as she heard what Mr. Oates had sworn, which she knew to be false, immediately she dispatched an express to London; and sent a petition to the king, 'That either Ireland might have a new trial, or his execution might be reprieved, till they brought up such witnesses, as would have made it apparent, and as clear as the light, that what this fellow had testified was notoriously false.' But such, such, I must say, was the misfortune of the time we were in, that stopped the fountain of mercy itself from letting forth its wonted streams; and even compelled that compassionate prince, rather than he would give any disturbance to his people, to permit that execution against his own inclination; because there was a verdict, and judgment in the case. For as he was really the Fountain of Justice, so was he of Mercy too. And it is well known to those that had the happiness to be near his person, how oft he expressed his concern for having consented to this Execution. And this continued with him even to his dying day, as the business of my lord of Strafford did with his royal father.

And, Gentlemen, I chose to mention this passage concerning his late majesty for this reason, That when we live in such tumultuous times, when things are put so hard upon princes, as to compel them to restrain their mercy, where they think it due, rather than seem to stop the current of justice; this should not be remembered with any reflection upon them, but with infamy to those that are the causes and grounds of it: when such prodigious wretches, as Oates and Bedloe, for there appears no evidence before you, but of those two profligate villains, who came out of gaols, and after having been guilty of villainies almost of all sorts that ever were committed, came to be sanctified by committing more; and were therefore called, 'The Saviours of the Nation.'

Gentlemen, the next objection that is made against the evidence for the king is, That they are all Papists; who design nothing but to destroy the government, and ruin the Protestant religion. And this must be taken to be the whole design of all these persons of quality, and others that they come to forswear themselves, and damn their souls to all eternity, on purpose only to destroy innocent Protestant Mr. Oates. Alack-a-day! When, at the same time, I must tell you, if it were necessary, you have about seven or eight Protestant witnesses of the Church of England that confirm the testimony of the rest: not that we must think, or ought to have any such conception among us, but that Roman Catholics in point of law are good witnesses, and are to be credited as much as

any other witnesses whatsoever, unless there be some objection made to them; which would be the same against a Protestant as a Papist: For there remains a right in them, and they ought to have equal credit given to their testimony with those of any other persuasion, if a regular objection be not started against them. And sure I am, that has been always the law; and shall be my practice, while I have any thing to do with the administration of justice. Let the sober party, as they call themselves, make what reflections they please upon it, or trouble themselves as they will about it, I value them not, nor their opinion: let them send as many penny-post letters and libels as they have a mind to do; two of which I received last night, about yesterday's trial. This I am sure of, lying is as much the talent and inclination of a Presbyterian, as ever it can be of a Papist: nay, more; for it is as inseparably incident to a Presbyterian (and such sniveling whining, canting knaves) to lye as to speak. They can no more forbear lying than they can forbear speaking; for generally as often as they do the one, they do the other.

Besides, I must observe to you, with what caution, care, and sobriety, both of expression and action, all these gentlemen and women have delivered their testimony, with the greatest tenderness and care that possibly could be: and as well as they have given it with caution, so I cannot but put it home to you, gentlemen at the bar, to give it its due consideration.

For though the other juries did believe Oates, and not them at that time; yet that is not to be your measure, because you have not the same reason to do it. Could any person think, that there should be such villains upon earth as impudently to swear downright treason, against their fellow-subjects, if there were no truth in the accusation? That was the thing that guided those juries, who were all of them, no doubt, very honest men; and that was it, which influenced the parliament to do what they did in the matter. For it was morally impossible to be thought, any such wickedness could be so publicly attempted.

But, God be thanked, the eyes of all honest and understanding men are opened; and we see the fault was in our credulity; and that these were fellows should not have been believed: and it concerns us when the truth has been so debauched, and our credulity so imposed upon, to shew the world our just resentment thereof.

And this I say to you, gentlemen, with a purpose to vindicate those persons who were concerned as jurors in the trials of all those causes: because that is the thing much harped upon, and aimed at: That because he was believed before, to disbelieve him now would cast a reflection upon the juries; whereas, if that opinion hold, never will there be any such thing as perjury detected, so long as the sun and moon endure; for if a verdict be obtained upon false testimony, and it shall be enough

for the witness to say, I was believed at such a trial, and therefore do not you offer to prosecute me for perjury; That would be the finest doctrine that could be taught, to give a license to destroy all truths, justice, and human society.

Therefore I leave it home upon you. Upon your consciences be it; for, in the presence of the great God of heaven and earth, that sees all our hearts, and will judge us for our inward thoughts at the last day, 'liberavi animam meam.' If you can find all these persons (in number forty-seven) guilty of wilful, downright, malicious, and corrupt perjury, then, you must acquit the defendant.

For the particulars of the evidence, which abound in many material circumstances in point of time and place, I shall run them over as short as I can, and remind you of them; not because I think it extraordinary necessary, as though there were the least doubt of the fact, but for the satisfaction of all mankind, that are not under invincible prejudice against the truth. And I am sure, upon yesterday's business, there remained not any doubt with any that heard it, save one, who I know had a great share in the design, that was at the bottom of it; and, I doubt, was one of those persons that set this villain on work: his name may be concealed for the present, but a few days will discover it here, or in some other place.

Gentlemen, what Mr. Attorney, or Mr. Solicitor-general, or any of the king's counsel have said, or what the defendant has said for himself, if not proved, and made plain by evidence, is to be no guidance at all to you, who are only to go according to the testimony given to you; for that is pursuant to your oath, which oath is the rule of your enquiry.

The witnesses that prove, that he did swear so in both the points in the indictment; I need not mention, they were so full: They tell you he swore that Ireland was in town from the 8th to the 12th of August: but because he fixed upon the 8th at first, there was caution given him, Be not so precise to a day, consider with yourself. Then comes he to stab the business to the quick, and to rivet it home: If I cannot be positive to the 8th, I will be positive between the 8th and 12th. And as to the other point I did observe before that; because Bedloe was at a stand, upon Ireland's denying his being in town the latter end of August or the beginning of September, therefore comes Oates up again, to fix it home; and, says he, I am sure he was in town the 1st or 2d of September, because he gave me twenty shillings. That he swore this, is testified by three gentlemen who were jury-men at those trials.

Now that this is notoriously false, false to a tittle; and, as Mr. Solicitor does observe, not the least time left to give any sort of countenance to what he swore, is thus made out to you.

First, you are to take notice, that upon the 3d of August, being Saturday, it is sworn by

three or four witnesses, That he went out of town; and this is not sworn as Mr. Oates gave his evidence positively without circumstances, but they give you an account how they remember it; because upon the Wednesday before, which was a public day of note amongst them, and always kept as a festival in memory of St. Ignatius, upon the last day of July, as both they and Mr. Oates himself do affirm, there went Mr. Ireland, Mrs. Anne Ireland, and their mother out of town to a friend's house to dinner. Mrs. Ireland did desire him to stay there all night, as she did. No, says he, I cannot stay all night, because I must go out of town on Saturday, and I must provide things necessary for my journey: Nay that is not all; for it goes yet further. Says his sister unto him, Why do you begin your journey on a Saturday? That is an improper day. Oh! says he, I do it, because I am that night to go to my lord Aston's house in Hertfordshire; where I am to meet with sir John Southcoat, and go down with them into the country: this does the mother swear, and the sister. And then the maid-servant, and the taylor's wife, do give you another token, that it was Saturday the 3d of August, because he had something to be mended in his clothes, and staid for them; and he was to go out of town, for he had his boots on.

There is yet this circumstance farther, wherein those four do all agree, That as he went out of town the 3d of August, so he did not return till the 14th of September; for they say it was the Saturday fortnight before Michaelmas, and the same day of the week that Michaelmas-day was of. So that you will find, that there is a constant proof, and as plain a one as any possibly can be in the world, as to the time of his going out and coming home; and where he was in the mean time, proved directly by a great company of witnesses, except one day. For you see the 3d of August he went to my lord Aston's at Standen; several there are that saw him there, the 4th, and dined with him there; particularly, sir Edward Southcoat. And to shew that it is not a thing they are positive in, and swear it roundly without consideration, they give you an account of the reasons of their knowledge. You are to consider also the testimony given by my lord Aston, a person of great honour and quality: says he, though I dare venture all I am worth in the world, upon the truth of it, that Ireland did go along with me all the journey; yet, because I did not take such particular notice of the rest of the time as I did of those two days, I will not take upon me to swear it. If Mr. Oates had had the fortieth part of that caution in his evidence, I dare say, you had not had the trouble of this day's trial.

The fifth, you have a great many witnesses who give you an account that he came on Monday night to St. Albans with my lord Aston; there is sir Edward Southcoat, Mr. John Southcoat, my lord Aston, the coachman, and all the servants. Sir Edward tells you.

that Monday was a hot day, and my lord Aston took him into his coach; but he rode a horse-back all the rest of the way, and had a fine going horse, which horse Mr. John Southcoat bought of him when the whole journey was ended. They tell you likewise, upon the 6th and 7th days, the very inns they lodged at upon the road; and particularly at Northampton, they lay at the George, which was sir William Farmer's house, which was then let to an inn-keeper, because of the fire in that town. And, which is most material of all, for Mr. Oates's satisfaction, you have for these times no less than four witnesses, that are Protestants of the church of England, who give you the same account. There are in all no less in number than fourteen to this point; and whether you will believe those fourteen to be wilfully perjured, without evidence to the contrary, is left to you; and if they do swear true, Oates that was yesterday found perjured, must be convicted of perjury again to-day: For in short, the question is, Whether you will believe persons of credit, that have no stain upon their reputation; or Oates, that upon plain evidence was found guilty of perjury yesterday?

When we come to Tixhall, we have no less number that testify where he was from day to day, and from night to night, to the 17th, and from the 17th to the 26th. You have fifteen witnesses more, all as direct and positive, as can be in the world, swearing where he was from time to time. It seems he came to Tixhall on Thursday the 8th; there he staid till Thursday following, and then he went to Holy-Well: he lay the first night at Nantwich; the next night at Holy-Well, at the sign of the Star, a notorious inn there; he came to Chester on Thursday, and some of the company left him there, but others came back with him to Tixhall: who say he went away on Saturday morning, which happens to be the 17th. And thus you have a full account of him, quite from the 3d to the 17th, beyond all controversy, plainly proved by persons of undoubted credit. And if he were, where they say he was, from the 3d to the 17th, how could Oates swear true, that he took his leave of him here in town, between the 8th and 12th?

Now, let us come from the 17th to the 26th, and you have no less than fifteen witnesses, four whereof are Protestants; which I urge not as a necessary qualification to be a witness, but to answer Oates's objection, as though this was a popish design to destroy him. They have given you an account where he was from time to time, by convincing circumstances, which you have heard: particularly of one day that he went to Litchfield, one of the witnesses went with him, and a protestant witness too that came back with him again, and supped with him at her father's house. The apothecary tells you, the day that he saw him was a wake-day, which is a remarkable time in the country. You are told of the funeral of one woman's mother, that made her stay away from Monday till Thursday; of another man's

child. I mention them but shortly to you, because I know you have taken notes of them, and they are only used as instances to manifest the integrity of the witnesses, that this was not a thing contrived on purpose to make a story of, but did really happen in the order they tell it. And I must remember you of another circumstance some of them do swear, that whereas Oates had a mind to evade their testimony by that question; whether this was the same Ireland that was tried? It was most certainly he; for that is made too evidently to appear, by their seeing him executed at Tyburn, I am sorry to say, innocently.

From the 3rd of August to the 26th, there is not one night but you hear where he was: And from the 26th of August to the 7th of September, you hear where he was, at the horse-match, upon the bowling-green, at Mr. Heweningham's, Mr. Lowe's, Mr. Gerrard's, Mrs. Crompton's, Mr. Pendrel's, Mr. Gifford's, and Mrs. Harwell's: And from the 7th to the 14th, save only one day, viz. the 8th, you have a particular account too; and it does not appear by a rambling evidence, but a faithful account is given of all the time, save that eighth day: which shews the caution of the witnesses. And it cannot but be easily presumed, he was either at Tixhall, or thereabouts; because he was at Wolverhampton the 7th, coming to London the 9th. How easy is it to imagine him there the 8th; and the rather, because where he was the 8th is not material to the point in question before you, but where he was the 1st and 2nd?

And, Gentlemen, if in case you had a mind to imagine, he was the eighth at London, it must be by a strained imagination: for you must take him to be at Wolverhampton the 7th, and make him ride post to London that night, and return post from London the 8th to Tixhall to be ready there early in the morning upon the 9th, or take four days journey back again; or else you cannot give the least countenance to any other imagination, but that he was about Tixhall the 8th of September.

Well, at Tixhall you have him the 9th of September; and from thence, you have it testified by all the persons that came along with him all the way, that he lay one night at Coventry, another at Banbury, a third at Agmondesham: that he baited at Uxbridge the fourth which was the 12th of September; and came to sir John Southcoat's house that night, being Thursday. He staid there Thursday night, and Friday; and upon Saturday the 14th of September, sir John Southcoat's man went along with him to London, whither he rode upon the horse he sold Mr. Southcoat: the man saw him at his lodging; and he says, they wondered when he came in, that he had staid so long.

And when we return to the four witnesses they begun with at first, who make all this testimony to stand well together; that he went away the 3d of August, and was never in town till the 14th of September; and every day, but

the 8th of September, which makes nothing to the business, is particularly spoke to: and he must be there that day too, except you will put him upon very hard service, to ride post to London and back again, in twenty four hours for no other reason, but only to commit a treason, that none ever found out, but Mr. Oates. And, I am sure, if he did, he took a great deal of pains, to a very little purpose.

Gentlemen, I have taken up much of your time, and detained you the longer in this matter, because I cannot but say, with grief of heart, our nation was too long besotted; and of innocent blood there has been too much spilt, it is high time to have some account of it. It is a mercy we ought to bless Almighty God for, that we are prevented from spilling more of innocent blood! God be blessed, our eyes are opened; and let us have a care for the future, that we be not so suddenly imposed upon by such prejudices and jealousies, as we have reason to fear such villains have too much filled our heads with of late.

Gentlemen, it is incumbent upon you to try according to the evidence that has been given whether the defendant be Guilty, or Not Guilty? And it is incumbent upon us that sit here as judges, to see the law executed, as we will answer it at the tribunal of the great judge of heaven and earth; before whom we must appear, and receive our trials at the great day. And God forbid, but we should use our utmost endeavours, to inflict the greatest vengeance, that the justice of the nation can permit us to inflict upon such villains as these are; that have contracted so much mischief and reproach upon us, and so much guilt upon themselves.

Gentlemen, I am sorry, I say, I have kept you so long. It is a case of such importance, that I could not but say what I have done it in. There may be other circumstances arising from the evidence, which I may have omitted; but were very largely and fully spoken to by Mr. Solicitor. Whatsoever has been forgotten by him, or by me, I am sure, will be sufficiently supplied by your observations; for I know you to be gentlemen of great knowledge and experience in matters of this nature.

Then the Jury withdrew, to consider their Verdict; and, after half an hour's recess, returned to the bar; and answering to their names, delivered in their Verdict, "That the Defendant was Guilty of the Perjury whereof he stood indicted." Which being recorded, the Lord Chief Justice spoke to the gentlemen of the Jury to this effect.

L. C. J. Look ye, gentlemen, because there has been some notice taken to day, as there was yesterday, concerning the opinions of Judges, about verdicts that have been given, I would say a word or two to you: not that I much admire the doing of it at any time; nor would I do it now, for your sakes; because I am sure you act according to your consciences, and affect not commendation: but because it may

be necessary, for the satisfaction of some people that they should know our opinions also in this matter; I must tell you, you have given a verdict that becomes your honesty, integrity, and loyalty. And I declare, in the presence of Almighty God, the Searcher of Hearts, that had I been of the Jury, I must have given the same verdict. Gentlemen it is an honest and just verdict that you have given; and, by it, you have contributed, as much as in you lies, to vindicate the nation from the infamy it has so long lain under.

Just. Withins. For my part, I think, if you had given any other verdict, you had found against plain demonstration; the evidence was so full and clear.

Just. Holloway. The court is very well satisfied with the verdict; and you have acquitted yourselves like worthy, honest gentlemen.

Just. Walcot. There is nothing can be said to the verdict, but that it is a just verdict, and according to the evidence. [And then the court arose.]

Die Lune, 11 Maii, 1685.

This day Mr. Wallop moved, that in regard the Court was pleased to give the Defendant time till Saturday next, to move in arrest of Judgment, upon the conviction on Friday last; they would please to give to the same day, to move in arrest of Judgment, upon the conviction on Saturday: which the court granted. But afterwards, upon the motion of Mr. Attorney-General, they ordered, that a note of the exceptions to both indictments, should be sent to the king's counsel some days before Saturday.

Die Sabbati, 16 Maii 1685.

This day being appointed for the Defendant to move what he could in Arrest of Judgment, upon the two convictions of Perjury; he was brought by rule from the prison, to the King's Bench court.

L. C. J. Mr. Attorney-General, have you any thing to move?

Att. Gen. My lord, I pray your judgment upon Oates, who is convicted upon two indictments, for two notorious perjuries.

L. C. J. Who is counsel for Oates?

Att. Gen. Mr. Wallop moved for him.

L. C. J. What is that Mr. Wallop has to say?

Oates. My lord, I desire I may speak one word. It was Thursday night before my attorney could make an end of examining the records; sir Samuel Astry knows it very well: then I sent the rule to those gentlemen that were assigned to be my counsel; and the exceptions were delivered in but yesterday. I pray I may have a day or two more, that my counsel may be prepared to argue for me.

L. C. J. We cannot do that; we gave you beyond the ordinary rules, in extending it until to-day.

Att. Gen. My lord, he talks of examining

the records; he had copies of them all this long vacation.

Oates. My lord, my attorney will be ready to make oath, that he finished the examining but on Thursday night.

L. C. J. We do all know they were pleaded to the last term; and you have had all this vacation to consider of them: and we have indulged you beyond the ordinary time.

Oates. My lord, I desire but a day or two more.

L. C. J. No, we cannot do it; we have done more already than we ordinarily do. Persons that are convicted, use to have but four days allowed them to move in arrest of judgment; but you, instead of having but four days after, had eight.

Oates. If your lordship pleases to give me time till Monday.

L. C. J. I tell you, we cannot do it. If Mr. Wallop have any thing to say for you, we will hear him?

Mr. Wallop. I have nothing to say.

Att. Gen. Here are four exceptions delivered to me last night, as made by Mr. Wallop.

L. C. J. But he says he has nothing to say. We know not whose these exceptions are.

Oates. I do deliver in those exceptions, my lord, pray let them be read.

L. C. J. Read them, air Samuel Astry.

Cl. of Cr. Reads. Dominus Rex versus Oates. The Defendant's Exceptions:

1. That a witness sworn in the behalf of the king in a process of high-treason, cannot be punished for perjury by the king.

2. That it does not appear, that the Indictments of Ireland, &c. found in Middlesex, were legally transmitted into London; and consequently, all the proceedings thereupon were 'coram non Justice.'

3. That the perjuries assigned, are in matters foreign to the issue.

4. It is 'Resolutio Signat' in that part of the Indictment, that mentions what the defendant swore; and in the perjury assigned, it is 'Resolutio Signat'; and it is no good assignment of the perjury.

Just. Withins. These are doughty exceptions indeed.

L. C. J. Mr. Attorney, what say you unto them?

Att. Gen. Truly, my lord, I think I need not say much to them. The first exception is a plain mistake of the indictment: for had Mr. Oates been indicted upon the statute, it had been something; but at the common law, certainly he may be prosecuted by the king, though he was witness for the king before. As to the second, that it does not appear Ireland's indictment was well transmitted from Middlesex to London; that sure is well enough: for after it is recited, that they were so and so indicted, it does set forth, that the trials were had upon records there depending before the commissioners of Oyer and Terminer, and goal-delivery; and it shall be taken, that they were well brought before them. As to

the third exception, that the perjuries assigned are foreign to the matter in issue, that is not so: for it is apparent, one of the indictments is in the express point of the great treason charged against them, that is, the consult of the 24th of April. And as to the second indictment it appeared upon the evidence, that there was a treasonable meeting sworn in August; and he swore Ireland was here in town in the beginning of August, and in the beginning of September. And then for the fourth matter, that he swore he saw them sign it; and the perjury assigned is, that he did not carry it to be signed; that receives a plain answer: for we alledge, he falsely and corruptly swore that he was present, and that he carried the resolution to be signed, and he saw them sign the resolution. Now, in these two things we have laid the perjury; 1. We say he was not there: and, 2. He carried no such resolution to be signed. Indeed, we do not say that he did not see it signed, nor we need not; for if he were not there, nor did carry it, he could not see them sign it. There is nothing in the exceptions, my lord; and therefore, I pray your judgment.

L. C. J. Is there any body of counsel for Mr. Oates, that will say any thing to these exceptions?

Oates. I pray, my lord, that I may have liberty but till Monday, for my counsel to prepare.

L. C. J. No, we cannot do it: indeed, if there had been any colour, or weight in the exceptions, it might have been something; though we have indulged in this case already, more than we used to do in cases of this nature; for it is known to every body, that knows any thing of the course and practice of the court, that after conviction, no more than four days are allowed to move in arrest of judgment. And being the practice of the court, it is the law of the court; and I am sure, as little favour ought to be shewn in a case of perjury as in any case whatsoever: but yet, however, because he should not think that the extremity of the law was aimed at by the court in this case, and he hindered in his legal defence, the court did indulge him more time than is usually granted in such cases now, as for the exceptions, certainly they are very frivolous.

For the first, It would be admirable doctrine indeed, in case it should obtain, that if a man be a witness in any case for the king, and forswear himself, he should not be prosecuted for perjury at the king's suit: for we know that no man can be prosecuted for his life, (except it be in cases of appeal) but at the suit of the king; and to be sure, all prosecutions for treason must be at his suit. If then witnesses come and forswear themselves, to take away men's lives, and they should not be called in question for it, criminally, by the king; that were a fine way to sanctify the greatest villainy, and make the process of law to become an instrument of the most infamous cruelty in the world. I presume, no gentleman at the

lar would think that an exception fit to put his hand to.

Then as to the second, That the perjury is not assigned in points material to the issue, that is plainly otherwise; for the time must needs be very material, because it was impossible that Mr. Ireland could be guilty of the treason sworn against him, at his chamber in Russel-street, between the 8th and 12th of August, if he were not in town between the 8th and 12th of August: nor could he be privy to the treason sworn by Bedloe the latter end of August, or the beginning of September, in Harcourt's chamber, if he were out of town from the 3rd of August till the 14th of September; and therefore both these perjuries were in the very points in issue.

And then for the 24th of April, which is the main perjury of all; it is not laid in this indictment, that there was no consult of the jesuits upon that day: nor is there any notice taken, that there was no consult at the White-Horse tavern; but it says only, that Oates did swear, there was a consult there, and that he was present at it; and that he saw the resolution written down by Mico, if I do not misremember the name: and that upon the 24th of April, he went with it from chamber to chamber, to have them sign it. And then comes the indictment, and assigns the perjury, 'Ubi revera' he was not at the White-Horse tavern that day; and I think it is pretty plain he was not, for he was then at St. Omers.

Then admitting all that matter about the signing of the resolution to be out of doors, a plain perjury is assigned and proved. For it was most proper for them to lay it as they did; and so it was in the other point too; he swore he carried the resolution from chamber to chamber, and saw it signed. Now, say they, he did not carry it from chamber to chamber to be signed; and if so, then he could not see it signed; and it will all be well enough sure. And if any one part of the oath he swore proves false, that is sufficient to maintain this verdict; and it is notoriously plain, it was false throughout.

And of this matter he now stands convicted, upon as full and plain an evidence as ever was given in any case in the world; and I am sorry to think that any man, who is guilty of such an offence, should continue so obstinate and hardened in villainy as he appears to be.

But I think it not amiss for me to say something upon this occasion, for the satisfaction of some that hear me; and for an example for the future. The crime whereof this man stands convicted is certainly a very heinous one, attended with such dismal consequences that ensued upon it, that I think no man can have a true Christian spirit in him, but he must begin to melt with the consideration of the great mischiefs his perjury has brought upon himself and us: it has brought the guilt of innocent blood upon many; to be sure it hath upon his own head, and I pray God deliver all men from having any hand in innocent blood.

And as the crime is great, so it is to be known, that a proportionable punishment of that crime can scarce by our law, as it now stands, be inflicted upon him. But that you may see we have considered how to punish it, as such a crime does deserve; we have consulted with all the judges of England, that if the law would allow it, he might have such a judgment for this heinous offence, as might be proper to terrify all others from committing the like again. For punishment is not intended only for the sake of the offender, to reward him according to his deserts; but it has a prospect also of example and terror to all others, that they should take care how they offend in any such manner, and that is as considerable a part of the end of the law as any other.

Gentlemen, it is known, that by the old laws of England perjury was punished with death; it grew a little more moderate afterwards, not to make the crime the less, but because of the danger there might be of malice of some revengeful persons, by endeavouring by perjury to convict others of perjury. But the next step was cutting out of the tongue, to shew that the law in all ages had an abhorrence of false oaths, and punished that impious crime of perjury with the most terrible punishments.

Since that time our ancestors have yet been more moderate, and have not extended the judgment to life and member; but by the unanimous opinion of all the judges of England, whom we purposely consulted with upon this occasion, it is conceived, that by the law, crimes of this nature are left to be punished according to the discretion of this court, so far as that the judgment extend not to life or member.

And I tell you this, Gentlemen, the rather, because, I observe our law-books are more silent here, in regard the judgments for these offences are not so solemnly and particularly entered up, as they are in cases capital: But they are left more discretionary; because that crimes of this nature may be attended with particular circumstances either to aggravate, or lessen the punishment: And therefore the punishment might be distributed accordingly.

And for that reason, Gentlemen, it is well known to us all, that that was the occasion of taking away the court of Star-Chamber, as the preamble of the act for taking it away does manifest: That inasmuch as the authority, for the correction of all offences whatsoever, was by the common law of this land originally fixed in the court of King's-Bench; and the proceeding by information in the Star-Chamber, when it might be by process in this court, was looked upon as a double way of vexation; therefore that court is abolished, and the authority of the King's-Bench court left entire. And it is notoriously known, how punishments, of all sorts and kinds, were inflicted by the court of Star-Chamber for perjury, and such like offences, while that court was up; and since that time, in Fox's case and others that you have heard of, it has been according to the discretion of this court, punished, as se-

verely as this court thought fit, so as the sentence did not extend to life or member.

Now I thought it proper for me, not only for the sake of the case now before us, but also for your learning sake, to tell you, this was the resolution of all the judges of England, upon consideration of the precedents, and of all the rules of law; which have been fully debated, and considered of: And this, I declare, is their unanimous opinion.

If then this be so, and it is left to the discretion of the court to inflict such punishment as they think fit: far be it from this court at any time, as on the one side to inflict punishment heavier than the crimes deserve, (no, we would rather use commiseration, than extraordinary and exorbitant severity;) so, on the other side, to let go crimes so notorious and heinous as these, without the severest mark that can, by law, be put upon them. When a person shall be convicted of such a foul and malicious perjury as the defendant here is, I think it is impossible for this court, as the law now stands, to put a punishment upon him any way proportionable to the offence, that has drawn after it so many horrid and dreadful consequences: We do therefore think fit to inflict an exemplary punishment upon this villainous perjured wretch, to terrify others for the future; which is not my part to pronounce: But what it is, my brother will tell you.

Att. Gen. My lord, you will be pleased to remember there are two Judgments.

L. C. J. There are so, we know it very well, Mr. Attorney.

Att. Gen. That which was tried first, was about the consult about the 24th of April; we desire that some particular mark may be set upon that day.

Then the Judges consulted a little together, and Mr. Justice Withins pronounced the sentence thus:

Just. Withins. Titus Oates, you are convicted upon two Indictments for Perjury; I say, for Perjury: I must repeat the word twice, because you are doubly convicted; one of the greatest offences that our law has cognizance of; it is so in its own nature: But your perjury has all the aggravations that can be thought of to heighten it. If a man kills another with his sword, and there be forethought malice in the case, he is to be hanged for it: But when a man shall draw innocent blood upon himself by a malicious, premeditated, false oath, there is not only blood in the case, but likewise perjury, corrupt, malicious perjury: I know not how I can say, but that the law is defective that such a one is not to be hanged. For, if we consider those dreadful effects which have followed upon your perjury, we must conclude our law defective; they are such, as no Christian's heart can think of, without bleeding for that innocent blood which was shed by your oath; and every knowing man believes, and every honest man grieves for. God be thanked, our eyes are

now opened; and indeed we must have been incurably blind, if they had not been opened, first by the contradictions, improbabilities, and impossibilities in your own testimony; but likewise by the positive, plain, direct, and full proof of forty-seven witnesses to one particular point; against whom you had not one word to object, but they were Papists and Roman Catholics; which is no objection at all: though, at the same time, it did appear, that nine or ten of them were Protestants of the church of England. That was all you had to say; you had not one word to justify yourself from that great and heinous perjury you were accused of. I hope, I have not been thought a man of ill-nature; and, I confess, nothing has been so great a regret to me in my place and station, as to give judgment, and pronounce the sentence of law against my fellow-subjects, my fellow-creatures: But as to you, Mr. Oates, I cannot say, my fellow-Christian. Yet, in this case, when I consider your offence, and the dismal effects that have followed upon it, I cannot say, I have any remorse in giving judgment upon you. And therefore having told you my thoughts shortly about your crime, and how readily I pronounce your sentence; I shall now declare the judgment of the court upon you. And it is this:

"First, The Court does order for a fine, that you pay 1000 marks upon each Indictment.

"Secondly, That you be stript of all your Canonical Habits.

"Thirdly, The Court does award, That you do stand upon the Pillory, and in the Pillory, here before Westminster-hall gate, upon Monday next, for an hour's time, between the hours of 10 and 12; with a paper over your head (which you must first walk with round about to all the Courts in Westminster-hall) declaring your crime." And that is upon the first Indictment.

"Fourthly, (on the Second Indictment), upon Tuesday, you shall stand upon, and in the Pillory, at the Royal Exchange in London, for the space of an hour, between the hours of twelve and two; with the same inscription.

"You shall upon the next Wednesday be whipped from Aldgate to Newgate.

"Upon Friday, you shall be whipped from Newgate to Tyburn, by the hands of the common hangman."

But, Mr. Oates, we cannot but remember, there were several particular times you swore false about: and therefore, as annual commemorations, that it may be known to all people as long as you live, we have taken special care of you for an annual punishment.

"Upon the 24th of April every year, as long as you live, you are to stand upon the Pillory, and in the Pillory, at Tyburn, just opposite to the gallows, for the

- “space of an hour, between the hours of ten and twelve.
- “You are to stand upon, and in the Pillory, here at Westminster-hall gate, every 9th of August, in every year, so long as you live. And that it may be known what we mean by it, 'tis to remember, what he swore about Mr. Ireland's being in town between the 8th and 12th of August.
- “You are to stand upon, and in the Pillory, at Charing-cross, on the 10th of August, every year, during your life, for an hour, between ten and twelve.
- “The like over-against the Temple gate, upon the 11th.
- “And upon the 2d of September, (which is another notorious time, which you cannot but be remember'd of) you are to stand upon, and in the Pillory, for the space of one hour, between twelve and two, at the Royal Exchange: and all this you are to do every year, during your life;* and to be committed close prisoner, as long as you live.”

This I pronounce to be the Judgment of the Court upon you, for your offences. And I must tell you plainly, if it had been in my power to have carried it further, I should not have been unwilling to have given judgment of death upon you; for, I am sure, you deserve it.

L. C. J. Mr. Attorney, we will take care, that the Clerk shall distinguish the Judgments in the Entries.

Then the Prisoner was taken away.

After the Revolution, Oates applied to both Houses of Parliament for relief against these Judgments and the Verdict which had been obtained against him by the duke of York: (See the Case at p. 125, of this Volume;) of which applications the following particulars appear in the Journals:

March 28th, 1689, Justice Dolben, one of the Justices of the Court of King's-Bench, brought into the House of Lords three Writs of Errors, *Rex versus Oates, Rex versus Oates, Dux Eborac' versus Oates*. On the 9th of April, the House, upon reading the Petition of Titus Oates, praying a day may be appointed for hearing counsel to argue upon his Writs of Error, ordered that counsel should be heard

* It appears by the account in this Collection of the Trial of Richard Baxter, on the 30th of this same month of May, 1685, that Oates was then standing in the pillory in New Palace-yard; and in Narcissus Luttrell's MS. Brief Relation, &c. it is said, under date August 11th, 1688, “Titus Oates stood in the pillory at Charing-cross, according to annual custom.”

on the 18th of that month, whereof Oates was to cause timely notice to be given to the Attorney General. On that day the House did not sit, but on the 22d, an order was made for hearing the Errors argued on the 26th, on which day is the following entry in the Journals:

This day being appointed for hearing counsel, to argue the errors in the writs of error brought into this House by Titus Oates, to reverse the Judgments given against him in the King's-bench; two at the suit of king Charles the second; and one, a judgment at the suit of the then duke of York; the counsel of Titus Oates appeared, and were ready at the bar; but no counsel appeared on the king's behalf, to maintain the judgments against him;

Whereupon Thomas Bales, solicitor for Titus Oates, being sworn at the bar, deposed, “That he had served several orders of this House made in this case upon Mr. Attorney General, to give him notice that the trial was to be; and the last order on the 24th of this instant June, for hearing of the cause this day; and Mr. Attorney said to him, that he believed he could not come.”

Then the House heard the counsel of Titus Oates, to maintain the errors assigned, and to make good their exceptions in point of law. Which ended; the counsel for Titus Oates was called in; and commanded by the House, to set down in writing what arguments and exceptions they had this day made against the Judgments, and deliver them to the Lord Chief Justice of the King's Bench to morrow morning.

On the next day the Lord Chief Justice of the court of King's Bench acquainted the House, That the counsel of Titus Oates had delivered to him, in writing, the Exceptions they made yesterday at the bar, to the writs of error, between Titus Oates and the king.

Whereupon it is ordered, That sir Richard Holloway and sir Francis Withins be, and are hereby, required to attend this House on Saturday the 4th of May next, to give their reasons or grounds for their judgment given against Titus Oates in the court of King's Bench; and that copies of the points insisted upon by the counsel of the said Titus Oates be herewith sent, to be considered of by them; and hereof they may not fail.

On the 6th of May the House order, that they will hear Holloway and Withins to give their reasons or grounds for their Judgment given against Titus Oates to-morrow. This order was continued from time to time till the 24th of May, when it was ordered, That to-morrow the House take into consideration Titus Oates's three writs of error, and that Holloway and Withins should attend.

On the morrow a printed Paper was brought into the House of Lords, which was dispersed abroad. Titus Oates being called in, was asked by the Speaker, Whether he did own this paper? And he answered, He did own this paper. The

question being put, Whether the paper owned this morning by Titus Oates, at the bar, shall be now read? It was resolved in the affirmative.

Then the said Paper was read, as follows :

“ The CASE of TITUS OATES, D. D. humbly offered to the tender consideration of the Right Honourable the Lords Spiritual and Temporal, and Commons, in parliament assembled.

“ The said Titus Oates, in the year 1678, discovered a horrid Popish conspiracy, for the destruction of the late king Charles 2, his present majesty (then prince of Orange,) and the Protestant religion within these kingdoms; and proved it so fully, that several parliaments and courts of justice, before whom he gave his testimony, declared their belief of it, by public votes, and the condemnation of several of the conspirators, accused not only by him, but by several other witnesses who had also a knowledge of the said conspiracy.

“ The House of Lords, being sensible of the great service of Oates, gave him their thanks in a most public manner; and addressed king Charles the 2d, to grant his royal protection to the said Oates, and to give him a subsistence till the parliament considered of a reward suitable to his great and public service to the king and kingdom; and three solemn days of fasting were proclaimed, at the request of three successive parliaments, to implore God’s assistance in the full and farther discovery of the villainous machinations of the Popish party.

“ The said Oates discovered the traitorous correspondence which Coleman held with Le Chaise (confessor to the French king,) which gave both Houses of Parliament full satisfaction of the Popish plot; and other letters were produced by a person of quality, by which the government was satisfied of the under-hand dealing of a great minister of state at that time in order to procure a great sum of money, to put off the parliament. All which did still justify the said Oates, and verify the truth of his discovery.

“ He appeared a witness at the Old Bailey, against Whitebread, Fenwick, Ireland, Pickering, and Grove, 17 Dec. 1678. Whitebread and Fenwick were not then tried; but Pickering, Grove, and Ireland, were tried, against whom the evidence was so full and plain, that they were all three convicted upon the testimony of the said Oates and Mr. Bedloe, and were executed for High Treason.

“ At the trial, two things were objected against Oates’s testimony: first, that he swore he was present at the consult held at London, April 24, 1678, when the Jesuits alledged he was not there, but at St. Omers; but, nothing being offered in proof thereof, this objection was looked upon as vain and frivolous.

“ The second objection was, That Oates swore, Ireland was in town between the 8th and 12th of August; and they alledged, he

was out of town all August: to this Mr. Ireland produced Ellenor and Anne Ireland, who testified, he set out for Staffordshire the 3d of August 1678; one Harrison testified, he met Mr. Ireland on the 5th of August at St. Albans, and was in his company till the 16th in Staffordshire; and Mr. Gifford swore, he saw Mr. Ireland two days after St. Bartholomew’s day, and the 9th of September, in Staffordshire.

“ In answer to which, Oates proved Ireland’s being in town great part of August, by the testimony of Mr. Bedloe and one Sarah Paine late servant to the aforesaid Grove, who testified, she saw Mr. Ireland about the 12th of August at his own door in Russell Street; whereupon the jury found Ireland guilty, and the lord chief justice Scroggs told them, ‘ They had done like honest gentlemen and good Protestants.’

“ Oates appeared at the Old Bailey, 15th June, 1679, when Whitebread, Fenwick, Harcourt, and Turner, (all Jesuits and Priests) were tried for the same conspiracy; and the same objections were made to Oates’s evidence then, as at the former trial; *videlicet*, That Oates was not in town at the consult, 24th April, 1678; nor Ireland in town between the said 8th and 12th of August, nor the 2d of September following.

“ For making good the first objection, they produced a great number of boys from St. Omer’s, as Martin Hilsley, Parry Doddington, Gifford Palmer, Cox Billing, Townely Fall, John Hall the College butler, Cooke a taylor of the College, and a lay brother of the Jesuits; these all testified, that Oates was at St. Omer’s all April and May; but the evidence was so ridiculous, and the witnesses appearing to be managed and suborned, the court and jury set no value upon their testimony: but, that the falsehood of their testimony might appear; to prove that Oates was in town, the counsel for the king produced Mr. Walker an aged minister of the church of England, Sarah Ives, Mrs. Mayo, Mr. Page, sir Richard Barker, John Butler, William Smith, and one Mr. Clay a Romish priest, who were all positive as to Oates’s being in town, except sir Richard Barker, and he testified what his servants Page and Butler had told him; which gave great satisfaction to the court and jury, and so Oates was set right as to that point: but as to the second objection, which was, that Ireland was out of town all August, and therefore that Oates was false in that particular; they produced several witnesses out of Staffordshire, to prove Ireland there: the lady Southcot testified, That she saw him from the 5th of August to the 16th; and sir John from August 5th till August 9th; and Mr. Edward Southcot from August 3rd till August 16th; and Mrs. Harwell and her daughter, who say, they saw him on August 17th; but this came not within the compass of the time assigned by Oates. Against these, Mr. Bedloe’s testimony and Sarah Paine. And some time after this trial, in came Mr. Jennison, who testifies, That

we saw Mr. Ireland in August at London; all which overthrows the testimony of Mrs. Ellenor Ireland and Mrs. Anne Ireland, and the three Southcots, all Papists, and relations of Mr. Ireland. The testimony of Sarah Payne was so innocent, and without any manner of guising, that the court and jury set a great value upon her evidence. Thus was that objection then answered.

“ Upon the 14th of June, 1679, at the trial of Mr. Langborne, Oates appeared at the Old Bailey, where the St. Omer witnesses appeared again upon that point of time and place; and the court observed, ‘ that they were mendled in testimony, and had improved themselves;’ but the witnesses produced against these boys were so plain in their testimony, that the St. Omer boys were not believed in this point at all.

“ The duke of York, having a great influence upon king Charles 2, as also several others of the Popish party, did prevail upon him to suffer the said Oates to be indicted for perjury, in two several indictments, 6 or 7 years after he had given his testimony concerning the Popish Plot; and brought the same to trial on the 8th and 9th of May, 1685, in the reign of king James 2; and produced the same witnesses, with the addition of some others, but all Papists and bred up at St. Omer’s, excepting one, who had his education at St. Omer’s; he was turned Protestant as he pretended, and was made a minister of the church of England by the bishop of St. Asaph. To these witnesses Oates produced two, Mrs. Mayo and John Butler, who were positive as to his being in town in the beginning of May, and one Page and Mr. Walker the minister (the latter being aged above 80 years old), through the long distance of time, could not be so positive as to the year; and Page could not be positive, both being in fear, by reason of the lord chief justice Jefferies browbeating Oates’s witnesses, as several honourable peers of this House can testify. The counsel perverting the testimony, and the lord Jefferies appearing so much Oates’s enemy, and no counsel daring to appear for Oates, he was found guilty of perjury upon the first indictment, which did relate to his being in town in April and May, 1678.

“ Upon the 9th of May, 1685, Oates was tried upon a second indictment of perjury; wherein it was alledged, That Ireland was not in town between the 8th and 12th of August, as Oates had sworn it 6 or 7 years before; for which were produced Mrs. Anne Ireland and her mother Mrs. Ellenor Ireland, who were very positive to Mr. Ireland’s going out of town, August 13th, 1678; but a third witness being called, did plainly contradict their evidence, and her name was Duddle, which was observed by the court; then one Mrs. Quino was called, another Papist, and the lord Aston; but he could not be positive, but only as to the two days he first saw Mr. Ireland; but sir Edward Southcot was positive from the 3d to the 16th of August; and several other wit-

nesses were produced; but they coming not within the compass of time alledged by Oates, they are here omitted.

“ The distance of time being such, that many of Oates’s witnesses were dead; as sir Richard Barker and his brother Mr. Barker, Doctor Tongue, Mr. Bedloe, Sarah Payne, Sarah Ives, William Smith, and Mr. Walker the minister, are dead; Mr. Jennison was forced to fly into Holland, for fear of being prosecuted; so that Oates, by reason of the death of Sarah Payne and Mr. Bedloe, and the going of Mr. Jennison into Holland, had not the benefit of their testimony, and was convicted of the second indictment for perjury.

“ The aforesaid indictments he hath removed into the Lords House, by writ of error; and if it be the pleasure of this honourable House to examine into the merits of the cause, he can produce three witnesses yet alive, that will justify his being in town, at the time the St. Omer witnesses swore him to be out of town; and he can produce Mr. Jennison, that can prove that Ireland was in town in August, 1678, which contradicts all the Staffordshire witnesses. And the said Oates humbly conceives, that the testimony of Sarah Payne and Mr. Bedloe may be used on his behalf, though they are dead; and also the testimony of those who are dead, that have proved him the said Oates to have been in town, against the impudent perjuries of the St. Omer witnesses, who swore him out of town April and May, 1678.

“ The Papists themselves having justified Oates’s testimony, by their open and avowed violation of our laws, liberties, and religion, and executing those things in the reign of the late king, which he did discover them to have been contriving in the reign of king Charles 2d, which was the sum and substance of his testimony; he hopes the reputation of St. Omer’s witnesses, who were bribed with places and offices in the army, and had sums of money given to them, shall not prevail with this House from setting aside the Judgments brought before your lordships.

“ All which is humbly offered to the consideration of your good lordships and your honours of the House of Commons, whether he ought to have undergone such a villainous judgment, or been found guilty of the aforesaid two indictments.”

After a long debate, the question propounded was, “ Whether this Paper, owned by Titus Oates this day, doth contain matter tending to the breach of the Privilege of this House?” A previous question was put, “ Whether this question shall be (now) put?” It was resolved in the affirmative.

Then the main question was put “ Whether this Paper, owned by Titus Oates this morning, doth contain matter tending to the breach of the privilege of this House?” It was resolved in the affirmative.

Leave was given to such lords as would, to enter their dissents; and accordingly these

lords following do enter their dissents, in these reasons ensuing:

“ We whose names are underwritten, having been present at this debate of the matter mentioned in the vote above written, concerning a printed Paper owned by Titus Oates; and the question being, Whether the same doth contain matter in it which is a breach of the privilege of this House? Which was resolved in the affirmative. We do dissent from and protest against the said vote, for the reasons following:

1. “ For that the matter resolved to be a breach of the privilege of this House is not plainly and distinctly expressed in the said vote, as we humbly conceive it ought to be; nor doth it appear therein what particular privilege of this House is broken by any matter contained in the said Paper; and that therefore this vote can be of no use, to support any privilege of this House, or prevent the breach of any of them for the future.

2. “ Because the said vote may tend to the disunion of both Houses, which, we humbly conceive, may prove of dangerous consequence to the king and kingdom; we apprehending the whole drift of the said Paper to be, in order to have relief in a legislative way; and accordingly the case and prayer is directed to both Houses.

3. “ Because this day being appointed, by order of this House, to have the opinion of the judges on the writ of error in the case of the said Titus Oates; and the said judges attending accordingly; we did think it proper that this honourable House would have heard their opinion in the said cause; and thereupon have (according to the usual course of other courts of judicature in such cases), proceeded to sentence before the taking into consideration the said Paper introduced but this morning into the house—Bolton, Macesfield, Stamford, P. Wharton, Cornwallis, Sydney.”

Next, the two orders for the commitment of Titus Oates were read. And the question being put, “ Whether this House agrees to these orders?” It was resolved in the affirmative.

The said Orders follow:

“ Ordered, by the Lords spiritual and temporal in parliament assembled, That the gentleman usher of the black rod attending this House, his deputy or deputies, do forthwith convey Titus Oates in safe custody to the prison of the King's Bench, there to remain during the pleasure of this House, for publishing and owning a printed Paper, containing matter in it which is a breach of the privilege of this House.

“ Ordered, by the Lords spiritual and temporal in parliament assembled, that Titus Oates be, and is hereby, committed to the Marshal of the Marshalsea of the King's Bench, there to remain during the pleasure of this House, for publishing and owning a printed

Paper containing matter in it, which is a breach of the privilege of this house; and that the Marshal of the Marshalsea do detain him accordingly.”

On the 28th, Oates presented to the House of Lords the following Petition:

“ To the right honourable the Lords spiritual and temporal in the high court of parliament assembled. The most humble Petition of Titus Oates, D.D.

“ Sheweth; That your petitioner's extraordinary punishments and trouble have been so heavy upon your petitioner, that it is a great mercy of God that he is not deprived of his senses; and your petitioner ever had so great a veneration for your lordships, and ever was so far from saying or doing any thing wittingly which might in the least interfere with the rights and privileges of this honourable house, that, if any thing be inserted in his case or petition which offends your lordships, it proceeds from ignorance or inadvertency; and humbly begs your lordships' pardon.

“ Your petitioner therefore humbly prays your lordships, in your lordships' great wisdoms and compassion, to discharge him from his confinement, being much afflicted to lie under your lordships' displeasure upon this or any account whatsoever.—TITUS OATES.”

The House, upon this, Ordered, That Titus Oates should be brought to the bar, to make his submission to this House. And That the Marshal of the Marshalsea of the King's Bench do forthwith bring Titus Oates, now in his custody, to the bar of this House.

On the 30th Titus Oates was brought to the bar; and having kneeled, was told, “ There were exceptions taken at his stiling himself D. D. in his petition.” He said, “ That he is Doctor of Divinity, and had his Degree at Salamanca in Spain.” Then he was commanded to withdraw. The House, upon consideration, called him to the bar again. And he was told, “ That the House required him to strike out the two-D. D. in his petition.” He said, “ he could not do it out of conscience.”

Upon this, it is Ordered, That Titus Oates be, and is hereby, remanded to the custody of the marshal of the King's Bench. That to-morrow at twelve of the clock this House will take into consideration Titus Oates's three writs of error depending in this House; at which time all the Judges are to be present. That sir Richard Holloway and sir Francis Withins do attend this House to-morrow at twelve o'clock, upon the occasion of Titus Oates's cases upon the three writs of error depending in this House.

On the next day the Lords having heard the opinion of all the judges concerning the illegality of the two judgments against Titus Oates, upon the point of perjury; for which he hath brought his writs of error into this House, to have them reversed:

The House upon consideration, and after long debate, had this main question proposed,

Whether to reverse the two judgments given below against Titus Oates, in relation to the two perjuries? The previous question was put, Whether this question shall be now put? It was resolved in the affirmative. Then the main question was put, Whether to reverse the two judgments given below against Titus Oates, in relation to the two perjuries? It was resolved in the negative.

Leave was given to such lords as will, to enter their dissents; and accordingly these lords following do enter their dissents, in these reasons ensuing :

“ 1. For that the king's bench, being a temporal court, made it part of the judgment, that Titus Oates, being a clerk, should for his said perjuries, be divested of his canonical and priestly habit, and to continue divested all his life; which is a matter wholly out of their power, belonging to the ecclesiastical courts only.

“ 2. For that the said judgments are barbarous, inhuman, and unchristian; and there is no precedents to warrant the punishments of whipping and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon him.

“ 3. For that the particular matters upon which the indictments were found, were the points objected against Mr. Titus Oates's testimony in several of the trials, in which he was allowed to be a good and credible witness, though testified against him by most of the same persons, who witnessed against him upon those indictments.

4. “ For that this will be an encouragement and allowance for giving the like cruel, barbarous, and illegal judgments hereafter, unless this judgment be reversed.

5. “ Because sir John Holt, sir Henry Pollexfen, the two chief justices, and sir Robert Atkins chief baron, with six judges more (being all that were then present), for these and many other reasons, did, before us, solemnly deliver their opinions, and unanimously declare, That the said judgements were contrary to law and ancient practice, and therefore erroneous, and ought to be reversed.

6. “ Because it is contrary to the declaration on the twelfth of February last, which was ordered by the Lords Spiritual and Temporal and Commons then assembled, and by their declaration engrossed in parchment, and enrolled among the records of parliament, and recorded in chancery; whereby it doth appear, that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted. — Bolton, Macclesfield, J. Bridgewater, Stamford, Oxford, Bolingbrooke, Bath, Herbert, Grey, Vaughan, Newport, Cornwallis, R. Eure, P. Wharton.”

Whereas, by virtue of their Majesty's writ of error, returnable into the House of Peers in parliament assembled, a record of the court of

King's Bench was brought into this court, on the fourth of April, 1689, with a transcript thereof, wherein judgment is entered, for and on the behalf of the late king James the 2nd, against Titus Oates clerk, upon a judgment for perjury; upon which writ of errors being assigned by the said Titus Oates, and issue joined by sir Henry Pollexphen their Majesties' Attorney General; and after hearing counsel for the said Titus Oates, (no counsel appearing for their Majesties) on the 26th of April last past :

After due consideration had of what was offered by counsel thereupon, it is this day ordered and adjudged, by the Lords Spiritual and Temporal in parliament assembled, That the said Judgment given on his late Majesty's behalf against the said Titus Oates, be, and is hereby, affirmed; and that the transcript of the said record, wherein judgment is entered as aforesaid, be remitted.

The Tenor of which Judgment follows, to be affixed to the record, to be sent back :

‘ Postea, scilicet, 4^o Die Aprilis, Anno Regni Domini Will^oi et Domine Marie, nunc Regis et Regine Angliæ, &c. Primo, Transcript. Record. et Process. præd. inter Partes præd. cum omnibus ea tangen. Pretextu cuiusdam Brevis de Errore corrigend. per præfat. Titum Oates in præmissis prosecut. dicto Domino Regi et Regine, in præsentî Parlamento a præd. Cur. dicti Domini Regis et Domine Regine hic transmissis. fuit; præd. Titus, in eadem Curia Parlamenti comparens, diversas Causas et Materias pro Erroribus in Record. et Process. præd. pro Revocatione et Adnullatione Judicii præd. assignavit; et postea, scilicet, 31^o Die Maii, Anno dicti Domini Regis et Domine Regine supradict. in præsentî Curia Parlamenti præd' visis et per Curiam ibidem diligenter examinat. et plenius intellect. tam Record. et Process. præd. ac Judicio super eisdem reddit. quam præd. Error. superius assignat. pro eo quod videtur Cur. Parlamenti præd. quod Record. ill. in nullo vitiosum aut defectiv. existit, et quod in Recordo ill. in nullo fuit Errat. ideo adtunc et ibidem considerationem est per eandem Cur. Parlamenti præd. quod Judic. præd. in omnibus affirmetur, et in omni suo Robore stet et Effectu.’

Whereas, by virtue of their majesties writ of error, returnable into the House of Peers in parliament assembled, a Record of the court of King's Bench was brought into this court, on the 4th day of April, 1689, with the transcript thereof, wherein judgment is entered, for and on the behalf of the late king James the 2nd, against Titus Oates clerk, upon a judgment for perjury; upon which writ, errors being assigned by the said Titus Oates, and issue joined by Henry Pollexfen their majesties Attorney General; and after hearing counsel for the said Titus Oates, (no counsel appearing for their majesties) on the 26th of April last past.

After due consideration had of what was offered by counsel thereupon, it is this day ordered, by the Lords Spiritual and Temporal in parliament assembled, That the said judgment given on his late majesty's behalf against the said Titus Oates be, and is hereby, affirmed; and that the transcript of the said record, wherein judgment is entered as aforesaid, be remitted.

The Tenor of which Judgment, to be affixed to the Record to be sent back, follows:

“Postea, scilicet, 4^o Die Aprilis, Anno Regni Domini Gulielmi et Domine Marie, nunc Regis et Regine Angliæ, &c. Primo, Transcript. Record. et process. præd. cum omnibus ea tangen. Prætextu cujusdam Brevis de Error. corrigend. per præfat. Titum Oates in præmissis. prosequit. dicto Domino Regi et Regine, in præsentī Parlamento, a prædicta Curia dicti Domini Regis et Regine, hic transmissis. fuit; præd. Titus, in eadem Cur. Parlamenti comparens, diversas Causas et Materias pro Erroribus in Record. et Process. præd. pro Revocatione et Adnullatione Judicii præd. placit. ad quod dict. Dominus Rex et Domina Regina per Henric. Pollexphen Mil. Attornat. suum General. comparens. placitavit quod nec in Record. et process. præd. nec in redditione Judicii præd. in ullo est Errat.; et postea, scilicet, 1^o Die Junii, Anno Regni dicti Domini et Domine Gulielmi et Marie Primo supradicti, in præd. Cur. Parlamenti. præd. dictorum Domini Regis et Domine Regine nunc, visis et per Cur. ibidem diligenter examinatis et plenius intellectis tam Record. et Process. præd. ac Judicio super eisdem reddit. quam præd. Error. superius assignat. et allegat. maturaque Deliberatione inde habita, consideratum est per Cur. præd. Parliamenti. quod Judicium præd. revocetur, adnulletur, et penitus pro nullo habeatur.”

On the 2d of June leave was given for the bringing in a bill to secure persons from the prejudices which may come by the oaths of Titus Oates but of this bill I find nothing further in the journal. On the same day after bearing counsel at the bar, to argue errors assigned by Titus Oates, upon a Writ of Error brought into this House, from the Court of King's-bench, the 4th day of April last past, to which James duke of Albany, afterwards late king of England, &c. was defendant, upon an action of Scandalum Magnatum:

After due consideration had of what was offered by counsel thereupon, the Lords Spiritual and Temporal in parliament assembled do order and adjudge, That the said Judgment, given against Titus Oates aforesaid, shall be, and is hereby, reversed.

The Tenor of which Judgment, to be affixed to the Record, follows:

“Et Postea, scilicet, Quarto Die Aprilis, Anno Regni Domini Guil'lmii et Domine Marie Regis et Regine Angli. &c. Primo, Transcript. Record. et Process. præd. cum omnibus ea tangen. Prætextu cujusdam Brevis dicti Domini Regis et Regine, de Error

‘corrigend. per præfat. Titum Oates in Præmissis. prosequit. Domino Regi et Domina Regine, in præsentī Parlamento apud Westm. a præd. Curia dicti Domini Regis et Domine Regine hic transmissis. fuit; prædict. Tytus Oates, in propria persona sua in eadem Cur. Parlamenti comparens, diversas Causas et Materias pro Error. pro Revocatione et Adnullatione Judicii præd. placit. ad quod dict. Dominus Rex et Domina Regina per Henric. Pollexphen Mil. Attornat. suum General. comparens. placitavit quod nec in Record. et process. præd. nec in redditione Judicii præd. in ullo est Errat.; et postea, scilicet, 1^o Die Junii, Anno Regni dicti Domini et Domine Gulielmi et Marie Primo supradicti, in præd. Cur. Parlamenti. præd. dictorum Domini Regis et Domine Regine nunc, visis et per Cur. ibidem diligenter examinatis et plenius intellectis tam Record. et Process. præd. ac Judic. super eisdem reddit. quam præd. causis et Materiis pro Erroribus superius assignat. et allegat. maturaque Deliberatione inde habita, consideratum est per Cur. præd. Parliamenti. quod Judicium præd. revocetur, adnulletur, et penitus pro nullo habeatur.”

On the 6th of June, the House having moved, “That an Address might be presented to their majesties, from this House, that they would be pleased to pardon Titus Oates, and discharge him from the remaining punishments he is liable to undergo, from the two judgments of perjury against him in the court of King's-bench,”

The Lord President, the earl of Bridgewater, earl of Macclesfield, earl of Nottingham, bishop of St. Asaph, bishop of Sarum, lord Wharton, and lord Godolphin, were appointed forthwith to draw an Address to this effect, and report it to the House.

The Lord President reported the form of an Address, which was as follows:

“To the King and Queen's most excellent Majesties.

“We, the Lords Spiritual and Temporal in Parliament assembled, do make it our humble request to your Majesties, That whereas Titus Oates, clerk, hath already received a severe punishment for the perjury whereof he hath been formerly convicted, and that some of the said punishments will be still continued upon him, unless they shall be remitted by your Majesties gracious pardon:

“Your majesties will be graciously pleased to grant your pardon to the said Titus Oates, to discharge him from the remaining part of those punishments, which he will otherwise be liable to undergo.”

This Address was read, and agreed to.

Ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the Lord President, the Lord Great Chamberlain, and the earl of Nottingham, do attend their Majesties, with the Address of this House concerning Titus Oates,

On the next day the Lord President reported that the Lords had attended the king with the Address, and that his majesty had given order for issuing out his Pardon as desired.

On the 11th of June, the House of Commons came to this resolution :

“ Resolved, That the prosecution of Titus Oates, upon two indictments for perjury in the court of King’s-bench, was a design to stifle the Popish plot, and that the verdicts given thereupon were corrupt; and the judgments given thereupon were cruel and illegal.”

On the 2d of July, A bill was brought into the House of Commons to reverse the two judgments against Oates, it was passed and carried up to the Lords on the 6th, on which day it was there read a first time, but it was never passed into an act, the Lords having made some amendments in it which they would not relinquish, and to which the Commons would not agree, notwithstanding different conferences between the two Houses respecting them. For an account of the proceedings in parliament, respecting this Bill, See the fifth Vol. of Cobbett’s Parl. Hist. p. 289, 386.

“ Upon the whole matter,” says Ralph, “ Oates,” by the dint of the struggle, made a shift to obtain, 1. An address from the parlia-

ment to the king, requiring that his majesty would be graciously pleased to grant him his pardon: 2. The king’s pardon in consequence of that address; and, 3. A pension of 5*l.* a week in lieu of the several pensions formerly granted him by king Charles of 624*l.* 60*l.* and 200*l.* per ann. which he had been deprived of, and which he had now again applied for, and expected to be restored to.”

Sir John Resesby, under date December 26, 1680, says, “ I dined with that excellent man Dr. Gunning, bishop of Ely. The famous Dr. Oates was of the company at table, and flushed with the thoughts of running down the duke of York, expressed himself of his highness and his family, in terms that bespoke him a fool and something worse; nor contented with this, but he must rail at the queen, his mother, and her present majesty. In this strain did he hurry on, while no soul dared to oppose him, for fear of being made a party of the Plot; till, no longer able to bear with the insolence of the man, I took him to task to such purpose, that he flung out of the room with some heat. The bishop told me that such was the general drift of his discourse; that he had sometimes checked him for the indecency of his talk, but that finding he had done it to no manner of purpose, he had desisted from any farther effort to set bounds to his virulence.”

324. Proceedings in an Action of Scandalum Magnatum, between CHARLES Earl of MACCLESFIELD and JOHN STARKEY, esq. 36 and 37 CHARLES II. A. D. 1684—1685. [Now first printed from the MSS. of Sir William Williams, in the Possession of his Descendant, C. W. W. Wynn, esq. and the MS. Reports of Mr. Justice Street, in the Possession of Francis Hargrave, esq.]

CHARLES Earl of MACCLESFIELD, *tam pro Domino Rege quam pro seipso*, Plaintiff; JOHN STARKEY, Esq. Defendant.*

IN an Action brought by the Plaintiff upon the Statute, 2 Richard 2, De Scandalis Magnatum,† against the Defendant: Wherein the Plaintiff declares upon that Statute, That he is

* The MS. of this Article appears to be the hand writing of sir William Williams.

† The law De Scandalis Magnatum rests on three Statutes; viz. Westminster the First (3 Edw. 1.) c. 34, (as to which, see lord Coke’s Second Inst. p. 225. and Barrington’s Observations on Westm Primer); 2 Ric. 2, c. 5, (as to which, see Barr. Obs. thereon); and 12 Ric. 2, c. 11.

The Stat. Westm. 1, c. 34, commands, “ That none be so hardy to tell or publish any false news or tales whereby discord or occasion of discord, or slander, may grow between the king and his people or the great men of the realm, and he that doth so shall be taken and kept in prison until he hath brought into the

and or thirty years last past was a peer of the realm, and a gentleman of the bed chamber to our sovereign lord the king.

That the Defendant maliciously devising the honour of the Plaintiff to lessen and wound; and to cause him to be reputed and taken for a person disaffected to the government, and a disturber of the peace; and to expose him to

court him which was the first author of the tale.”

And by Stat. 2 Ric. 2, c. 5, “ None shall devise or speak false news, lies, or other such false things of the prelates, dukes, earls, barons, and other nobles and great men of the realm, and of the chancellor, treasurer, clerk of the Privy Seal, steward of the King’s House, justices of the one bench or the other, and other great officers of the realm, and he that doth shall incur the pain of the stat. Westm. 1, c. 34.”

And by Stat. 12 Ric. 2, c. 11, “ When any such” [person as is described in the foregoing statutes] “ is taken and imprisoned, and cannot find him by whom the speech be moved, he

his majesty's displeasure and distrust, 17 Sep. 35 Car. 2. at Wantage in the county of Berks, by conspiracy between him and sir Thomas

may be punished by the advice of the council, notwithstanding the statutes of Westm. 1, c. 34; and 2 Ric. 2, c. 5."

Though the foregoing Statutes do not expressly give an action, yet it has been holden, that the party injured may maintain an action on stat. 2 Ric. 2, c. 5, upon the principle of law that an action lies on a statute which prohibits the doing an act to the prejudice of another. Though the dignity of Viscount was not enacted when these statutes were made, yet it has been holden that such dignity is within the statutes, and since the Union a peer of Scotland also may take advantage of these statutes. See Selwyn's Abridgment of the Law of Nisi Prius, title, "Slander," sec. 1. Emlyn in his learned Preface to the Second Edition of the State Trials slightly mentions cases of Scandalum Magnatum, (See in this Collection, vol. 1, p. xxxi) and Mr. Christian, in a Note to 3 Blackst. Comm. 124, (15th edition) makes some observations upon them. He enters somewhat into the distinctions between Scandalum Magnatum and slander of ordinary persons, and he notices that the action for Scand. Mag. is now seldom or never resorted to. Under the title "Scandalum Magnatum," some learning on the subject is collected in the Law Dictionary, edition 1809. See in this Collection some proceedings in an action de Scand. Magn. the duke of York against Titus Oates, June 18th, 1684, p. 125, of this volume.

These actions which lord Macclesfield brought against the Cheshire Grand-Jurymen for presenting him as a seditious Addresser, &c. were part of that system of mutual legal persecution by which the Whigs and Tories tormented each other, and distracted their country during the latter years of the reign of king Charles the Second.

Bishop Burnet tells us that,

"The duke of Beaufort, lord Peterborough, and some others, brought actions of Scandalum Magnatum against those who in the time of our great heat had spoke foul things of them: and great damages were given by obsequious and zealous juries. An information of a higher nature was brought against Williams, who, though he was a worthless man, yet was for his zeal chosen Speaker of the House of Commons in the two last parliaments. He had licensed the printing the votes, which had in them matters of scandal relating to some Lords. So an information was brought against him; and he upon it demurred to the jurisdiction of the Court. This was driven on purpose by the duke's party, to cut off the thoughts of another parliament; since it was not to be supposed, that any House of Commons could bear the punishing the Speaker for obeying their orders." 1 Burnet, 591.

Grosvenor with seven more named in the Declaration, did falsely, and maliciously, without any lawful or reasonable cause, publish a scan-

[See sir William Williams's Case in this Collection, A. D. 1686.]

I have not been able to meet with a report of any of these Trials, but the following Entries which occur in the Commons' Journals shortly after the Revolution relate to some of them.

"Veneris, 22 die Novembris 1 Gulielmi et Mariae. Ordered, That leave be given to bring in a Bill to reverse two Judgments obtained by the duke of Beaufort in two actions of Scandalum Magnatum, one in the Common Pleas against sir Trevor Williams, bart. for 10,080*l.* damages, and the other in the King's-bench against John Arnold, esq. for 10,000*l.* damages."

"Ordered, That there be also a clause in the aforesaid Bill, to discharge an action, for Scandalum Magnatum now depending between the duke of Beaufort, and John Dutton Colt, esq."

It appears that the Bill was read a first time on the 29th of the same month, and a second time on the 3rd of January following. It was then referred to a select committee, and, on the 24th, Mr. Christy reports from the Committee to whom the Bill for reversing of two Judgments in two actions brought by the Duke of Beaufort, upon the statute of Scandalis Magnatum; one against sir Trevor Williams, bart. and the other against John Arnold, esq. and also to discharge an Action depending between the said Duke and John Dutton Colt, esq. upon the said statute, was referred; "That the Duke had given sir Trevor Williams a release, under his hand and seal, of the Judgment obtained against him; and that Mr. Colt was contented to withdraw his order, and refer the matter to the Duke's honour: And that therefore the Committee had agreed to leave out of the Bill all matters relating to sir Trevor Williams and Mr. Colt: and had agreed to amend the same accordingly; and made it to relate to Mr. Arnold only: which Amendments he read in his place, with the coherence, and then delivered the same in at the Clerk's Table: where the same were once read throughout; and afterwards a second time, one by one; and, upon the question severally put thereupon, agreed unto by the House."

"Ordered, That the Bill be ingrossed."

Three days afterwards that parliament was prorogued, and it was never again convoked. On the 20th of March following a new parliament met, and, on the third of the next month; leave was given to bring into the House of Commons "A Bill for reversing a Judgment obtained against John Arnold, esq." and the Bill was presented to the House and received. On the 4th, it was ordered to be read on the morrow morning; at which time, however, I do not find that any thing was done upon it. On the 7th the Bill was read a first time, and the House resolved,

Jalous defamatory and malicious Libell, by them falsely and maliciously devised, framed, and written against the Plaintiff.

The tenor whereof follows in English in the Declaration :

‘ We the Grand Jury sworn to enquire for the body of the county of Chester at the assizes held in the Common Hall of Pleas in the castle of Chester, upon Monday the 17th day of September, Anno Domini 1683, having heard his Majesty’s Declaration, &c.’

The Plaintiff avers he never was disaffected to the government nor a disturber of the peace; nor guilty of any of the matters contained in that libell against him :

Whereby the Plaintiff is much wounded in his honour, hath lost the grace and good opinion of his majesty; And by reason thereof divers false rumours and scandalls are stirred and divulged among the nobles and commons of the Plaintiff, and many discords may thereby arise :

Contra formam stat. ad damn. 10,000*l*.

The Defendant pleads the Plaintiff ought not to have or maintain his action, ‘ quia dicit ‘quad ad sessionem Cestr’ tent. apud Cestr’ ‘in comitat’ Cestr’ in Communi Aula placit’

That it should be read a second time on the morrow morning. I have not found in the Journals any further mention of the Bill until Thursday the first of May, when it is entered, that “ Mr. Arnold desiring leave to withdraw his Bill for reversing the Judgment given against him in the King’s Bench; Ordered, That he be at liberty to withdraw the same accordingly.”

The second session of that parliament commenced on the 2nd of October following, and on the 18th of November, the House of Commons Ordered, That no more private Bills be brought in to this House this session until such as are already brought in or ordered to be brought in be dispatched, except a Bill for reversing a Judgment against John Arnold, esq. in the King’s-bench.” On the next day, “ A Bill for reversing a Judgment against John Arnold, esq. in the Court of King’s-bench” was presented to the House and received. On the 21st it was read the first time, and ordered to be read a second time.

On Saturday the 29th it was ordered to be read on the Monday following, which was accordingly done; and, upon a division, the bill was ordered to be ingrossed. On the fifth of December the Bill passed the Commons, and was ordered to be carried to the Lords for their concurrence; which was done. In the House of Lords the Bill was read a first time on Saturday the 6th of December, upon which occasion a debate arose whether the Bill should be rejected. This debate was adjourned to the following Tuesday, and it was ordered, That all the Lords be then summoned to attend. On that day the debate was resumed, and the Bill was rejected.

‘comitat’, pred’ 17 die Sep’ris 35 Car. 2. ‘coram Georgio Jefferys milite et baronetto ‘uno servient’ dicti domini regis ad legem ‘justiciar’ dict’ dom’ regis Cestr’ et Johanne ‘Warren, armiger, altero justiciar’ dicti dom’ ‘Regis comitat’ predict’.

The Defendant and sir Thomas Grosvenor and the rest named in the Declaration with others, ‘ debito modo secundum leges hujus ‘regni Angliæ, were impanelled and returned to be Jurors of the great Inquest at the said sessions, and were then and there sworn and charged to inquire for the king, and for the body of the county of Chester, of certain articles to them there delivered by the said justices.

And that they with the rest who were of the said inquest, ‘Secundum jramenti sui debitum, ‘et secundum evidenciam et testimonium eis ‘exhibitum,’ of the Plaintiff, and according to their consciences, and to preserve the peace in the said county,

Presentaverunt (did duly present) in the English words in the declaration mentioned as was lawful for them to do; Absque hoc, that the Defendant is guilty ‘de premissis, &c. in narratione , predict’ superius specificat, et ei imposit’ in , predict’ Comitatus Berks seu alibi extra predict’,

There is in 3 Mod. Rep. 41, a short Note concerning a collateral point which arose out of an action brought by lord Macclesfield against sir Thomas Grosvenor, foreman of the Cheshire Grand-jury, by which the presentment of the earl had been made. The word ‘tedious’ appears to be twice printed instead of the word ‘seditious’ in this Note, which is as follows :

“ The Plaintiff brought an Action upon the statute De Scandalis Magnatum against sir Thomas Grosvenor, for that he being foreman of the Grand-jury in Cheshire, spoke these words of the plaintiff, “ He is a tedious man, and a promoter of sedition and tedious addresses.”

“ The Plaintiff desired that the Defendant might put in special bail; but the Court would not grant it, and said it was a discretionary thing, and not to be demanded of right: it was denied to the Duke of Norfolk, unless oath made of the words spoken.

“ The Court therefore ordered common bail to be filed.”

In the MS. “ Historical Account,” &c. by Narcissus Luttrell, in the All Souls’ Library, is the following Entry :

“ 1683. Oct. 4th. The Grand-juries at the Quarter Sessions for the county of Sussex, held at Midhurst, and for the county of Chester, have presented the most considerable of the Whig Party as disloyal and disaffected; amongst whom are some noblemen, divers knights and esquires, and many gentlemen, who any ways favor the Whig Party.”

'comitat. Cestr' modo et forma prout the Plaintiff declares, vel aliter vel alio modo quam the Defendant hath alledged, et hoc, etc.'

The Plaintiff demurs specially: For that,
1. This Plea amounts to the general issue only.

2. That the Defendant ought to have pleaded the general issue.

3. That the traverse is immaterial, repugnant in itself, and argumentative, etc.

4. That the Plea doth not answer the Declaration.

5. That it doth not appear that the matters pleaded were recorded, nor doth the Plea conclude 'prout patet per recordum.'

The Defendant hath joined in Demurrer.

The law hath conceived such an opinion of the peaceable disposition of noblemen, that it hath been thought enough if one of them promises upon his honour, that he would not break the peace against a man. Brooke, Tit. Contempts. 6. 24 Ed. 3. 33. 17 Ed. 4. 4. Dalton Surety of the Peace, cap. 117*.

17 Ed. 4. 4. If a person will demand sureties for the peace against a person for no other cause, but that he is in doubt, that that other person will take him and imprison him, the peace ought not to be granted by the court.

Br. Contempts 6. Whereas other persons are imprisoned or bound to the peace in the same case, the peer's word passeth, that he will not meddle with the party, though he had menaced to beat him.

1. This way of presenting is a new course, and will alter the old methods of justice, in a matter so highly necessary to the administration of justice, especially by grand juries.

2. This way alters the nature of presentments and their forms, and may enable juries to write any false and malicious thing, and they are exempt from actions he it never so false, never so malicious.

3. The injured hath no other way to acquit himself of such imputation but by action: he cannot traverse such presentment, shall he traverse their apprehensions or their fears? they affirm nothing positively, shall he traverse their judgment that he ought not to be bound to the peace? Don't this presentment conclude him, that he must be bound to the peace upon these surmises? Is the court bound by this presentment? can he try [qu. traverse] that he was not an addresser to Mr. Booth and Sir Robert Cotton; [that he] was not of the Ignoramus Jury; † that he was not at the receipt of the

* See, too, Lambard, 81, 82.

† See the Case of lord Shaftesbury, vol. 8, p. 759, of this Collection. Of the reception given by juries to legal doctrines which are disagreeable to them, Dryden, in the Medal, thus writes:

The man, who laugh'd but once to see an ass
Mumbling to make the cross-grain'd thistles
Might laugh again to see a jury chaw [pans,
The prickles of unpalatable law.

duke of Monmouth; * that he is no favourer of Fanatics, and non conformist-preachers; that he

* The motives, circumstances, and consequences of Monmouth's progress (A. D. 1679), in quest of popularity, are related by different authors with different degrees of minuteness. Dryden thus speaks of it in the Absalom and Achitophel:

"Surrounded thus with friends of ev'ry sort,
Deluded Absalom forsakes the Court;
Impatient of high hopes, urg'd with renown,
And fir'd with near possession of a crown,
Th' admiring crowd are dazzled with surprise,
And on his goodly person feed their eyes,
His joy conceal'd, he sets himself to show
On each side bowing popularly low:
His locks, his gestures, and his words he frames,
And with familiar ease repeats their names.
Thus form'd by Nature, furnish'd out with arts,
He glides unfelt into their secret hearts:
Then with a kind compassionating look,
And sighs, bespeaking pity ere he spoke,
Few words he said; but easy those and fit,
More slow than Hybla drops, and far more sweet.

I mourn, my countrymen, your lost estate,
Though far unable to prevent your fate:
Behold a banish'd man, for your dear cause
Expos'd a prey to arbitrary laws!
Yea, oh! that I alone could be undone,
Cut off from empire, and no more a son!
Now all your liberties a spoil are made;
Egypt and Tyrus intercept your trade;
And Jebusites your sacred rites invade.
My father, whom with reverence yet I name,
Charu'd into ease, is careless of his fame;
And, brib'd with petty sums of foreign gold,
Is grown in Bathsheba's embraces old;
Exalts his enemies, his friends destroys,
And all his pow'r against himself employs.
He gives, and let him give, my right away;
But why should he his own, and yours betray?
He, only he, can make the nation bleed,
And he alone from my revenge is freed. (eyes)
Take then my tears, (with that he wip'd his
'Tis all the aid my present pow'r supplies:
No court-informer can these arms accuse;
These arms may sons against their fathers use:
And 'tis my wish the next successor's reign
May make no other Israelite complain.

Youth, beauty, graceful action, seldom fail;
But common int'rest always will prevail:
And pity never ceases to be shown
To him who makes the people's wrongs his own.
The crowd that still believe their kings oppress,
With lifted hands their young Messiah bless:
Who now begins his program to ordain
With chariots, horsemen, and a num'rous train:
From east to west his glories he displays,
And, like the sun, the Promis'd land surveys.
Fame runs before him as the morning-star,
And shouts of joy salute him from afar:
Each house receives him as a guardian god,
And consecrates the place of his abode.
But hospitable treats did most commend
Wise Issachar, his wealthy western friend.

had not been at any riotous assembly? these are not affirmed so as they are traversable in this presentment.

4. There is a difference between an action upon the case for a false and malicious prosecution of a person by indictment, and a conspiracy.

In a conspiracy many things are required to support it, which are not necessary to maintain an action upon the case. As that the party is 'legitimo modo acquietat.' inde, that the indictment be found, that the indictment be sufficient in law: these are not necessary in case.

Smyth and Crashaw's Case, 2 Roll, 258. 2 Bulstr. 271. Palm. 315. Cro. Car. 15. Latch. 79. W. Jones 23.

[This following Report of the Argument of Mr. Ward (probably the same who was afterwards Lord Chief Baron) for the Earl of Macclesfield, and of Mr. Holt (probably the same who was afterwards the admirable Chief Justice of England) for Mr. Starkey, and the Article by way of Answer to some Argument by Holt, which, I apprehend, relates to this Case, are among the MSS. which formerly belonged to sir Wm. Williams, and which have been very obligingly imparted by his descendant Mr. Charles Watkin Williams Wynn, for the improvement of this Work. In the margins of several of the pages containing the report of Holt's Argument, are Observations in a different and much worse hand-writing. These Observations are here printed by way of Notes, with the designation of 'MS.' Some resemblance may be noticed between the contents of these marginal Observations and the contents of the Answer to Holt. The title of the MS. Report is here retained.

This moving court, that caught the people's eyes,

And seem'd but pomp, did other ends disguise:
Achithopbel had form'd it with intent

To sound the depths, and fathom (where it went)

The people's hearts, distinguish friends from
And try their strength before they came to blows.

Yet all was colour'd with a smooth pretence
Of specious love, and duty to their prince.
Religion, and redress of grievances, [please,
Two names that always cheat and always
Are often us'd; and good king David's life
Endanger'd by a brother and a wife.

Thus in a pageant shew a plot is made:
And peace itself is war in masquerade."

See, too, vol. 9, p. 305, of this Collection.

The MS. of the Answer has no title or other account of itself: Some passages in it might excite a conjecture that it was a speech of the Plaintiff. It appears to me, that there is not any resemblance between the hand-writing of the 'Report,' 'Observations,' or 'Answer,' here printed, and those of other Manuscripts belonging to Mr. Wynn, which bear satisfactory internal evidence of having been written by sir William Williams.]

Term, Mich. Anno xxxvi. Car. 2. Reg. Martis,
Nov. 25, A. D. 1684 in Scacco'.

Earl of MACCLESFIELD v. STARKEY.

This day was argued the Cause, before the Barons of the Court of Exchequer; by Mr. Edward Ward of the Inner Temple, for the Earl, Plaintiff; and by John Holt of Grays Inn, for the Defendant.

MR. WARD'S ARGUMENT.

Mr. Ward. May it please your lordship, Charles earl of Macclesfield, viscount, and baron of Brandon, is Plaintiff, and John Starkey, esquire, is the Defendant. This comes before your lordship upon the Plaintiff's Demurrer to the Defendant's Plea.

The Plaintiff hath in this case declared, 'and sent forth, That by the statute made at Gloucester in the second year of king Richard the 2d, It is ordered, and strictly prohibited, That from henceforth no one should be so hardy, as to devise, speak, or relate, of the prelates, dukes, earls, barons, and other noble and great men of the kingdom of England, nor of the chancellor, treasurer, clerk of the privy seal, steward of the king's household, justices of the one bench or other, or of any other great officers of the kingdom any false news, lyes, or any such like falsehoods, whereby scandall or discord might arise within the realm, and that he that should do the same should incur the pain ordained in the statute of Westminster the first. Then the Plaintiff sheweth, That for thirty years last past he hath been and is one of the nobles and peers of this realm, and has for that space been one of the gentlemen of his majesty's bed-chamber, and in all that time hath demeaned himself in those places and honours with all faithfulness and integrity, and justly and faithfully served the king: Yet the Defendant the aforesaid statute little weighing, nor fearing the pain ordained in the statute of Westminster the first, but maliciously contriving the good name, state, credit, dignity and honour of the plaintiff to hurt and blacken, and the plaintiff as a person disaffected to the government of this kingdom, and a disturber of the peace, and public tranquillity, and state of the kingdom, to cause to be esteemed, and reputed, and to cause the

plaintiff to be drawn and brought into the displeasure and distrust of the king, and of the peers, and great officers of the kingdom, and of divers other honourable and venerable persons, subjects of the king; of his mere malice and envy forethought the 17th day of September, in the 35th year of this king, at Wantage in the county of Berks, by a conspiracy between the defendant, and one sir Thomas Grosvenor, baronet, and others in the Declaration named; a certain scandalous and malicious libell against the said earl then and there falsely and maliciously by them contrived and invented, did then and there falsely and maliciously without any lawful or probable cause, cause to be written, and the same libell so invented contrived and written to divers noblemen and peers of the realm, and other honourable and venerable persons, subjects of the king, then and there did openly and publicly affirm, speak, relate, publish and divulge. And that the Defendant by the said conspiracy between him and those other persons, in the same libell divers false feigned, and contrived and invented scandalous words, lies and falsehoods of the plaintiff, with a false and malicious mind to defame and scandalize the plaintiff, then and there falsely and maliciously, and without any lawful or probable cause, to be written did cause, and procure. And then sets forth the tenor of the libell in *hoc verba*. The effect whereof is, that the persons therein named, (for it begins thus) "We the grand jury sworn to enquire for the body of the county of Chester," and the effect of all is, That having heard his majesty's Declaration concerning the late conspiracy of his life and government read at the sessions, and in their parish churches, they conceived it high time to manifest their separation from such persons and principles, as are therein mentioned, and held themselves bound in that distempered juncture of affairs, to present, that they had strong apprehensions of danger from a disaffected party in that county, that is such as did present a Seditious Address to Mr. Booth*

* This Address is printed in the second volume of State Tracts, &c. from the year 1660 to 1689, and is as follows:

THE CHESHIRE ADDRESS.

"To the honourable Henry Booth, esq. and sir Robert Cotton, kt. and bart. being chosen knights for that county, March the 7th. Immediately after their election, the right honourable the lord Colchester, and the lord Brandon, presented them a Paper, containing the sentiments and desires of the Gentry and Freeholders, in these words:

"We the gentry and freeholders of the sooty palatine of Chester, who have by a free and unanimous consent re-elected you to be our representatives in parliament, do thankfully acknowledge your joint integrity and concurrence with the worthy and eminent members of the last, who in so signal (and

and sir Robert Cotton, at their election for knights of the shire, and had several meetings and cabals since, which did administer greater suspicion by the store of arms, many of them were provided with; and their assembling with schismatics, and disaffected persons in the reception of James duke of Montmouth, who was a confederate in the conspiracy, and for prevention (as far as in them lay) of the spreading of the contagion, they conceived it expedient, that they that promoted the Address, and that were aiding in the reception of the duke of Montmouth, and the frequenters of conventicles, and maintainers of nonconformists, be obliged to give security for the peace, and particularly the plaintiff, and divers others there enumerated. Then the Declaration further sets forth, that this writing containing this false and scandalous matter, the defendant by conspiracy with the said other persons did, openly, falsely, and maliciously, read and publish, and cause to be read and published, whereas in truth the plaintiff the earl never was disaffected to the government of this realm, nor a disturber of the peace or public tranquillity of the kingdom, nor any ways guilty of the matters alledged against him in the said libel, but by pretext of those things the plaintiff in his reputation, honour and dignity, is greatly hurt, and scandalized, and lost the favour, good opinion and esteem of the king, and other nobles, and great men, and by reason of these premises, divers false rumours and scandals between many of the peers and great men of the realm, and other the king's subjects concerning the plaintiff have arisen and been divulged, and great scandals and discords by occasion of the premises, between the earl and other great men, do arise, and daily more and more may arise, to the great disturbance of the peace and public tranquillity of the realm, and in contempt of the king, and his government, and to

never to be forgotten) a manner of petitioning, promoted the union, support and growth of the true Protestant religion established by law; and the only expedient (we think) to perpetuate these to our posterity, is to adhere to what the late parliament designed relating to the duke of York, and all popish successors; to provide for the defence and safety of his majesty's person; vigorously to pursue the discovery of the horrid Popish Plot; and to punish all Sham-plotters, whom we esteem the worst of villains, without which his majesty can neither be easy, nor secure. These with those great and excellent things then under their considerations, make us confident of your sincerity and proceedings; which that they may be successful, is our prayer, and will be the support of all those who wish the happiness of his majesty, and these distressed kingdoms. We likewise desire the Votes may continue to be printed, that till the effects of your endeavours (on which depends the happiness both of church and state) are accomplished, we may be truly acquainted with your proceedings."

the great scandal and grievance of the earl, the plaintiff, against the form of the statute, and to the damage of the plaintiff ten thousand pounds.

To this declaration the defendant pleads, *actio non*, because he says, that at a sessions of Chester, holden in the Common Hall of Pleas of that county, the day in the Declaration named before sir George Jefferies knight and baronet, justice of Chester, and John Warren esquire, another justice of that county, the defendant with sir Thomas Grosvenor, and the other persons named in the Declaration, and with some others, 'debito modo et secundum Leges hujus Regni Angliæ' were impanneled, and returned to be of the grand inquest, and before the said justices were sworn and charged to enquire for the king, and the body of the county of Chester 'de certis articulis' 'ibidem eis per prefatos justiciarios traditis,' and that he the defendant and those other persons, and the rest that were of that inquest, 'secundum juramenti sui debitum ac secundum evidentiam et testimonium eis ibidem exhibitum de prefato comite ac juxta eorum conscientias ac ad conservandam pacem, &c.' 'debito modo presentaverant,' in the English words in the declaration set forth, 'prouit eis bene licuit,' and then he comes and traverseth, and says, *absque hoc*, that he is guilty *de premissis* in the declaration specified, 'in predicto comitatu Berks, seu alibi extra prædictum comitatum Cestr' modo et forma prout,' the plaintiff has declared, 'vel aliter, vel alio modo,' than the defendant has before by his plea alleged and prays judgment, if this action can be maintained.

To this plea, the plaintiff hath demurred especially, and shews divers causes. As first, that the plea amounts to the general issue, and that the general issue in this case, ought to be pleaded. Secondly, that the traverse is immaterial, repugnant, argumentative, and wants form. Thirdly, that the plea doth not answer the declaration, but is also argumentative and double. Fourthly, that the defendant doth not set forth, that the matter by him pleaded, is upon record, nor doth conclude as he ought, 'prouit patet per Recordum.'

The Defendant hath joined in Demurrer.

Upon this whole record, I humbly conceive with submission, my lord, that there appears in the declaration that hath been thus opened a good cause of action for the Plaintiff, and that this good cause of action is not sufficiently, in good form or substance answered, denied, traversed, or avoided, by the defendant's plea that has been likewise opened, and consequently judgment ought to be given for the plaintiff to recover his damages.

My lord, there are some things that I desire humbly to premise in the case, and I shall only just mention them, and the first is this.

1. That this action here brought, is an action 'tam pro Domino Rege quam pro Seipso,' and according to the opinion, 4 Co. 13, in all these actions the king himself is interested and concerned.

2. My lord, this action that is grounded upon the statute de Scandalis Magnatum, is an action very much favoured in law, and deserves so to be, as being for the punishment of such bold persons as raise and publish false things and scandals of the noble men, and great officers of the kingdom, whereby discord and scandal may arise between the king and his people.

3. That a lesser thing in the case of a peer will serve to ground and bear an action than for the case of a private person, and there are great reasons for this; the greatness of their persons, their nearness to the king, and the concerns they have in the affairs of the kingdom, are so considerable, that in their case, 'unde falsi Rumores oriri possint' this action will lie, when it would not do so, in the case of a private and ordinary subject.

4. Another thing I would premise, is concerning the quality of the plaintiff, who is by this declaration set forth to be a very great person, both in dignity and office.

First, in dignity, he is a peer of the realm, and it is set forth in the declaration, that he hath been so for the space of thirty years past and more.

Secondly, in office, for it is likewise set forth that he is and hath been so long a gentleman of the bedchamber to the king, a place of the highest trust that I know of. These things appear in the declaration, and are well known and not denied by the defendant.

5. The next thing that I would premise is this: this case as it comes before the court, is before them upon a special demurrer, wherein all advantages of exception to the defendant's plea both as to the substance, and as to form, are saved, and to be allowed to the plaintiff.

These things being premised; now, my lord, I shall come to the consideration of the plaintiff's cause of action, and the defendant's defence; where I shall desire leave to go by these steps.

First, I would observe the nature of the plaintiff's action.

Secondly, the nature of the defendant's plea. The plaintiff in this action, my lord of Macclesfield, charges the defendant by the declaration with these things:

First, that by a conspiracy in Berkshire with other persons he invented, writ, and published this scandalous libel.

Secondly, that all the matter in the declaration is charged to be done falsely and maliciously, and with a malicious mind, without any lawful or probable cause.

Thirdly, that it was done on purpose to scandalize and defame the plaintiff, and,

Fourthly, the consequences of it are in the close of the declaration recited (*viz.*) that the plaintiff suffers in his reputation; discords and scandal have arisen and more may arise to the disturbance of the peace, in contempt of the king and the great scandal and grievance of the plaintiff.

My lord, I shall observe this upon the matter

of fact, laid in the declaration in general; that if any person by conspiracy, or any such false ways and means an^d to such purposes as are mentioned in the declaration, do make or publish against a peer of the realm, or other great officer, (nay even a private subject,) any writing that may be scandalous to his reputation and honour, or have such effects as those in this declaration, that is a good cause of action, unless the defendant by his plea can set forth matter sufficient to justify or excuse it.

Next, my lord, I shall consider what it is this libel doth charge upon this noble lord. In effect and in a manner, it doth charge him with being a confederate with those concerned in the late conspiracy; it doth charge him as a seditious addresser to the knights of the shire. It doth charge him as a riotous, tumultuous, receiver and entertainer of the duke of Monmouth, who is therein said to be one of the conspirators against the king's life and government, and then likewise it doth charge him as a frequenter of conventicles, and a harbourer of non-conformists. These are the things that this writing (which the defendant is charged by the declaration to have invented, written, and published) doth carry in it, and that in a special manner have influence upon the plaintiff, the earl, who is here before your lordships seeking a remedy, by this action, for the scandal and prejudice he has incurred by it.

I do not say, that in this case these things directly and in *terminis* are charged upon the plaintiff. But I humbly conceive it is worse than if it had so done; because if this had been a direct and positive charge, there had been a way to have put the fact under its due examination, which now, as it is thus penned and managed, cannot be done. If therefore by any rational and argumentative consequence or inference, that can be drawn or made from this writing as thus framed, it can be concluded that these are words which carry reflection and dishonour upon this great peer, though there be not direct and positive affirmations, yet certainly they are such calumniating and reproachful reflections as will support this action: it is not, I conceive, necessary that there should be affirmative words but any oblique scandal in the case of a peer will bear an action.

As in my lord of Peterburgh's case*, as it is reported in Mr. Siderfin's Reports, fo. 484, Mich. 21 Car. 2, B. R. where an action was brought and adjudged maintainable for these words, 'I met J. S. my lord of Peterburgh's man, and I know not but my lord sent him after me to take my purse;' though there were no affirmative words: and many instances of this nature and of this action there are in our books which I shall not trouble your lordships with citing, but plentifully may be read of it, in 5 Co. 125, the case of *de libellis famosis*, and elsewhere.

* See earl of Peterborough, v. Mordaunt, S. C. 2 Keb. 537, 559, 606, 1 Ventr. 59, 1 Lev. 277.

So then, my lord, in this case, this matter being thus set forth, and the circumstances and aggravations of it as being by conspiracy, and with a purpose to defame the plaintiff, &c. I shall humbly offer this to your lordships, that those things are laid in the declaration not only as aggravations, but as matters that of themselves will ground and bear this action.

For I conceive, with submission, for men to conspire together to do such things as these are, is certainly criminal and actionable, though the thing they did conspire to do did not take its designed effect. As in that memorable case Hil. 15 and 16 Car. 2 of the Sterling and other Brewers* in the court of King's Bench, by the opinion of all the judges. They were informed against for conspiring to depress the Gallon trade by which the poor were supplied, and so to cause the poor to make a mutiny against the farmers of the excise, and besides for endeavouring by conspiracy and confederacy to depauperate the farmers of the excise. The case is reported in Mr. Siderfin 1 pt. 174, and upon the trial they were found guilty of nothing but only a conspiracy to depauperate the farmers of the excise, and though the special fact of agreeing to depress the Gallon trade was laid in the information; but not found, yet the court held, that any conspiracy, combination or agreement of persons, for the doing of any such things, was a thing punishable by the law, and they were fined severely for it.

The statute of 31 Ed. 1, and the subsequent laws that have been made, are very considerable in this case, and this is a certain rule in law, wherever an indictment or writ of conspiracy will lie against many, there an action upon the case in the nature of a conspiracy will lie against any one of these many. And so we conceive there is a sufficient cause of action set forth in the Plaintiff's declaration.

Now, I come to consider the effect of the Defendant's Plea; and whether that doth answer fully the Plaintiff's Declaration, and excuses, justifies, or avoids the Plaintiff's cause of action set forth in the declaration: and I conceive with submission, my lord, it doth not.

I shall not take upon me to say, that for what a juryman doth as a juryman, being sworn in a court of justice and upon a matter consonable by that court, an action will lie against such a person, I find authorities in our books that hold it will not, as 20 H. 6. 5. and 20 H. 6. 33. and other places.

But my lord, in this case, I humbly conceive we must consider what the Plaintiff hath said in his declaration, and how it is and in what steps and methods, the defendant has answered it, in his justification, and that justification doth consist of these parts. I crave leave to take in pieces this plea of the Defendants, and so we shall the better see whether altogether, or in pieces it doth answer the charge

* See the Case of Rex v. Sterling, 1 Lev. 125. also 1 Keb. 650, 665, 675, 682. S. C.

in the Declaration, for which this action is brought by the Plaintiff.

First, then, the Defendant says, that there was a sessions held at Chester, in the Hall of Pleas there, the 17th day of September in the declaration mentioned, before such and such justices, naming them. Then he says, that the Defendant and others by name were there according to the laws of this kingdom, in due manner impanelled and returned to be of the grand inquest, and sworn, and charged with certain articles which were delivered unto them, by the said justices; and upon evidence and testimony to them given concerning the Plaintiff, and according to the duty of their oaths, and according to their consciences they did make the presentment, in the English words, in the Declaration set forth, as it was lawful for them to do.

Now, my Lord, I conceive this justification as it is pleaded is not sufficient either in form or matter.

It is not sufficient as to form, for it hath not the form of presentment that is usual in all presentments of Grand Juries, for it doth not say that these persons did present this matter upon their oaths. The settled forms of law are to be pursued, and these are the settled forms in all such cases, 'Juratores pro Domino Rege et super Sacramentum suum presentant.'

Again, my Lord, I conceive it doth not appear in all this Plea, that this presentment thus pleaded by the Defendant is the same thing with the libell or writing set forth in the declaration. And there are these differences between them.

First, that which is set forth in the declaration is alledged in itself to be at the assizes held at Chester in the castle of Chester such a day, but that which is in the plea, is said to be at the sessions of Chester in the county of Chester in the Common Hall of Pleas of the said county. Neither hath the Defendant in all this plea said that this is the same writing, or thing for which the action is brought, for he should have avowed that, and said it was the same. And there is not so little in the former variance, as at first perhaps may be thought, for Chester hath many jurisdictions, some by the common law, others by grants from the crown, and others by statute, and it doth not appear that this court was held particularly by any of these, for it might as aforesaid have various and different jurisdictions upon various and different titles, it might have its assizes held at one place; and its sessions at another. Then the paper in the declaration having set itself forth to be at the assizes, and the paper in the plea, being said to be at the sessions, cannot be one and the same, and so the plea doth not answer the declaration as it ought to do directly and in terms.

My lord, I humbly conceive the plea in this case does not answer the plaintiff's cause of action, as to the matter of it. It is true all presentments of jurors are, and should be of such things in a court of justice, as that court where-

in the presentment is, has consuance of, and in such a manner as that the party accused may have recourse to that court to defend himself, by examination and trial, whether the things charged upon him in such a presentment are true or not, otherwise if it should not be so courts of justice if they should accept of extravagant presentments may be a means of obstructing justice, and of casting illegal and unwarrantable aspersions upon men, and those reflections so put upon them must remain there for ever upon record, the worst and longest way of scandalizing a man. If words will bear an action, and the party of whom they are spoken ought to be vindicated from such aspersions, much more ought he from that which appears upon record if there be not a sufficient justifiable cause.

The Plaintiff here hath had a reflexion and imputation put upon him, and is, and was very desirous to have had the truth of this case, examined, whether he be guilty of the matters charged upon him in this presentment or not. The things are very heinous in their nature by way of reflection, and if true are very ill things as to the consequences that may attend them.

If, indeed, persons may be admitted to present things not properly examinable in those places where the presentment is made, or things that may not, by some method and course of law be brought into a way of examination and trial, it would cross all the administration of justice which provides means and remedies as well to acquit the innocent as to punish the guilty.

For the jury are highly to be favoured, and protected by the law, while they keep within their due limits; yet if by a confederacy, or ill practice, they do any thing that is not warranted by their legal power, they lose their privilege of favour and protection that the law gives them.

I will suppose with your lordships' leave, one thing in this case; suppose the grand jury here should present a thing of which they had no authority by the law to make a presentment, would an action lie against them for it, yes, or no? I conceive it would lie in that case, for the law takes no care to protect any persons from actions for what they do by colour of their office, but those that keep within the limits of that authority which the law gives them.

As for instance, if they present their opinion of things only, as that they conceive I. S. and I. N. enjoying such an office to be altogether unfit for it. This sure would be quite beside the office, and nature of a juror, this being out of the limits of their authority and inquiry, and though this should be among other things which they might lawfully enquire of and present, that would be no excuse for this extravagant presentment which they had no authority to make.

In this case, my lord, I must confess I do not find, but hope to hear something from the other side about it, what article of their usual charge, the matter of this presentment belongs unto in reference to my lord Macclesfield the

plaintiff, and the rest, unless it be, that which is endeavoured to be intimated about their having rid armed, and that indeed they had by several laws power and authority, to inquire of as by 2 Ed. 3, c. 3. 7 R. 2. c. 13. and 20 R. 2, c. 1.

But even as to that I must say as I said before, in general it is not directly nor positively affirmed and charged upon the plaintiff that he did so, and there we say lies the reflection, being an oblique calumny and accusation to insinuate as if my lord did so and so, but doth not downright say, that he was guilty of any of these things. Now my lord, I must confess, upon looking into the matter I conceive that all presentments ought to be affirmative and positive as to the charge, but this is not any such thing, but they conceive it expedient to declare their separation, and they hold themselves bound in this juncture of affairs to present their apprehensions of danger from a dissatisfied party in that county, and then again they conceive it expedient that such and such persons do find security for the peace, and the plaintiff first.

It is the end of all law to bring things to judgment in a due course, and method of examination, and trial, but now such a proceeding as this upon which this action is brought is not a legal course upon which a formal indictment may be raised: and under favour, my lord, in all criminal accusations the course of proceedings should be such that the party accused may put himself upon the trial of his innocency, whereby he may either be found guilty or acquitted.

And besides, my lord, this I have further to say, as to the matter, that I conceive the parts of the justification the defendant hath very much failed in, and that in many particulars.

First, the justification is made of a presentment made at Chester in the Common Hall of Pleas there at the sessions, and the declaration is for a libell and conspiracy at Wantage in the county of Berks, and it doth not appear that the thing justified is the same with the thing charged. Nor doth the plea say by what authority this court at which the presentment was made, was held, nor by what commission. I did mention that Chester hath various and different jurisdictions, some by common law, others by statute 32 H. 8, and 38 H. 8. c. 13. Now it is necessary in such a case that he that will make such a justification, must justify in such a manner as to leave nothing out or unalleged, that makes any thing to the completing, and perfecting such a justification, for by his justification he acknowledgeth all the matter of fact alleged in the declaration to be truly set forth, but only justifieth the manner of doing that fact, without which justification the same matter would be a fault, for which he must suffer.

Again, the Defendant in this plea doth justify, that he was among the rest sworn and charged to enquire for the king and the body of that county, upon certain articles delivered to him and his fellow jurors by the justices, but doth not mention what those articles were. Now as

this is alleged in the plea, it should seem that the 'Articuli per Justiciarios eis traditi,' were articles delivered to them in writing, and so being certain ought to have been particularly set forth, that it might thereby have appeared, that this presentment was in pursuance of those articles. For in case of a plea in bar of, and to avoid such an action as this, he ought thus as I conceive to have justified. I confess I did such a fact, as in the declaration is alleged, but it was at that time given me in command and charge to enquire so and so, and for that reason, I did make such presentment; and so ought to have set forth what the articles were, or at least to have said they were such as did contain in them matter upon which this presentment might be grounded and founded.

Another part of this justification is that he says he did it according to evidence, and testimony there to them given concerning the said earl. Now that I conceive to be too general and therefore naught. In *Bushell's Case* in my lord Vaughan's Reports, fol. 137 *, there was a jury fined because they did not bring in a verdict according to evidence, and they being committed to prison, thereupon brought their Habeas Corpus in the Common Pleas; and my lord chief justice Vaughan who delivered the opinion of the whole court, in that case did take exception to the return of the Habeas Corpus, which set forth that matter so, because the court that made the return ought to have set forth the evidence given below, so that it might appear to this court here whether the verdict were according to evidence or not. My lord, I would borrow a reason from this case in Vaughan to use in our case, and urge it thus. I conceive that he that will chuse to plead specially and not generally, ought to make it so certain and positive, that no exception may be taken to the generality and uncertainty of it, and surely I think with submission, a barr or a justification in a plea ought to be more particular and certain than the return of a writ from one court to another, which as the return of a court they might with more reason think fit to give credit to and construe more largely. But this, as all pleas, must be taken most strongly, against the party pleading, who is presumed best to know his own case, and to be best able to set it forth, and therefore it will likewise be presumed that he has set it forth all, and if then it be too general and uncertain it must needs be naught.

I have this further to say, my lord, as to the form of this pleading, I conceive it hath failed in many particulars, for

First by this plea or justification of the Defendant's, the plaintiff is streightened, and the traverse taken in the plea is too narrow to bring this matter to a fair trial.

And the jurisdiction of Chester, whether the defendant by the plea would draw the examination of this cause, being a limited and circum-

* See the Case, vol. 6, p. 999, of this Collection.

scribed jurisdiction, is not large enough to carry all the matters, charged in the declaration and excused or justified by the plea, thither to be tried and determined.

The plaintiff declares upon a conspiracy and libel had, written, and published at Wantage in the county of Berks, the defendant justifies upon an impanneling, swearing and charging, and presentment in the county of Chester, and then traverseth, *absque hoc*, that he is guilty 'de premissis in narratione' in the county of Berks, or other where, out of the county of Chester.

Now to this, my lord, I think I have two exceptions. Here are many things laid in the declaration; as a conspiracy, the writing of the libell, and the publishing, and these may be and are so laid in this action as distinct crimes of themselves, and I conceive are to be enquired into distinctly by the jury, that should try this cause upon issue joined. And that argument I ground upon Smith and Crashawe's case, Palmer 315. The case is twice reported, once upon an action brought in king James's time, and judgment was arrested, by opinion of three judges in the King's Bench. Palmer 315 and 317: and again as it stands reported in Cro. Car. fo. 15, where judgment is given for the plaintiff. But there it is agreed that where a conspiracy is laid in one place and the fact conspired about was in another, though in the same county, there ought to be several issues, which proves them to be distinct crimes.

And besides, my lord, I conceive with submission the traverse ought to have been 'absque hoc quod est culpabilis de premissis nec de eorum aliquo,' for it is sufficient for the plaintiff to recover if he make out any cause of action in any one particular. Now how can this traverse, that confines all to the county of Chester, be good or large enough, for they can try nothing but what happens to be within their own jurisdiction, and the plea which grounds the traverse goes only to the making of the presentment, and answers not at all to the conspiracy or writing the libell.

And certainly the last words of the traverse, 'nec aliter vel alio modo quam' the defendant has in the plea before alledged, will not make it good; for these words answer to the writing, or the conspiracy, and I shall compare it to the case in Cro. Eliz. fo. 435. of Askue and Saunderson, trover for sheep, 1 Dec. 36 Eliz. The defendant pleads he was sheriff of Lincolnshire, and J. S. recovered against the plaintiff 100*l.*, and had a *fi-fa*, returnable Crastino Animarum 35 Eliz. which was delivered to him 1 Oct. 35 Eliz. to be executed, and he 20th Oct. 35 Eliz. took, &c. which is the same conversion *absque hoc*, that he converted them 'aliter vel alio modo;' and the plea was by the whole court held insufficient, because it was not answering to the time laid in the declaration (though that were a transitory matter and the material things of the action were answered,) and not answering all comprized in the declaration, it was ill in all. So here this plea hath not answered the whole declaration, for the

conspiracy might be in Berkshire though the presentment were made by them as a jury in Cheshire, and therefore is certainly naught, because both may be true, the declaration and the plea, and yet not answer one another, because they speak not of the same facts.

And I conceive the general issue ought to have been pleaded in this case, but of that I shall say somewhat more presently.

Another exception, my lord, that I take to the pleading, is this, that the defendant hath pleaded matter acted and depending in a court of record, and yet hath not pleaded it 'prout patet per recordum.' Every plea must have an apt conclusion to bring it to a proper issue or judgment, if the plea doth contain matter of Record, it must conclude, 'prout patet per recordum,' because that proves itself, and the replication must be 'null tiel record,' and thereupon it shall be tried by the record when produced, or judgment upon failure of the record. And so is the book, of 30 Assis. pl. 21. In a like matter as this it is said if the defendants in a writ of conspiracy will justify as jurors or indictors they must make it appear by record: that is to be way and method of trial in the case, and so it must here be.

So 7 H. 4. 31. There was an action upon the case for a conspiracy; the defendants plead their impanneling before a justice of peace, and an indictment of trespass was found by them and demanded judgment, 'si action &c.:' thereupon 'Null tiel record' is replied and upon that issue joined, and upon failer of record, judgment is given for the plaintiff. These two cases prove clearly that the trial must be by record and therefore, 'prout patet per recordum,' should have been the conclusion of the plea, and the plea not having concluded so, and that being specially assigned for cause of demurrer, the plea is naught. Our last exception is that instead of setting forth this special matter as it is here pleaded, the defendant ought to have pleaded the general issue, and could not plead it thus; for it is a plain and known rule wherever a justification doth amount to a bar, not guilty, that is cause of demurrer. In such a case I need not cite books, I am sure, for proof of this, it is so well known and so plain law, Cro. Car. 737 Lynnett and Wood's case,* and abundance more are expressed in it.

And the reason of law is plain, because special pleading tends only to intricate and inveigle the court in such a case when matters ought to come to a proper issue; so it would in this case; whereas all advantage of this special matter, if it amounts to a good excuse, would have been saved to them upon the ge-

* The case here intended seems to be that of Lynner v. Wood, Cro. Car. 157. One of the first general principles in pleading is that nothing may be pleaded specially which amounts to the general issue or a total denial of the charge, See Co. Lit. 303, b. 3 Blackst. Comm. 309. Com. Dig. title (Pleader E. 14.)

neral issue, but this special plea would intricate the court in disputes between matters local and transitory, and between particular and general jurisdictions, and a great many other questions arising upon it. So that both for the substance of the plea as also for the form in which it is pleaded, I conceive there is not matter sufficient in it as it is pleaded to preclude the plaintiff, from his action, and therefore humbly pray your judgment for the plaintiff.

MR. HOLT'S ARGUMENT.

Mr. Holt. May it please your lordship, I am of counsel in this case for the defendant. The Record hath been already truly opened by Mr. Ward, and therefore, I shall not trouble your lordship to repeat the particulars of it, But the general question of the case is,

Whether this action as the matter appears before you upon this whole record doth he or not against the defendant.

And with submission, this action I conceive doth not lie. And next suppose that action did not lie, in case a proper plea were pleaded, then the question is whether this plea doth not sufficiently avoid the action, and with submission I conceive it is a good plea and doth well avoid the action.

I shall then in the first place consider whether this action upon the case, in the nature of a conspiracy, for this matter, doth lie as it is set forth in the plea, that is the main question, and as I said with submission to your lordship I do conceive the action doth not lie.

Mr. Ward did indeed premise several things which I do admit, as

First, that the action brought by this noble lord the plaintiff is brought as well for the king as for himself upon this statute, and that the king is concerned in it; all this I do admit, and yet I conceive that will be no ingredient into the case, nor will affect the case at all one way or the other. For I do not observe that he hath inferred, nor indeed can he infer any consequence thence to maintain this action.

Secondly, I do admit that this noble lord the plaintiff is a person of great honour and dignity both by title and office, and in himself of great worth and honour, and I conceive the integrity worth and honour of my lord of Macclesfield are not at all concerned in this case. I would not be misunderstood: though I should justify and maintain the presentment of the Grand-jury, to be a good plea in law in bar of this action, yet I would not be thought in the least to make any reflexions upon my lord's honour; that which I stand upon and intend to argue is the law of the case, not any thing of that tendency; and so I desire all along to be understood.

As to the causes of the special demurrer, I shall consider then by and by, but that this action as it stands before your lordships upon this record is not to be maintained by law, I shall propose to prove by these three grounds and reasons.

First, that this is a presentment made of

these matters that are therein mentioned in a proper judicature before proper judges that had consuance of the cause.

Secondly, as it was made before proper judges, so it was also made by proper persons, such as were very fit to judge of the matter given them in charge. And

Thirdly, That the causes and matters mentioned in the presentment, are very good causes and grounds upon which these persons might request that the persons therein named might find sureties for the peace.

And I conceive, my lord, that if I make out these things this action that is thus brought upon this presentment must of necessity fall to the ground. In the discourses of these heads I shall answer Mr. Ward's objections as I go along.

First I say that this presentment for which this action was brought was made in a proper judicature and before proper judges that had consuance of the cause; and being then made in a course of justice, I think it will be yielded me that the action doth not lie.

Now that it is made in a proper judicature and before proper judges, I think will be pretty plain if we do consider the jurisdiction of the court* in which this presentment was made, which though Mr. Ward hath made one of his objections that it doth not appear what jurisdiction it is, yet with submission I take it you and all the courts in Westminster-hall will take notice of their jurisdiction being in a County Palatine without its being particularly pleaded, for it is the king's own immediate Court, the County Palatine having Jura Regalia, and the judges sit there by the king's immediate commission, and patent from the king. It is then like the jurisdiction of this Court and the other Courts in Westminster-hall, and I think it always has been taken notice of as such by the Courts in Westminster-hall.

If a Writ of Error be brought of a judgment given in the County Palatine of Chester, as we have precedents of such in Co. Entr. tit. Error, they do not set forth that it has been a County Palatine time out of mind, they do not set forth their jurisdiction to be by prescription, letters patents, or act of parliament, but generally use their plain stile as it is set forth in this plea.

But now it is true in cases of judgments and proceedings in inferior courts and subordinate jurisdictions, there the title of the Court must appear in the stile, and it must be made out by what authority they hold plea, by prescription, or letters patent, such as these, or act of par-

* " This is fallacious, and begs the question, presupposing the libell to be a lawful presentment, that being the only question. Every false malicious lye published in a Court in such a manner as no issue can be therein legally joined, is not made a lawful presentment, because done by a jury, and because they say, we present, &c." MS.

liament, and therefore it doth not need to set forth its authority specially.*

And I remember there was a case of a Writ of Error of a judgment in a County Palatine, where it was assigned for Error that the cause of action in the declaration was not alledged to be 'infra jurisdictionem' of the Court, but the Court held it needed not be so alledged because the County Palatine was not such an inferior subordinate jurisdiction as must be particularly set forth and restrained to such limits, and this was the case of one in the Petty Bag.

And the reason of the law is the same, with that in the Prince's Case, in the eighth Report; † where it is held that an act of parliament concerning the Duchy of Cornwall, and which gave a special manner of inheritance to the king's eldest son, was a public act of parliament and not such a private one as need to be specially set forth, and your lordship as all other the King's Courts ought to take notice thereof.

Then this being in a County Palatine which has regal power, and this being the King's Court by immediate commission from the king, this jurisdiction doth comprehend within the County Palatine, the same authority as the King's-bench has in other parts of the kingdom and therefore it hath power to enquire of all offences committed within the County Palatine that justices of Oyer and Terminer can enquire of, nay more than ordinary commissioners of Oyer and Terminer, and may examine the Errors of other justices of Oyer and Terminer, and enquire of things they cannot enquire of.

Now it being so, pray let us a little consider what is mentioned in this presentment but what the judges there had power to 'enquire into' and examine hear and determine.' They by their commission are to proceed against all that frequent conventicles or unlawful meetings under colour of the exercise of religion contrary to law, against all that go or ride armed, which is an offence in time of peace, and against those that unite and assemble in unlawful numbers, and in a tumultuous riotous manner, so that there is nothing mentioned in this presentment but what is proper for the consance of that Court before whom it was made. †

* So in the Original.

† 8 Co. Rep. 14.

† "This is fallacious, for a crime whereof a Court hath consance may be maliciously suggested in such manner that the Court cannot legally hear and determine the same, nor bring it to any issue, nor grant any process upon the suggestion. Every Court (except parliaments) is bound to legal forms, as well as limited to the matters whereof it may take consance, but the Court could not hear and determine any of the matters in this libell in the manner these are set forth, and therefore no lawful presentment, nor to be deemed a verdict or act of a jury as such nor could the Court regularly take any consance of that libell." MS.

Now my Lord, I would desire to consider this declaration of the plaintiff in this matter which seems to comprehend these sorts of actions.

The first is an action grounded upon the statute de Scandalis Magnatum, and that I do acknowledge to be favourably taken, being grounded upon an act of parliament.

Secondly, another sort of action seems to be grounded on the common law for a libell, and that action any man may have, as well as a nobleman. And,

Thirdly, it seems to be a kind of action of conspiracy for to indict or accuse the plaintiff of these matters in the presentment without probable cause.

Now, as to the first, though it be favoured in law as an action grounded upon a statute and for the preservation of the dignity of peerage which hath so great an influence upon the government, yet even in that case a proceeding according to the course and method of law,* shall take away the action of a peer upon this statute, for such a fact: for a peer is certainly as liable to the justice of the nation, and matters done by him as inquirable of by a grand jury before a proper court as a private subject, and if the court have jurisdiction of the cause, a jury may enquire of that matter of which the court have jurisdiction. And for such an enquiry he cannot have his action, and that is not a suggestion of mine, but grounded upon a full authority in point, and that is the case, 11 Eliz. Dyer. 285. † A peer brought an action upon the statute de Scandalis Magnatum, in the Common Pleas, against a man for accusing him for forging a deed (which certainly is a great offence and draws with it a great deal of infamy and scandal) the defendant he justified thus. 'I brought an action against 'this peer,' the plaintiff, of 'forger de faux fauts' which is the same matter upon which this action is brought, and thereupon the plaintiff demours.|| This was held to be a good justification, and that the statute, de Scandalis Magnatum, did not extend to give an action for such a matter though false, though malicious, and though brought for vexation without reason; and why, because it is a proceeding in a court of justice, and wherever a

* "This is the vain fallacy that runs quite through all this Argument, that he supposeth the libell to be a proceeding according to the course and method of law. If it were, no action would lie against the defendant, though all the matters of the accusation were false. And it may be, the law would not suffer it to be deemed a conspiracy." MS.

† Lord Beauchamp v. Croft et al.

|| "All this Argument is trifling and begging the question, taking it for granted, that the writing this libell was a legal proceeding in a court of justice, which is utterly denied. The action against the peer was a legal process against him, for which no man shall suffer." MS.

man, doth proceed in a proper court that hath proper jurisdiction, and for crimes that the court hath cognisance of, he is under the protection of the law, for that prosecution, and no action will lye against him for it.

And that, my lord, is the difference taken in the fourth Report fo. 14, Cutler and Dixon's case, which was thus: Divers scandalous articles are exhibited to justices of the peace, against certain persons. Some of those things the court had jurisdiction of, some it had not, but though they were scandalous and without reason exhibited yet for the meer scandall, no action would lie because defendant had pursued the ordinary course of justice.*

It is true my lord, a special action upon the case will and may lie after the matter is determined, for proceedings without a probable cause;† but then the action must be special, and the plaintiff must declare that there was such a prosecution upon which he was acquitted, and that it was without any probable cause.

But, my lord, the Declaration in this case now before your lordship is not so, setting forth that they proceeded in a court of justice where the matter was examined, and the plaintiff acquitted, and that the proceeding was without any probable cause; but it supposeth a libell made by the defendant in conspiracy with others in Berkshire, and then sets forth the presentment in hæc verba, and then a publication of it in Berkshire, to the scandall of the plaintiff.

Now as this Declaration is made, *prima facie*, no question but the action doth lie; but then taking the whole record together, and as the matter is thereby disclosed to the court, it appears to be quite another thing: if so be these things had been done in Berkshire, as the plaintiff has declared; without the methods of justice, there had been nothing to be said to it, but being by the plea shewn to be in Chester, before a proper court in a legal course; and not any thing shewn by the plaintiff to deny the matter of the justification,† I think it can never maintain this action, to make this a libell, made by conspiracy and published in Berkshire.

I come, then, to the second ground of my Argument, why this action will not lye, and

* "If the libell be no prosecution in judgment of law in a course of justice, then this Argument is vain. The matter of the libell could never be determined by the court to whom it was offered, nor the plaintiff acquitted; and therefore it is to be judged a libell, and the plaintiff must have his remedy now, or else he can never have any; and so he shall receive a great injury, and be without possibility of relief if this action do not lye, and that is against the known maxim of law, *nemo recedat a Curia regis absque remedio.*" MS.

† "This ought to come into the evidence at the trial. The plaintiff cannot give evidence to the court upon the Demurrer." MS.

that is this, this presentment is made by proper persons, for it is made by a grand jury, of a county who are by their oaths to present all offences that the court hath authority to hold plea of.*

I think it will be easily agreed to me, that it is not necessary for the grand jury, to stay till an indictment be drawn up by an officer or other person in form, and in Latin, and so in their inquiry to confine themselves only to such bills of indictment as are prepared and presented in form to them; but they are to enquire and presentment make of all things that are given them in charge, and the court they present unto hath cognisance of, that they have any notice or knowledge of themselves, or, are informed of by any person,† and this without doubt they may do: and it is the constant universal practice of grand juries after they have dispatched the bills that are brought to them in form, they go and consult amongst themselves what they know of their own knowledge, or are informed of, concerning any of the matters relating to the business of the county within their charge and authority, and according as upon enquiry they find matter to present, they do present it to the court, and that very often without the strict form in paper and in English; this is done by them every assizes and sessions.‡

And what is the effect of this? why what is double, the officer of the court receiveth the presentment and draws up a bill upon the matter presented into forme, which the jury find as an indictment, or else it is used as evidence to another grand jury, the next assizes or sessions, to find a bill of indictment upon, and commonly indeed this latter way is taken: the clerk of the assize, or clerk of the peace, reserves these informal presentments as evidence for a succeeding grand jury, to find bills by him drawn up thereupon. Now, my lord, this being the practice all over England, I know not why it should come to be a fault in our case, to do it here.

Then in the next place, my lord, I would desire that this may be a little considered. A Grand-jury do apprehend the peace of the country to be in danger, they do observe many meetings of suspected persons, men ride

* "This Argument is sick of the same infirmity with the first." MS.

† See the Grand Juror's Oath, vol. 8, pp. 759, 772, 773, of this Collection.

‡ "Yet if they will become accusers they must do it in the course and form of law, whereby the parties accused may have a course in law to acquit themselves, and clear their innocency. The law never did empower a jury or any other, to blast any man's reputation without possibility to clear it; the jury may present defaults of all kinds, but they may not raise lyes, or maliciously accuse persons out of the course of justice, and be free from all punishment for abusing such an authority as the law hath placed in them." MS.

armed in great numbers, and the country terrified by such tumultuous assemblies, shall not this Grand-jury endeavour to preserve the peace of the country? Shall not these men present their fears and apprehensions to the court of justice,* to desire the aid of that court for the preservation of peace and prevention of mischief? Shall not a private man that is affronted and apprehends himself to be in danger of life or bodily hurt come before a magistrate and declare his fears,† and desire the security of the peace from him of whom he stands in fear (nay though it be a peer) and shall not a Grand-jury that are sworn to enquire of all breaches of the peace be at liberty to present their fears of a public danger? Certainly the law would be defective if it were not so as I say, for all will agree that the Grand-jury represent the country in, if not in their enquiry about, all matters about which the country may be or apprehend themselves to be in danger, and in this case that is the thing done. In this presentment they declare their apprehensions, they give reasons of those their apprehensions, what is the cause of their fear, and desire that their fear may be taken away by a remedy provided by the law and in a lawful way.

My lord, with submission it is not necessary for justices of Oyer and Terminer to enquire always by indictment.‡ They have another way, and that by the express words of their commission ‘per sacramentum proborum et Legalium Hominum de Comitatu ac alijs viis Modis et Medijs quibus melius sciverint’ per quos, rei veritas melius sciri poterit, of those offences of which they have conuance so that it is not necessary, that the proceedings and informations of a Grand-jury to all intents and purposes, should be by indictment, for the very commission gives authority to make inquiry as well by other means and ways whereby the truth may best be known, as by the oaths of honest and lawful men. If then they have authority to enquire by other ways and means, surely the way of presentments, and desire to take security of the peace as occasion shall be, is a good and legal way of proceeding: and surely,

* “A Grand-jury may inform a Court of any matters of fact, but their fears or fancies are no ground in law to deprive any man of his liberty, unless he finds sureties for the peace. If any one Jury-man will swear he is afraid of his life by any man or men, and exhibit you causes upon oath of his fears, he may have him bound to the peace in 40*l*. recognizance, and two sureties in the like sum, but this is not as Jury-man. If the jury will shew their fears of their lives by any man, they must proceed as other men do, and that comes not to the point to justify them in this libell.” MS.

† “There must be just cause of his fears alledged and he must not invent lyes of the party he fears.” MS.

‡ “This is not to the purpose.” MS.

if it be considered it will appear to be a very merciful presentment to desire only security of the peace in such matters as are therein contained.

That commissioners of Oyer and Terminer have power to bind persons and take of them security of the peace is expressly held for law* in Fitzh. Nat. Brev. fo. 38, where speaking of justices of peace how they come to have a general authority to bind persons by recognizance to keep the peace, the book says it is by virtue of that special clause in their commission which gives them power and authority, ‘ad Audiend’ ‘et Terminand’ et Inquirend’, of all things done against the peace. If then, by virtue of that clause, in the general commission of the peace, justices of the peace have power and authority to bind to the peace, surely the judges of Oyer and Terminer at the assizes at Chester have likewise an authority to bind to the peace, which is all the end of this presentment.

My lord, Mr. Ward hath made some sort of objection against this manner of presentment.

First, he would have it to be so scandalous to my lord Macclesfield because it doth import in a manner† that he is guilty of treason, of great breaches of the peace, of going ‘to conventicles, riding armed, and tumultuously, &c.’ and this he would have to maintain this action. I think it is not so, but if it be so, no action I conceive would lie: for if it be true or they are so informed,‡ the Jury ought to present it by their oaths, but if you take it the other way, and my lord is not thus scandalized but by inferences, not by positive and direct charge; then I hope you will not let such inferences construe a man into an action, when my lord is not accused of these offences. Will you bring an action for an accusation? No, you by these inferences yourselves scandalize my lord, and certainly never an action was maintained upon such a ground as that.

Words are not to be strained § in any case whatsoever to make a man liable to punishment or action for them. These words I conceive ought to be plain, or no action lieth, so that take it either way this action must fall, if it doth, or doth not accuse my lord of Macclesfield, If it doth accuse my lord, the Grand-jury have done it upon their oaths,¶ who by

* “Not to the point.” MS.

† “The libell expressly saith that the plaintiff is disaffected, a caballer with Schismatics, a frequenter of Conventicles, &c. and being so charged in the declaration, none but a jury can try that matter of fact.” MS.

‡ “The matters criminal in the libell are not so set forth as the Jury could have oaths made of them, nor could they in that manner depose or know them, and therefore now no matter for a presentment.” MS.

§ “The libell is grossly scandalous without straining one word in it.” MS.

¶ “Our law does no more admit any man to swear another to be disaffected than it admits him to swear a man is a felon or a

that oath are answerable to God and their own consciences for making such presentment, but not to any person by action. If it doth not accuse my lord then there is no scandall, and consequently no ground to support the action.

In this case, my lord of Macclesfield is only desired to find sureties for the peace, and if an action of Scandalum Magnatum lieth for a peer's being desired to be bound to the peace, that I think would be pretty hard, that is a chance that may befall any person whatsoever. The most innocent person in the world may be required to find sureties of the peace, and no man's greatness can exempt from it, for a man is not to refuse to keep the peace, nor to give caution so to do. If a man then be presented under suspicious and dangerous circumstances (I say not, my lord of Macclesfield is under any such, but only speak to the matter of this presentment) and desired to be bound to the peace, there is reason he should so be, because it doth legally and fairly appear that he hath given cause of suspicion to the king's ministers, or people,* of some danger from him, though he hath not gone so far as to commit any act whereby a breach of the peace doth actually appear: for binding to the peace is for prevention of breach of the peace, and securing from the danger threatened or feared, and not for a punishment of an offence past.

Now, my lord, this being, as I have already said and proved, proper for a Grand Jury to take upon them to do, I will cite to your lordship two or three authorities out of multitudes that might be brought to maintain the assertion that in any case whatsoever a Grand Jury is not so much as to be called in question, or impeached by action or otherwise for any thing they do by virtue of and within the limits of their authority†; nor indeed are they to be questioned for any thing whatsoever that they have done before the time of their being upon the jury, because they once having been upon the Grand Jury, and thereby being to enquire of all offences within their knowledge or informa-

tion; the matter of fact ought only to be sworn, and the law or a jury must judge what crime was in the fact, so that this libell is not a thing done in the course of a Grand jury, wherein the law protects them, but it is a scandal maliciously and by conspiracy done to scandalize and defame the plaintiff." MS.

* "This subverts (if it were law) all the liberty of Englishmen, and subjects them all to be sent to gaols without any offence sworn against them, from which they can be acquitted; and when the king's ministers shall say a whole county is under dangerous suspicious circumstances, they may send them all to gaols if they cannot or will not find sureties." MS.

† "This ought to be given him without his authorities, but is nothing to the point. This libell is not done by virtue of, nor is it within the limits of their authority." MS.

tion* doth excuse them of all things done by them before.

My first authority is 21 Ed. 3. fo. 17, a writ of conspiracy is brought against one, the defendant justifieth that he was an indictor among others who were charged to present and took an oath so to do, and they indicted the plaintiff of murder, and what they did was upon oath, and concludes that for that reason especially the action could not be maintained; and judgment was for the defendant; the very being one of the Grand Jury was sufficient to exempt him from any consideration of liableness to an action, nor was any inquisition to be made of what was done by him while he was in that service. 8 Hen. 4 fo. 6. Pl. 8† in an action of conspiracy the like plea was pleaded as the former that the defendant was an indictor, but then the plaintiff replieth you were it is true an indictor, but before such times as you were in-pannelled of the grand inquest you and such met together, and there conspired to indict, and there contrived that matter among yourselves, and you got yourself returned by the sheriff on purpose to frame this indictment upon me, and hereupon there was a demurrer, and it was held to be no good replication at all; for whatever he did before, whatever meetings or conspiracies there were, yet, if once he came to be a Grand Juryman and to be upon his oath to present, and he doth thereupon indict or present, the provision of the law for his protection is so great that he shall not be accused for any thing done by him before that time. And in that case judgment was given for the defendant.

So Fitz. Nat. Brev. tit. conspiracy fo. 115, Lit. D. if jurors are sworn to enquire, &c, and afterwards any of them is discharged by the justices, he shall not be punished for that which he did when he was sworn, but if he conspire after, &c. he may for that be charged in conspiracy.

Again Stamf. Pl. Cor. fo. 173. If after the conspiracy the conspirators are sworn upon the inquest and indict the party conspired against, in that case no writ of conspiracy lies against them, because it cannot be intended false or malicious when they do it by virtue of their oath and with other jurors. So that though by the conspiracy before, there was a cause of action, yet their coming once to be of the Grand Jury purgeth all.

So 12 Report 28. and Bridgman's Reports 130, Agard against Wyld and others. An action on the case for maliciously procuring

* "They are to enquire of all offences by the oaths of good men, and therefore may present all offences, but they cannot present matters which cannot be sworn. None can swear another to be disaffected, &c." MS.

† "This is a mistake of Mr. Holt's, for this is the same case mentioned before 21 Ed. fol. 17." MS.

|| "All these cases are nothing to the point, for the reasons before given." MS.

the Plaintiff to be indicted of barratry, there is the like plea pleaded with ours, that the Defendant Wyld and another were impannelled upon the grand inquest and sworn, and having evidence, indicted the Plaintiff as they well might do. And judgment for the Defendant.

And so I think I have dispatched the second thing that I propounded to speak to, and that is as there was a court and judges that had cognizance of the matters presented, so this presentment was made by proper persons, they being impannelled and sworn upon the Grand Jury, and obliged upon their oaths to present if they apprehended danger.*

Then to come to the third thing; I take it this presentment doth contain in itself sufficient matter to justify the making of it, and the desire that is in it.

I shall not, my lord, enter now upon the enquiry at all, whether it be true or not, for that they best know that made it, and the truth or falsehood of the charge is not enquirable now; but the matter of whether it be, as I think it is, such as is sufficient for them to make this request upon it, that the persons therein named should find sureties for the peace.

And here I will suppose that the grand jury of a county apprehends danger from several sorts of persons: † they observe some persons perpetually five in known disobedience to the law, constantly frequent conventicles, and such seditious forbidden places, and never come to the known and established places and way of worship: they observe others to meet and consult together in an extraordinary manner, and in great numbers. Then the question to be asked, is whether this be not lawful for them to present. Surely my lord, it is, for the law doth take notice of these things as breaches of the peace.‡ It takes notice of conventicles as seditious and unlawful, and dangerous to the peace; and they are, besides others, so declared by two acts of parliament made since his majesty's happy restoration, the one made 16th of this king, cap. 14, and the other made 22 of this king, ch. 1. They declare that these have been found to be the grounds of rebellion, and very mischievous to the government.

* "Not obliged to present their apprehensions or fancies, but offences done, if any were." MS.

† "Every person ought to be presented for his own several offence only, unless some be joint offenders in any case, and the offences ought to be so specified, that they may be tried in due course of law, whether they be guilty or innocent." MS.

‡ "He would have the jury present breaches of the peace; and nobody denies it; but to blast men's names when they have not broke the peace, and to take away their liberty when they have not offended or are not convicted, is against all the law of the land; and if justices act in that manner, the law will not protect them, but they must answer damages to those that they so wrong." MS.

And if other persons, that do perhaps themselves conform to the established worship of the church, do harbour such men as the teachers and leaders of such dangerous meetings, surely the grand jury may present their apprehensions of danger from such persons, especially if the presentment as in this case is not upon any positive assertion, or accusation, but only in their prudence they present it as expedient.

Dalton Off. Inst. Peace, cap. 67, concerning sureties for the peace, tells us it is called surety of the word *securitas*, because the party that was in fear is thereby the more secure and safe. So that is grounded upon fear, and he says afterwards in the same chapter, if a man hath a fear that another will kill, maim, beat, assault, or hurt him in body, or burn his house, though the man hath no actual wrong done him, yet that very fear of his, is a good cause of him to desire, and of the justice to require sureties for the peace. And is not then the fear of a whole county, cause to have such persons, as they apprehend danger from, bound to the peace. And is not the fear of a grand jury that represents the county * declared in their presentment upon oath, a legal ground to demand security for the peace? If private men upon their private fears may desire and ought to be secured, I think the county upon their public fears much more.

My lord, in the next place the juncture of time is to be considered. † What time was this, that these gentlemen came to be upon this jury? There was a plot, an horrid conspiracy against the lives of the king and his brother lately discovered; a plot that was published by the king's Declaration, ‡ and made judicially to ap-

* "The law never yet deemed a grand jury to be the county, nor any representative of it; their pretended fears may be only malice or faction. The consequence of this assertion would destroy all justice in the course of the law, if this doctrine were true." MS.

† "Vain and foreign to the question." MS.

‡ This Declaration was as follows:

"C. R. It hath been our observation, that for several years last past, a malevolent party hath made it their business, to promote sedition by false news, libellous pamphlets, and other wicked arts; whereby they endeavoured not only to render our government odious, and our most faithful subjects suspected to the people, but even to incite them to a dislike and hatred of our royal person: whereupon it was evident to us, that the heads of this party could have no other aim, but the ruin of us and our government.

"And whilst, by our utmost care, we manifested to all our subjects, our zeal for the maintenance of the Protestant religion, and our resolutions to govern according to law, it was a great trouble to us to find, that evil persons, by misrepresenting our actions to the people, should so far insinuate themselves into the affections of the weaker sort, as that they looked upon them as the only patriots and as-

pear by the trial of several of the conspirators; a plot that was evident to have been carried on by

serters of their religion and liberties, and gave themselves up entirely to their conduct.

"As their numbers increased, so did their boldness, to that height, that by often shewing themselves in tumults and riots, and unlawful and seditious conventicles, they not only engaged, but proclaimed an impunity to their own party, who thought themselves already too strong for the laws; and they seemed to believe, that in a short time they should gain upon the people, so as to persuade them to a total defection from the government.

"But it pleased God, by these their violent ways, to open the eyes of our good subjects, who easily foresaw what troubles these methods would produce, and thereupon, with great courage, as well as duty and affection towards us, upon all occasions, did manifest their resolution and readiness in defence of our person, and support of our government, and the religion established; and did likewise convince the common people of the villainous designs of their factious leaders, and the miseries that would befall them in pursuing such courses.

"By these means the factious party lost ground daily, and finding that it was impossible to keep up the spirits of their followers, against the religion established, and the laws, whilst we were steady in the maintenance and execution of them, became desperate, and resolved not to trust any longer to the slow methods of sedition, but to betake themselves to arms, not doubting, but that they remained still strong enough, by force to overturn the government, which they could not undermine.

"It is hard to imagine, how men of so many different interests and opinions, could join in any enterprize; but it is certain, they readily concurred in the resolution of taking arms, to destroy the government, even before they had agreed what to set up in the place of it.

"To which purpose, they took several ways; for, whilst some were contriving a general insurrection in this kingdom, and likewise in Scotland, others were conspiring to assassinate our royal person, and our dearest brother, and to massacre the magistrates of our city of London, and our officers of state, that there might be no appearance of government, nor any means for our subjects to unite for their defence.

"In case it had pleased God to permit these wicked designs to have taken effect, there could have been nothing in prospect but confusion; for, instead of the reformation they pretended, their success would have produced divisions and wars among themselves, until the predominant party could have enslaved the rest, and the whole kingdom.

"But the divine Providence, which hath preserved us through the whole course of our life, hath at this time, in an extraordinary

persons of those principles that were the tenets preached at conventicles, and [who] harboured

manner, shewed itself in the wonderful and gracious deliverance of us and our dearest brother, and all our loyal subjects, from this horrid and damnable conspiracy.

"As it is therefore our desire, that all our loving subjects should join with us, in giving thanks to Almighty God for this mercy, so we thought it necessary they should be now, in some measure, informed of the fact as it hath been discovered to us by undoubted proof, and the confession of divers of the accomplices in this conspiracy, whereof, though we have not as yet perfectly traced all the particulars, the principal and main designs of it, nevertheless, have appeared to be as followeth:

"About the beginning of October last, when the heads of the faction saw the magistracy of our city of London settled in persons of loyal principles, they became impatient, and fell immediately to consult of rising in arms; for which some thought their party so well prepared, that they could not fail of attaining their ends, whenever they should break out into open force.

"Whereupon there was a meeting of some of the principal conspirators, to agree about the best means to master our guards, and to seize our person; but, upon consideration, they found it necessary to prepare their friends in the several counties, as also the disaffected party in Scotland, to join with them; without which, any attempt in our said city, or upon our guards, appeared too rash to be undertaken: so that they laid aside the thoughts of a present rising, and disposed themselves to find, by a correspondence with Scotland, and with several parts of this our kingdom, how far they might be assisted by a general insurrection, so that they might not, in human probability, fail of success.

"Whilst this first design was forming, some villains were likewise carrying on that horrid and execrable plot of assassinating our royal person, and our dearest brother, in our coming from Newmarket, and money was deposited for that purpose. But by the shortness of the time, (we being then immediately upon our return) and for want of necessary preparations, they were forced to defer the execution of it till further opportunity.

"It was then proposed among them, whether they should attempt the same at our next going to Newmarket, in March last; but some objected, that our guards, which usually remain here some time after our departure, would be capable of making a great opposition, upon the arrival of the news. For which reason, and because they were not then in a sufficient readiness, it was agreed to be done at our return from Newmarket.

"The place appointed, was the house of one Richard Rumbold, a malster, called the Rye, near Hoddesdon, in the county of Hertford; and it was resolved, that 40 persons in number

their teachers; some of whom were, in a course of justice, legally attainted and executed, and others fled from justice.

who were to be actors in this assassination, under the command of the said Richard Rumbold, should hide themselves in or near the said house; and, when our coach should come over against them, then three or four were to shoot with blunderbusses, at the position and horses, and, if they should fail of killing the horses, some were to be ready in the way, who, in the habit of labourers, should turn a cart cross the passage, and so stop our coach: others were appointed to shoot into the coach, where our royal person, and our dearest brother were to be, others to fire upon the guards that should be then attending us. And it was further resolved, that, upon the same day, many lords and other persons of quality, whom they supposed favourable to their design, should be invited to dine in our city of London, that they might be the more ready to appear among the citizens, upon arrival of the news; the actors in the said assassination having contrived the manner of their escape, by a nearer passage than the usual road; by which means they hoped to get to London, as soon as the news could be brought thither.

“They thought it would be easy, upon their perpetrating this horrid fact, to possess themselves of the government, presuming upon the numbers of the disaffected.

“But lest the blackness of such an action might deter any from joyning with them, they prepared to palliate it, as far as they could, by some remonstrance or declaration, which was ready to be printed and dispersed in that confusion, to amuse the people: and lest our officers of state, and the magistrates of our said city, with the militia thereof, and other our loyal subjects should be able to put some stop to their career, they resolved to follow this blow with a massacre, wherein they particularly designed for immediate slaughter, our officers of state, the present lord mayor, and sheriffs, and the magistracy of our city, and other our subjects that had been most eminent for their loyalty.

“But it pleased Almighty God, by his wonderful providence, to defeat these counsels, by the sudden fire at Newmarket, which necessitated our return from thence before the time we had appointed.

“Yet these villains were not thereby discouraged from pursuing the same bloody design, but resolved to take the first opportunity for effecting the same, and proposed to themselves, that it might be done either in our passage from Windsor to Hampton-court, or in our journey to Winchester, or when we should go by water in our barge, or under Bedford garden-wall, as we should pass that way, or at the bull feast, which was to be in Red-lyon-fields, they being informed, that we and our dearest brother had intentions of coming thither.

Had not a considerative conscientious grand jury then reason to be apprehensive of danger from those that did adhere to such persons,

“And that they might be the better prepared, when there should be occasion, by having a certain number of arms lying always ready for that purpose, arms for forty men were bespoke in all haste, viz. Thirty carbines with belts and swives, thirty cases of pistols, and ten blunderbushes, which were accordingly made and paid for.

“And for the more easy drawing their party together, against the time of execution, they contrived to divide our cities of London and Westminster, and the suburbs, into twenty parts, from each of which they expected 500 men to be ready at the first onset; and some agitators were to give an account of the men to be furnished in each division, and to give out orders to them as there should be occasion.

“And to the end the forces they should raise might be the sooner modelled into the form of an army, there were 100 old officers, who had been engaged in the late rebellion, ready in town to take the command of them: in the pursuit of which project, they continued till they knew that a discovery had been made unto us.

“During all this time, the principal conspirators were managing their other design for a general insurrection in both kingdoms.

“The late earl of Shaftsbury, who had at first pressed them to sudden rising, which he would have had before the 17th of November last, or upon that day at the farthest, sent to the conspirators, at a meeting appointed by them, to know their resolution; and finding they would not adventure without farther preparation, conveyed himself secretly into Holland, to avoid the danger he might be in by a discovery.

“His withdrawing himself from their counsels, did not discourage them from pursuing their design; only made them more cautious: whereupon a new council was appointed of six persons, that were to have the chief management of affairs, in order to a general insurrection, by a correspondency with their party in Scotland, and several counties of this our kingdom: and because a correspondency by letters was thought dangerous, it was held necessary that some person should be sent into Scotland, to invite the heads of the disaffected party in that our kingdom, to come hither, under pretence of purchasing lands in Carolina, but, in truth, to concert with them the best means for carrying on the design joyntly in both kingdoms; and a treaty was thereupon had with Archibald Campbel late earl of Argyle, already attainted of treason, who demanded 30,000*l.* at first, but afterwards agreed to accept of 10,000*l.* for buying of arms in Holland, and making other provisions necessary for a rebellion, within our kingdom of Scotland.

“In the said council of six, it was debated,

and frequently were in their company? having had so much experience of the mischief, did it not lie upon them to express their care and pru-

whether the rising in this kingdom should be first in our city of London, where, by reason of the vast numbers that might readily unite, they thought they might easily master the guards; or rather in some remote parts, whereby we should be under a necessity of sending our Guards to suppress them, and thereby the rising in our said city would become more secure and effectual: but at last it was resolved, as most convenient, that it should be in all parts at the same time, lest our city might be defended by the Militia thereof, without the help of our Guards, which we might send for the suppressing any insurrection in the country: and they did all dispose themselves accordingly, for the compassing their design, which was very near taking effect.

“But, such was the abundant mercy of Almighty God, while they were yet meditating their execrable mischiefs against our royal person, our dearest brother, and the government, a discovery was made unto us by one of the accomplices, on the 12th of June last, since which time we have used the best means we could, for the detecting and prevention of so hellish a conspiracy.

“But so it has happened, that divers of the conspirators, having notice of warrants issued out for their apprehension, are fled from justice, viz. James duke of Monmouth, the lord Melvil, sir John Cochran, sir Thomas Armstrong, Robert Ferguson, who was the common agitator entrusted by all parties in the several conspiracies, Richard Goodenough, Francis Goodenough, Richard Rumbold the maltster, William Rumbold his brother, Richard Nelthorp, Nathanael Wade, William Thomson, James Burton, Joseph Elby, Samuel Gibbs, Francis Charleton, Joseph Tyley, — Carstairs, — Lobb, both nonconformist preachers, Edward Norton, John Row, John Aylief, and John Atherton.

“Ford lord Gray being apprehended, made his escape out of the hands of a Serjeant at Arms; and Arthur late earl of Essex, being committed to the Tower for high treason, killed himself.

“Others have been taken and committed to custody; some of whom, viz. the lord William Russel, Thomas Walcote, William Hone, and John Rouse, have, upon their trials, been convicted, attainted, and executed according to law.

“This we thought fit to make known to our loving subjects, that they being sensible (as we are) of the mercy of God, in this great deliverance, may cheerfully and devoutly joyn with us, in returning solemn thanks to Almighty God for the same.

“For which end, we do hereby appoint the 9th day of September next, to be observed as a day of thanksgiving, in all churches and chapels within this our kingdom of England,

as far as in them lay to prevent it for the future?

If a grand jury have not this power and au-

dominion of Wales, and town of Berwick upon Tweed, in such manner as shall be by us directed, in a form of prayer with thanksgiving, which we have commanded to be prepared by our bishops, and published for that purpose.

“And it is our pleasure, that this declaration be publicly read in all the said churches and chapels, as well on Sunday the 2nd of September next, as upon the day of thanksgiving aforesaid.

“Given at our Court at Whitehall, the 28th day of July, 1683, in the 35th year of our reign.”

Somewhat earlier had been published in Scotland the following Proclamation for a Thanksgiving:

PROCLAMATION FOR A THANKSGIVING, AUGUST 7, 1683.

“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, pursuivants, and messengers at arms, our sheriffs in that part, conjunctly and severally, specially constitute, greeting: to all and sundry our good subjects, greeting: Forasmuch as Almighty God, in his great mercy, and by his wonderful providence, hath brought to light, defeated and confounded a most unnatural, traitorous, and diabolical, conspiracy, contrived and carried on by persons of fanatical, atheistical, and republican principles, for taking away our sacred life, and the life of our dearest brother James, duke of Albany, subverting of our government, and involving these kingdoms in blood, confusion, and miseries; concerning which treasonable conspiracy, we have emitted our royal Declaration, to all our loving subjects, at our court at Whitehall, the 28th of July last, in this 35th year of our reign, which we have ordered to be reprinted here: and we being deeply sensible of the humble and grateful praises and adoration we owe to the Divine Majesty, for this great and signal instance of his watchful care over us, whom he hath so long preserved, and so often delivered by miracles, have, out of our religious disposition, readily approved of a humble motion made to us, for commanding a solemn and general thanksgiving, to be religiously observed throughout this whole kingdom, to offer up devout praises and thanksgiving to Almighty God, for this eminent and miraculous deliverance granted to us, and in us, to all our loyal and dutiful subjects; as also, fervently to pray, that God may continue his gracious care over us, and his mercies to these kingdoms, and more and more bring to light, defeat and confound all traitorous conspiracies, associations, and machinations against us, our dearest brother, and government: we, with advice of our privy council, have these

thority, there will want a sufficient means for ought I know to keep the peace. It is better

fore thought fit, by this our royal proclamation, to indict a general and solemn thanksgiving, to be observed throughout this kingdom, that all our loving subjects may offer their devout praises and gratulations, and their fervent prayers and supplications, to Almighty God, for the purposes foresaid: and we strictly command and charge, that the said solemn thanksgiving be religiously and devoutly performed by all our subjects and people within this our kingdom, upon the 9th of September next. And to the end this part of divine worship, so pious and necessary, may be uniformly and at the same time offered by all our loving and loyal subjects, we hereby require the reverend archbishops and bishops, to give notice hereof to the ministers in their respective dioceses, that upon the Lord's day immediately preceding the said 9th day of September next, as also upon the said 9th of September, they cause read and intimate this our royal proclamation, from the pulpit, in every parish church, together with our foresaid Declaration, dated at our Court at Whitehall, as said is, and that they exhort all our subjects to a serious and devout performance of the said prayers, praises, and thanksgiving, as they tender the favour of Almighty God, and the safety and preservation of our sacred life and government: certifying all such as shall contemn or neglect this so religious and important a duty, they shall be proceeded against, and punished as contemnors of our authority, and as persons highly disaffected to our person and government; and ordain these presents to be printed.

"Given under our signet, at Holy-rood-house the 7th day of August, 1683, and of our reign the 35th year.

"Per Actum Dominorum Secreti Concilii.

"WILL. PATERSON, Cl. Secr. Concilii.

"God save the king."

Of this latter, Fountainhall, (1 Decisions, 237) says, under date,

"August 7th, 1683. At Privy Council, his majesty's printed Declaration aient the phantical Plot is read, and a Thanksgiving appointed upon the 9th of September, 1683, throughout all Scotland for its discovery, and this Declaration to be read through all the churches. They would not make it on a week day lest all the people might have withdrawn and absented themselves from it."

Concerning the two, Wodrow writes thus:

"July 4th, 1683. The Council [of Scotland] send up a most flattering Address to the king, congratulating his majesty upon the Discovery of the Plot, and acquainting him, that they were appointing a Thanksgiving for this.

"It is August 7th, before this Proclamation for Thanksgiving be insert in the Records, and

certainly to prevent a mischief before it comes, than to be to look for a remedy when it happens: and the law prefers prevention beyond the remedy."

If a jury do enquire of the crimes of malefactors and bring them to punishment, it is not so much in the eye of the law for the correo-

it in September 9th, before it is kept. The occasion of this delay seems to have been to keep peace with England in theirs. The trials of the excellent lord Russel, captain Walcott, Mr. Rouse, and some others, are in every body's hands, and their speeches and letters in print. When those were dispatched under colour of law; and the government, or rather the duke of York, were rid of some whom they were unwilling should live, a day of Thanksgiving is appointed for his majesty's merciful deliverance, in England and Ireland. The English Declaration is pretty large, and alleges a general insurrection was designed, and that a correspondence was established in Scotland, and that the earl of Argyll, lord Melvil, sir John Cochran, Mr. William Carstairs and others, were concerned in it. This Paper was reprinted with the Scots Proclamation, and ordered for solemnity's sake to be read twice from every pulpit, to impress the people the more with ill thoughts of the Presbyterians, on whom they would fix the Plot. There are several matters of fact in it, which, I doubt not, were laid before the king and council, but afterwards were discovered to be groundless and false. It is dated July 28, 1683.

"The Scots Proclamation is dated Aug. 7th. To throw an odium upon the Presbyterians in Scotland, it is intitled, 'Proclamation indicting a Thanksgiving for the deliverance from the Fanatical Conspiracy;' and 'fanatical,' the ordinary term for expressing Presbyterians, is joined in the body of the Proclamation, with atheistical and republican principles, and named in the first room, as being, in the sense of the penners of this Proclamation, the worst of the three. They likewise make the king to say, 'That Providence had often delivered him by miracles;' and in a few lines again, 'tis termed 'a miraculous deliverance.' How well this came from the pen of court-parasites, and flattering ministers, I shall not determine; but 'tis plain, common decency might have kept them from putting this in the king's own mouth, especially since it was not true."

* "Pitiful argument. He fancies that all the officers of justice and other men are not able to keep the peace, and therefore the grand jury must have power to scandalize men in matters, from which they shall have no means to justify themselves; and to desire their liberty to be taken from them, whilst they are innocent in the eye of the law. The peace hath been well kept many hundred years, yet no grand jury libelled the peers, and called them presentments." MS,

tion of the persons that have offended, as for preventing the spreading of the infection, and to caution others that they do not offend. Now this being the end of the law, in their inquiry (*ut pœna ad paucos metus ad omnes perveniat*) shall they have a power to bring offenders to judgment and not have a power to prevent the commission of the offences; and by declaring the grounds of their fears and apprehensions, obtain what help they can have from the court to prevent the accomplishment of their fears? That sure was never denied to any grand jury in the world.

Then, my lord, as to the next thing which is mentioned in this presentment, the tumultuous reception, and entertainment of the duke of Monmouth. I cannot tell whether this noble person the plaintiff did or did not appear at that time amongst 'those that met tumultuously.* But I may say as things then stood upon this discovery, such assemblies of armed men might give great umbrage to a grand jury. The duke of Monmouth was by his majesty's proclamation and declaration mentioned as concerned in the design: he was under the accusation of an indictment; and was at the exigent; and that is here declared to be the reason and ground of their apprehensions of danger from those meetings.

And whether the things be true or false in fact is all one upon the matter in this case, before your lordship; though upon this presentment by the grand jury, who were all men of good quality, knowledge and fortune, *primâ facie* they ought to be presumed to be true. But that I insist upon is that these are good causes of presentment, falling properly under the consuance of a grand jury in such a court of judicature;† and if these be not such, there can certainly be nothing that can properly fall under the consuance of a grand jury of a county.

When there hath been a horrid conspiracy and treason discovered, of which some that are accused are attainted and executed, others fled, and among them the principal person, who not long before had with a very great number of gentry and others come into the country, and there had been upon that account a tumultuous disorderly assembly,‡ why should it not be rational for a grand jury in such a juncture to apprehend those things might be dangerous to the country? And if they do apprehend them dangerous, they are obliged, by their oaths, and bound by the duty they owe to God and the king, and by the trust that is reposed in them, as inquisitors for their country, to make such prudent and discreet representations of their fears, and the grounds and reasons of them,

* "Was there any such meeting found by trial to be riot, or rout, or unlawful assembly?" MS.

† "If the matters scandalously suggested had been in due course of law presented, there had been no cause of action." MS.

‡ "Who said it was a tumult before the law hath judged it?" MS

to the court, before whom they are sworn, and that can apply proper remedy; in order to get security for the preservation of the peace, and therein as far as in them lies, secure the government and prevent the dangers, that in their apprehensions threaten it.

My lord, I must observe that this was the first action that ever was brought in this kind;* I will not say, the first action that ever was brought against a grand jury had any success. The authorities [qu. that] I have quoted to your lordship, that have been in all times both ancient and modern, Grand jurymen have been sued, but always protected by the law from those suits. And as those actions have been exploded in preceding ages, so I hope never to see them take effect in this; for it would be a most dangerous thing if the law should subject them to actions for what they do as jurymen. No man would serve the country, with any freedom or cheerfulness, in that office, but whoever did serve must do it by compulsion and not dare to do his duty, for fear of an action: every man of quality would constantly endeavour to avoid it, and so the king and country want the service of the best men in it.†

My lord, to turn the tables a little and consider the consequences of this action, if a grand jury shall be liable to every man's action for what they do as a grand jury, it must also be granted that they must be liable to an information, for if an action will lie against them for misdemeaning themselves against a private person, much more should an information lie against them for their misbehaviour against the government, which I have shewn cannot.

This will be to take away the reputation of the law and infringe the privilege which English people have by Magna Charta, to have grand juries to accuse them, and to be enquired of by their country and neighbours before they be tried for their offences. And the law will never suppose that they will do that which is hurtful and prejudicial to the people,|| as those authorities that I have cited to your lordship do prove. But this would be to their great prejudice.

Now then, here is a grand jury lawfully impaneled, and sworn before competent judges, that have made a presentment of such matters as are within their enquiry and the consuance of the court desiring only to prevent apparent dangers to the government, by having security

* "This is the first libel of this kind called a presentment." MS.

† "Vain, Vain, if a man suffers for acting out of the course of a grand jury, therefore none will be of a grand jury." MS.

|| "Strange doctrine of the impeccability of grand juries, and is only fallacious, meaning that whereinsoever a grand jury acts by virtue of, and within the limits of their legal authority, they cannot be questioned; no more can any other lawfully authorized in any matter: it may be said of a constable, yet if he exceeds his authority, he must suffer for it." MS.

for the peace: if for so doing an action will lie against them, the honour and reputation of the law that reposes such a trust in grand juries will be impeached, and the privilege* of the people to have the state of their country enquired of by gentlemen their neighbours, invaded and in effect destroyed; in regard none will be willing to serve in the office, or dare to perform the duty of it: therefore I hope your lordship and the court will take care of the king and his people; that neither the government want due security, nor the people have their due privileges infringed, especially such great and essential ones as these. †

And for these reasons I conclude, the first general point or question in this case; that this action doth not lie for the plaintiff, against the defendant upon the merits of the cause as they are disclosed, in the matter and substance of the whole record.

Secondly, then as to the plea; I come next to consider that as it is here pleaded; and as I conceive we have a good case of it for the defendant, upon the merits of the fact; so I hope we have by our plea, sufficiently and legally justified, and vindicated our right to that fact: and truly, better we could not have pleaded, that I can apprehend; though these gentlemen would have had us indeed pleaded in some other manner.

Before I come to speak to the main matter of it, I shall endeavour to answer Mr. Ward's objections, that he has been pleased to make to our plea. And,

Obj. 1. First, says he, as to this matter of the plea, the defendant hath not set forth the articles, that he says were delivered to them by the justices to enquire of. To that I answer.

Ans. With submission, it is not necessary for us to do so. And for the case is no more than this. It is the oath of a grand jury-man, 'you shall diligently enquire and true presentment make of all such things as shall be given you in charge,' &c. but I think it is seldom known that all the articles of which the court hath consance, or the jury power and authority to enquire and present upon, are given in charge; but commonly the judge gives those in his charge that are the most material.

Then the case comes to this, here is perhaps an article omitted in the charge, but that is a matter of which that court hath consance, and which by the law is inquirable of by the jury, and they do enquire upon it, and present: May they do this? Yes, sure, and it is done most unquestionably every day; if it be an article within the judges power and commission to hear and determine, they ought to do it by their oaths, and it can be no satisfaction to the conscience or integrity of a grand juryman, that because the judge omitted to give that matter in charge, he should neglect the trust

reposed in him to present mischief and danger to his king and country. It is justifiably certainly to present in such a case, and therefore the particular articles need not be set forth, for if they were, perhaps the thing presented was not one of them, and yet the presentment might be legal.

Obj. 2nd. Next, it hath been said, the defendant hath in his plea, alledged that there was proof, concerning the plaintiff, and that the presentment was legal, 'secundum evidentiā ac testimonium eis ibidem exhibit' de 'profecto comite,' but he hath not particularly set forth, what that evidence was as he ought to do, they say; and Mr. Ward quoted my lord Vaughan's opinion in Bushell's case.

Ans. But I hope there is no great matter in that objection, nor in that authority, for in Bushell's case that was a return made from a court of justice, and that was of an act of that court to a superior court. The court of sessions in the Old Bailey, did fine Bushell and other jurymen for finding a verdict contrary to evidence and against the direction of the court, but did not return what the evidence was that the court might judge of the cause of commitment. Is the case the same here? We say and stand upon it, that we were upon our oaths to present, we did it according to the evidence; and that evidence we by the express letter of our oath ought not to discover, for we are bound to keep secret the king's counsel and our own, and our fellows, and would you have had us break our oath upon record and shewn openly the evidence, which is our counsel, which we ought not to do? That therefore can be no objection in this case; but the plea will be well enough, though we have not said what the evidence in particular was. The jury themselves are judges of the evidence; and take the presentment or indictment to be well grounded upon their oaths; then saith Mr. Ward,

Obj. 3. In the next place the traverse is naught, for here are several matters contained in the declaration; and though one should fail, the other or some one of them would support the action, and you have answered says he to the presentment, but not to the conspiracy. To this I answer.

Ans. The meeting together, that is the conspiracy,* I suppose; for they could not conspire together unless they met together; the drawing up the presentment that is the writing, and the making of it to the court that I take to be the publication: but now we as I conceive by this plea do confess and avoid it, for we say we did upon our impanelling lay our heads together and so we met about it, and that answers the conspiracy: indeed if it did appear we had met and done this, after the court had discharged us from the duty of grand jurymen, all this had maintained the charge of

* It is a sad privilege to be accused and imprisoned without being heard, or possibility of defence or reparations." MS.

† "Mockery." MS.

* "There may be another kind of malicious conspiracy proved upon trial, and therefore it ought to have been pleaded unto." MS.

a conspiracy. But being met together upon a lawful summons, and impanelled, sworn and discharged [qu. charged] as a grand jury, and so making this presentment, we have purged that meeting, which otherwise would have been a conspiracy, and justified it as legal.

Obj. 4. But, says Mr. Ward, the traverse is sought for another reason, you have not traversed the whole and every part, as you should have done, and said, 'non culpabilis de premissis nec aliqua inde parcella.'

Ans. But I hope, that is not so, for I desire to know of Mr. Ward, did ever any body in pleading not guilty, say 'de premissis nec de aliqua inde parcella?' I never saw any such plea, it is always taken for granted that upon an action brought for divers things, in a chain, which each of them are actionable, 'if a man plead not guilty 'de premissis,' it is of the whole and of every part, and if upon issue joined he be found guilty of part, that is enough for the plaintiff to maintain his action.

But pray what is it that is the main matter upon which this action is brought? It is the presentment which contains this matter that the plaintiff [alleges] to be a scandal to him; for I must crave leave to differ from Mr. Ward in that matter and take the law to be otherwise. If these gentlemen had met together to consult and contrive such a presentment, but had not made it or framed it, I conceive the action doth not lie: for I take the law to be plain, no conspiracy doth lie, without some act doth follow. Indeed an information would lie against them at the suit of the king, if so conspiring, as an offence, if they had not sufficient authority to justify them in it: but an action upon the case would not lie for the party, for it is the publishing which is the defaming upon which I must ground my action.

So it being a complicated action, though it be made up of many particulars, yet one hath dependence so much upon another, that all make but one cause of action together; and then, with submission I take it we have as well answered the whole as can be.

Obj. 5. But then, it is further objected that we do not conclude our plea, 'prout patet per recordum.'

Ans. Truly if we had, [we had] done ill, and put ourselves upon an issue which we could not well have maintained, and yet our fact nevertheless justifiable; for this presentment is not a record, neither is it necessary it should be so.

Suppose a man were for his justification to plead an affidavit in court in an action for words for saying he [the plaintiff] was perjured, must he alledge, 'prout patet per recordum,' is that a record? and yet it is a good justification.

Can a grand jury make no presentment but upon record? The practice and the law is certainly otherwise: they do it every day in paper, in English, and not upon record. What then is this presentment? you will say, it may be, it is a warrant to make a record by, if the clerk of the assize, or clerk of the peace will turn it into Latin, and form an indictment by,

and when it is formed into an indictment it is a record; and then it not being a record, suppose the party bring his action before the clerk can put it into the form of a record, shall he not justify by it without alledging it to be upon record when there is no such record?

But my lord, this is that which I say for a plain and full answer to this objection; though it be not upon record, yet I rely upon it for law, they may by their office, and by their oaths are bound to present to the church [qu. court] such matters as they are in their own consciences and judgments convinced are for the security of the peace of the country* though it be not formally upon record, and then it needs not be alledged 'prout patet per recordum.'

Obj. 6. But, says Mr. Ward, you have not answered our whole declaration, for part of it may be true and out of Chester, and so not justifiable by this plea, that reacheth only to what was done in Chester, for it may be the conspiracy was in Berkshire. To this I answer,

Ans. Besides what I have said about that point of law that the conspiracy alone would not bear an action, I say that their meeting together upon such an occasion is the conspiracy†; and that we have solely confined to Chester, for there we say we were impanelled sworn and charged.

Again, we have given them as full a traverse as can be abque hoc, that the defendant is guilty 'de premissis in com' Berks,' or elsewhere out of the county of Chester, and so we avoid all places in the world, but only Chester 'vel aliter, vel alio modo,' than as we have alledged by the plea; so that I know not how there could have been made a plea more comprehensive of the matter charged in the declaration. If Mr. Ward would have told us how to do it, we would have taken notice of it as a precedent for another time; but I know not if I must confess how to mend it: as it now stands I take it to be as full as can be.

Obj. 7. He next objects that we do not say or aver in all our plea, that the presentment is in the plea, and the libel in the Declaration are the same.

Ans. Surely, my lord, we do sufficiently make it appear to be the same; for we say, this is all we did; and that we are not guilty of any of their charge in Berkshire, or out of Chester, or any otherwise than as we have alledged; then it must be the same, if it be all we did: if they do not like what we have said in our bar, or if they do not think what is there alledged to be true, let them if they can take issue upon our traverse, and prove us guilty in any other place but in Cheshire, whether we by our plea have brought and confined it: if the law

* "But always with this proviso that they injure no persons nor go out of the legal course of justice." MS.

† "That is gratis dictum only: There may be another sort of conspiracy and agreement proved." MS.

will not let them do that, I cannot help it. If they cannot do it, we think, I hope we have very well justified what they say against us.

Obj. 8. As to the last matter that they say, that it amounts to the general issue; and the Argument they ground thereupon:

Ans. Truly, I will not much contend with them about it: I do think all this matter might have been given in evidence upon not guilty pleaded; and yet I think at the same time that is not any cause of Demurrer. But not to enlarge upon that point I would only urge two things, that a man is allowable to plead specially where he may plead the general issue and give the special matter in evidence, in two cases.

First, when a defendant by his plea doth admit some colour of action to be in the plaintiff, but sheweth some special matter of fact to avoid it.

Secondly, where a man pleads matter of law which admits the fact but is not proper for a jury. Both which rules are comprehended in the plea in this case, and so I shall apply them.

As for the first, when the defendant by his plea doth admit some colour of action to be in the plaintiff, but sheweth some special matter of fact to avoid it, there he need not plead the general issue, but may plead specially, not to set the whole matter at large before the whole court and a jury.

As in the tenth Report, fo. 88, Dr. Leyfeild's Case: Action of trespass is brought by A. against B. B. pleads that queen Elizabeth was seized of the Rectory of Clevee, and demised to C. for life, but setts not forth the Letters Patents, who demised to D. for years, if C. lived so long, and B. as servant to D. did the trespass; what is this to the purpose? It is an ill plea for that reason, for not setting forth the Letters Patents. But if he comes and says C. seized in Fee made a lease to B. for life and after to A. for life, and B. made a lease for years to D. determinable upon his life, B. dyes, A. enters, D. brings trespass; and so allows a good title and cause of action in D. if it were not for this sufficient matter: In such a case the plea is good, it is not indeed a good title against A. because I shew that the title of B. on whose title D.'s title doth depend, is determined; and my right and title avoids his: yet, my lord, in this case he might have given the matter in evidence upon the general issue; but in regard he gives colour to the plaintiff's action in that case, it is a good plea, and not demurrable to, as amounting to the general issue.*

* This is not very clearly stated. The case in 10 Co. is this:

“John Leyfield, D. D. brought an action of trespass in the King's Bench, Hill. 8 Jac. Regis Rot. 1282, against Henry Hillary, for corn and hay, taken and carried away at Old Cleve, in the county of Somerset. The defendant pleaded in bar, that queen Elizabeth was seized of the Rectory of Old Cleve, in the same

county, in her demesne, as of fee, as in right of the crown of England, and by her Letters Patent 20 Junii 35 of her reign (without saying, here shewed forth) demised the said rectory to Conard Prowse, for his life; who 16 January anno 3 Jac. Regis demised the said rectory to George Pincomb for eight years, if the said Conard ‘tam diu viverit’ and that the defendant as servant to the said George, took the corn and hay as tithes severed from the nine parts; and averred the life of the said Conard, upon which the plaintiff demurred in law, and shewed the cause of his Demurrer, because the defendant's plea amounted to the general issue; and it was adjudged in the King's Bench, that the bar was insufficient, because the defendant in his plea did not shew to the court the Letters Patent of queen Elizabeth made to Conard Prowse, which the court took to be matter of substance, and which the defendant ought to have shewed forth, although he in whose right he justified, had but part of the estate. Whereupon a writ of error was brought in the Exchequer chamber, and there two errors were moved, one which was assigned by the plaintiff for the cause of Demurrer, sc. that the said plea amounted to the general issue, because the defendant gave the plaintiff no colour, in which case no judgment ought to have been given against the defendant, but the court ought to have ruled him to answer over: the second, that for want of shewing the said Letters Patent the court ought not to have given judgment against the defendant. After much argument, it was resolved, that in this case colour ought not to be given to the plaintiff, and also that the lessee for years ought to shew the Letters Patent made to the lessee for life. So the judgment below was affirmed.”

That is in the case of an express colour given, now let us see how the law stands, in the case of a colour implied; as in some cases the books speak of a colour implied as well as express.

As if a man brings an action of trespass for taking away so many sheaves of corn, the defendant comes and justifies, and says I was parson or rector, and those sheaves were set out for tithes, and I came and took them: here needs no formal colour be given, but a very good colour of action is implied; for he admits the sheaves of corn were the plaintiff's and in his possession, but now he sets forth a right in the defendant to have them and take them. The plaintiff had a right against all the world but him, and against him too if he had not such a right specially set forth.

And no question but this action would lie here in our case, against all mankind but the jury, and against us too, if we had not been of a jury, but here we have avoided the action by such special matter. It is in truth a great scandal in itself, but being done in this manner by gentlemen that were of a grand jury, it shall not impeach us.

county, in her demesne, as of fee, as in right of the crown of England, and by her Letters Patent 20 Junii 35 of her reign (without saying, here shewed forth) demised the said rectory to Conard Prowse, for his life; who 16 January anno 3 Jac. Regis demised the said rectory to George Pincomb for eight years, if the said Conard ‘tam diu viverit’ and that the defendant as servant to the said George, took the corn and hay as tithes severed from the nine parts; and averred the life of the said Conard, upon which the plaintiff demurred in law, and shewed the cause of his Demurrer, because the defendant's plea amounted to the general issue; and it was adjudged in the King's Bench, that the bar was insufficient, because the defendant in his plea did not shew to the court the Letters Patent of queen Elizabeth made to Conard Prowse, which the court took to be matter of substance, and which the defendant ought to have shewed forth, although he in whose right he justified, had but part of the estate. Whereupon a writ of error was brought in the Exchequer chamber, and there two errors were moved, one which was assigned by the plaintiff for the cause of Demurrer, sc. that the said plea amounted to the general issue, because the defendant gave the plaintiff no colour, in which case no judgment ought to have been given against the defendant, but the court ought to have ruled him to answer over: the second, that for want of shewing the said Letters Patent the court ought not to have given judgment against the defendant. After much argument, it was resolved, that in this case colour ought not to be given to the plaintiff, and also that the lessee for years ought to shew the Letters Patent made to the lessee for life. So the judgment below was affirmed.”

My lord, in the common case of maintenance, which I think will come home to this case in question; (As 9 H. 6, fo. 64. and other books) no doubt but upon 'ne maintena pas,' pleaded the defendant may give it in evidence that he did it for his fee, or as a party that had interest, or as a relation of the party that sued: but yet is there any thing more common than to plead this matter specially? The defendant justifieth that he did it either as a relation, or as a counsellor for his fee, or as a party interested and [doth] not leave the matter at large to a jury: so are the precedents in Rastall's Entries, fo. 439, and Brook tit. Maintenance N. 17, and a great many other books.

Then we allowing a colour to the plaintiff to bring his action; and that the action had been good if not brought against us in our circumstances; we have by this special matter avoided it, and it is a good justification and bar; though we plead not the general issue and reserved^a for evidence: that is as to the first ground. For the second which is when there is a matter in law pleaded that is not proper for a jury, then, though it amount to a not guilty, or the general issue, yet there cannot for that cause be a Demurrer to the plea; and the reason, because that were to perplex the jury with many questions and inquiries, and intricate the cause which the law is against. In our case, what an abundance of things must have come under the inquiry of a jury, if we had pleaded the general issue? But we have pleaded specially, to bring to one certain point whether this matter before the court be sufficient to justify what we have done, and save us from this action.

My lord, in Leyfeild's case, that was mentioned before, it is held, and no question but the law is so, upon not guilty pleaded in trespass a release which is a bar in law may be given in evidence; and yet I may plead that release in bar to the action brought, and that without giving a formal colour; for that implies, the Plaintiff might have had his action else. And this being a bar in law to the action, the Defendant need not intrust a jury with a matter of law, but refer it to the consideration of the court and they shall give judgment upon it: and it is no damage to the Plaintiff if the fact alledged or any part be not true, for he may take issue upon what point certain he pleases to pitch upon, and the jury may try that, and not be puzzled with intricate things. So in an action of trespass or trover for taking away of goods, the Defendant he pleads that he bought the goods in market overt, that is a good plea, because it acknowledges that the Plaintiff had a good cause of action, if it had not been for the property's being by act of law altered and vested in the Defendant; and so here the action would lie, if we were not intrusted by law and impanelled, sworne and charged to enquire and present.

And though you may accuse others and have your action against them for what they

shall say against you of a scandalous nature, yet we by the protection of the law are sacred persons, that cannot be impeached for what we do as a Grand Jury; and this being a discharge in law from the action it is most natural and proper to lay it before your lordships and represent it as a matter of law, and not leave it to lay gentlemen to enquire of, and for this I shall quote to your lordship some cases that I take to be authorities in point.

21 Ed. 3. fo. 17, which I cited before. In an action of conspiracy the Defendant justifies that he was an indictor, &c. Nobody doubts but that if he had pleaded not guilty, this in evidence would have discharged him, and that this was a virtual 'not guilty,' but there he justifies specially and adjudged a good plea.

So 27. Ass. pl. 42. In conspiracy the Defendant justifies as a judge, and that he directed and charged the jury, &c. and pleads this matter specially, and held to be a good plea.

And it is the same in our later books. So Moor fo. 600 pl. 623, Varel versus Wilson, there was an action of conspiracy for falsely indicting the Plaintiff of Felony: the Defendant he comes and pleads, says he, the goods were feloniously taken away, and I found them in the possession of the Plaintiff, for which I preferred a bill of indictment and gave evidence to the jury, who indicted the Plaintiff, and upon his trial I was sworn and gave evidence to the jury, upon which the Plaintiff was acquitted; and traverses that he conspired 'aliter vel alio modo.' There was a demurrer upon this plea, because it amounted to not guilty, for the probable cause was the gist of the action, and that answered the doing of it without probable cause; and yet it is held a good plea, and the justification to be good.

There is another authority and that is 3 Cro. 871. Pain versus Rochester and Whitfield^a, conspiracy for procuring him falsely and maliciously to be indicted for robbery, &c. whereof he was acquitted; the Defendants plead that they were robbed by persons unknown and one of them upon a brown gelding, that they made hue and cry and could not find them. Whitfield one of the Defendants came to such a town, where the Plaintiff was upon a brown gelding, and suspecting him shewed him to the other Defendant, who upon that suspicion went with him to a justice of peace, and the Plaintiff absented himself, and afterwards being taken was committed to jail, indicted, and after acquitted, which is the same conspiracy. The very objection made by one of the judges was that this amounts to the general issue, but the rest of the court held it was a good plea. 'Pour Doubt del lay Gents:' those are the words of the book: for they ought to have the protection of the law for what they do according to law, and law justifies them in what they did.

There is another case in the same book, 3 Cro. 900. Chambers against Taylor. An action upon the case, in the nature of a conspi-

^a So in the original.

* 1 Bulst. 150. S. C.

racy for procuring him to be indicted of felony; and the Defendant pleads himself possessed of the goods, and they were stolen by persons unknown, that he found them in the Plaintiff's house, and because he would not restore them nor say how he came by them, he prosecuted him, &c. the Plaintiff demurred, but it was held to be a good plea, though certainly it as much amounted to the general issue as this does here.

There is likewise another case 2 Cro. 130. *Marham versus Pescod* upon a writ of error of a judgment in the King's Bench in an action upon the case for procuring him to be indicted of felony, &c. And the Defendant pleaded a special justification that he was possessed of a piece of timber which was stolen from him by persons unknown but found in the Plaintiff's possession, upon which by warrant he was apprehended, and for cause of suspicion committed, the Defendant bound to prosecute, and afterwards the Plaintiff indicted, &c. and thereupon acquitted: the Plaintiff replies 'de injuriâ suâ propriâ,' &c. Issue thereupon, and found for the Plaintiff; but now for errors, it was sought to be reversed, and amongst other errors, it was alleged that this was no good plea; but was held a good justification and plea, and judgment affirmed. And if such replication had been here, it might have been tried: and the like case is in *Calleway's* [qu. *Keilways*] Reports, fo. 18.

Without all peradventure, both in this case and all the rest of the cases; the Defendants might have taken advantage on the general issue of giving this special matter in evidence; but yet I have plainly shewn from all these authorities, where the Defendants have matters in law to defend themselves by, from the Plaintiff's action, they may either save to themselves the benefit of that defence upon the general issue; or plead the special matter, and it shall be a good justification in law.

As for the case in *Dyer* 385 which was mentioned before, it is by the better opinion in that book, even in the case of a scandalum magnatum, held to be a good justification to plead the prosecution at law. He justified in that case specially; he might, indeed, it is said, have pleaded not guilty, and that special matter would have fetched him off upon the evidence; but he would set forth his legal justification in his plea, that he was under the protection of the law in pursuing the method of law; and it was held to be sufficient.

My lord, there is yet one case more, and it is *Bridgman*, fo. 130, the case that I mentioned before of *Agard* against *Wild*, et al. where, upon pleading that the defendants were indictors, which is specially set forth, judgment is given for the defendants: and so is the precedent *Rast. Ent. 123. tit. Conspiracy*, a special plea.

The sum of our case, my lord, upon this plea, stands thus: we were impannelled and sum-

* S. C. Noy 116.

mous on the grand jury to enquire for the king and the body of the county; we were duly sworn and charged so to do, before judges that had conspience of the causes presented. What we did hereupon was by virtue of our oaths and according to our consciences. We were under apprehensions that the country was in danger, and therefore thought it necessary, and incumbent upon us, in the office we were then in, to make presentment of our apprehensions to the court, that they, upon our representation of our fears and the grounds of them, might, according to their wisdoms and the direction of the law, consider of the dangers and take security for the peace and preservation of the government, which is all that is desired by it.

And upon this case, my lord, thus stated, I conceive it a matter of dangerous consequence for a grand jury to be subjected to actions for what they do in execution of their office.

Never any action, of this nature yet held water, but in all past ages have met with dis-appointment, and I hope the same success, that such actions have hitherto met with, this action shall find here. And therefore I humbly pray your Lordships' Judgment for the Defendant.

OBSERVATIONS, &c.

[Of this Article the MS. appears to have been written by a very careless or very ignorant scribe. It is extremely faulty as to punctuation, orthography, and grammatical structure; and some parts of it are utterly nonsensical; as to these, however, no alterations are here made, except those of which the propriety seemed to be altogether indisputable.]

There is no judicature, that has cognizance of mens thoughts, or a power to fasten suspicions in such a way, as to leave the party without remedy, or power of vindication.

This Libel, called a presentment, is in the nature of a Judgment upon a Peere.

There is no such power belongs to the authority of any human judge, nor ever before assumed. Nor ever any judge gave in charge to a jury to present men ill affected, which would tend to raise factions and animosities, instead of securing the peace. No judge can make any thing a fault from pretended reason of state, if it be not one by the law. Nor turn a little transgression of some obsolete law into a treasonable practice.

The business of a Grand jury is to present law breaches and offences against the peace; that the law hath determined to be such.

* "The libell in question was not done in execution of their office, and therefore the action lies." MS.

Though they may make unformal indictments and be excused in it; yet nothing is presentable, but what is an offence against the law, and what there is a form for.

Let the counsel bring any form or precedent for such an indictment out of the king's bench, or that had the allowance of any of the great courts of judicature, and I will be concluded by it.

The office of a Grand Jury is to present fact; they have no judgment of law, and therefore no power of censure; but ought to leave the facts found by them entire to the judgment of the court.

If more than this be once allowed them, my lords, the judges will soon find their authority undermined by popular and factious Grand Juries; and defame * your proceedings with the same liberty.

With what heat hath it been contended between the judges and Grand Jury, whether they ought to find all mankilling murder. For that they are not judges of the law upon the circumstances of the fact, † that seem to extenuate the mankilling, and constitute the fact not murder. The judges have gained this clear point, and it is settled; but a chief justice (I think) did first perish in the conflict. I hope by amplifying their authority you will give no more occasion to revive disputes.

Grand juries were never taken to be judges of the law: and will you allow them to bring matter prejudged before you, and instead of explaining and opening matter of fact for your judgments, tell you of matters that they censure, but in such a manner that the truth of them cannot be enquired into by yourselves: and indeed they have foreclosed your enquiry, and have prejudged them to your hands.

The wisest judges have been careful not to interpose in matters of fact, because they are discharged by the law from that vexatious province: but if you allow them to interpose of matters of law, there is an end of your authority.

Neither hath the Grand Jury any conservancy of the peace, nor can the judges use the authority of the leivetenancy, who are to secure the

* So in the original.

† As to the respective provinces of Judges and Jurors, See in this Collection, vol. 6, p. 1013. In the case of *Machell v. sir William Temple*, (2 Shower 283) where one of the questions was concerning the validity of a will. The court and counsel agreed on a special verdict, but the jury being obstinate after twice or thrice sent out, would find for the plaintiff, who was heir at law, although there was a doubt in the law, saying they were all of opinion it was no good will; and thereupon the poll was demanded that they might all of them severally give their verdict, which they all accordingly did for the plaintiff: Whereupon the reporter remarks, "the first jury that ever refused a special verdict on a point in law, they all incurring the danger of an attain't."

peace by arraying and disarming, and taking caution. But judges, and Grand Juries their ministers and informers, enquire of nothing, and censure nothing, but overt facts and offences against the peace.

No reason can be drawn from swearing the peace by a person menaced and threatened; applying himself to a justice of peace, and stating the reasons of his fears before a judge, the person is required to give security. This does not entitle the Grand Jury to the office of a lord leivetenant, nor the judges to the office of a justice of peace. I pray let me have judgment in this point.

Mr. Holt himself hath no other way to justify these proceedings of a jury, but by destroying the fundamental law of the kingdom: and by the help of his fancy, without any cooler for his dreams, imagines there is any other ways of proceeding upon a commission of Oyer and Terminer, against offenders than by indictment or informations.

He forgot Empson and Dudley's doom.*

It is our security that no man can be impeached or accused, or his good name brought in question, but by the oaths of twelve men, in order to be tried for the same; and is to be charged in such manner, that the person may be able to make his defence; that the commission of Oyer and Terminer may proceed to enquire upon the oaths of good and lawful men, and by any other means, whereby the truth of the fact may be found out: but gives them no authority to change the process, and the fundamental laws of charging facts distinctly, so as they may be answered and defended. Nor gives them power to make any thing they please an offence, or chastise any offence, but as the law directs.

Nothing is more sacred than the boundaries of power, and nothing more apt to confound our government, than to abolish them. It cannot be done but by suppressing of old offices and officers, and creating new, or which is the same allowing them to act as they please, 'colore officii.' And therefore this action that complains of an undue extent of a necessary office to hurt and oppression deserves great regard.

Justices of the peace have power to bind by recognizance to the peace, and commissioners of Oyer and Terminer have the like power; but we know also that this is stated, and brought into rule, and determined to cases that require it. But this is upon complaint of persons obnoxious to danger, and producing their fears reasonable. It is not to be done upon panic fears, groundless apprehensions, and persons that are not concerned in the danger.

But a grand jury are not the government, and it doth not belong to them, nor any court of judicature out of the course of law to provide for the peace. Extraordinary cases are to be provided against by the government, but

* See their Case in this Collection, vol. 1, p. 283.

the course of law must proceed. Shall a Grand Jury upon every panic fears or pretence of such a feare (I wonder that Mr. Holt could think fit to give them that appellation, that call themselves the county, a most incongruous and unnatural assuming of a dozen or two of men impanelled together by chance by the undersheriff, to minister to the court in finding indictments of course,) take upon them to innovate the law, and at their discretion find new expedients for the peace. The law will be by such means quite perverted, and we fall under the wits, humours and caprices, and malice of men.

It is no more warrantable for a Grand Jury to interpose and exceed his authority, by pretending services to the government, than it is for men to run into arms not authorized thereto, and pretend public danger.

It is represented by Mr. Holt to your lordships, as a very small thing, that I am required to find sureties for the peace.

I am censured by this presentment untried, and am judged by this Grand Jury and fined my honour and loyalty, my prince's favour, my liberty, and doomed ever unfit to be trusted about his majesty in any office in the government, in any commission even of the peace.

It is fit that precedents should be searched and found out to warrant your lordships to forejudge my action; which seeks remedy and vindication against such insufferable injury, imposed upon me without any reason of the defendant shewn either in his presentment, or in the defence of the action, for justifying this scandal and oppression.

That these men were under an oath at this time of a Grand Juryman, and under the execution of that office, will not draw any matter that belongs not to that office and ministry under their oath, or justify them in whatever they shall do, say, or write, that is foreign to that office. If they have no authority to do what they have done, their plea that they did it as Grand Jurymen in hanceth their wrong, while they seek to entitle it to a judicial proceeding, and I shall be most of all hurt by your lordship's judgment in the case.

The Precedents cited by Mr. Holt to prove no action will lie against a Grand Jury for their indictments, is where the presentments were of matters criminal, clearly within their charge and oath.

Mr. Holt is so sensible that this way of proceeding is a * by the Grand Jury, that such he justifies their proceedings in making this libell. He says it is for my correction, 'ut poena ad paucos, metus ad omnes perveniat.' An injury it is, against which I come to your lordships for relief. But a stronger reason cannot be thought of for the support of this action, than that the Grand Jury have assumed in this libellous presentment, a power to punish and censure, which no man is so little acquainted with our lawes, as to allow them.

* So in MS.

The binding to the peace is sometime the censures of the court, upon repeated offences, committed, presented, and tried. But a Grand Juryes presentment of facts untried, are not convictive, and they have no power to censure, or promote a censure. This is the business of the court.

Malitious busy bodyes, that are hurtful by a pretended officiousness, have been always held chastiseable as wrong doers.

Grand Juryes are to enquire of traytors, and treasons, but this with great prudence, and reasonable enquiries, and conclude upon probable inducements. But not to dishonour the government by sporting with men's honors, and liberties, and make a game and jest of judicial proceedings. They had better give their verdicts by the chance of a die, which hath been censured, and fined.

This presentment condemns itself and appears to be absurd and unreasonable, and therefore malitious, and false, and consequently actionable.

This may be the first action of this kind (as Mr. Holt says), and this is the first libell of this kind called a presentment.

I allow a Grand Jury, and no other officer can be impeached in the honest discharge of his office, with the best prudence they have, though not always in the best manner, so they keep themselves within the verge of their office. But it is too slight a colour to impose upon your lordships, that therefore they are not to be answerable for their extravagant and factious excesses. Where they use the authority of their office; maliciously, apparently, and that of their own shewing, the presentment itself makes and declares their fault.

If a Grand Jury will alledge reasons for not finding a bill, and say though the proof they think probable, yet they have a good opinion of the man, and think him innocent, such a behaviour is fineable.

If therefore they will present a man, and say he hath been seen in such company, or done an act which the law doth not censure, but they will take upon them to blame, and condemn, an action shall be allowed to lie in the case. For it is against their oath and office, and directly against their duty, who are to present no man for hatred or ill will, nor spare any man for favour or affection. When these do not appear they are presumed innocent; but all presumptions duly made in favour of officers vanish upon clear evidence of malice.

And if no man will serve in any office, except he be indemnified for all the disorder and oppression he shall commit in that office, it is much better to want them; for no malice is so mischievous, as that which is authorized.

As to that which Mr. Holt says, That the Defendant being a Grand jury-man could make no better and more particular a justification then he hath done, for that he is under an oath of secrecy, referring to that clause of a Grand jury-man's oath, The king's counsel, and fellows, &c.

This oath doth not oblige them to suppress

their presentments, nor to prosecute, and assist them.

In this action the Plaintiff hath provoked them to make good their presentment, which they ought to do, if they can, in his majesty's service.

That clause of their oath can be only understood to this purpose, That they should not give notice to a prosecuted criminal of his accusation for the making of his escape. For all the witnesses to an indictment their names are ingrossed with the indictment, and they are sworn in court. And it is now in practice to examine the witnesses publickly to an indictment.*

Mr. Holt useth a multitude of words, but comes not to the merits of the cause, but touches it as an ass mumbles thistles.

SIR WM. WILLIAMS'S ARGUMENT.

[The MS. of this article is in the hand-writing of Sir William Williams; as is also the following indorsement upon it: "My Argument in the court of Exchequer, Hill. 36 et 37 Car. 2. for Charles earl of Maccolesfield, tam pro Domino Rege quam pro seipso" plaintiff, against "John Starkey, esq. Defendant. Cur. advis."

Of the many passages in the margin of the original MS. some which are merely abstracts of the matter in the text are here omitted, and some are here inserted as notes with the designation of "MS."]

THE GENERAL QUESTION.

Whether there be a good cause of action for the Plaintiff against the Defendant upon this Record?

That there is a good cause of action set forth for the Plaintiff in his Declaration I suppose cannot be denied; for I do not observe it contradicted by Mr. Holt, that argued for the Defendant, and I suppose this will not be insisted upon.

The Special Question in this case I take to be:

Whether the Defendant by his Plea hath sufficiently answered the Plaintiff's cause of action set forth in his Declaration?

I conceive he hath not.

In my way to the argument of this question, I shall observe the parts of the Plaintiff's Declaration, and the parts of the Defendant's Plea; and by comparing them endeavour to satisfy the court, that the Plea doth not answer all the parts of the Declaration.

The Declaration consists of three parts.

1. It sets forth a false libellous writing, al-

leging it to be devised, framed, written and published by the Defendant with others, against the Plaintiff falsely, maliciously, by conspiracy without any lawful or reasonable cause, at Wantage in Com. Berks 17 Sept. 1683—

To have the Plaintiff, being a peer of the realm and a gentleman of his majesty's bed chamber, reputed and taken for a person disaffected to the government; and a disturber of the peace; and to expose him to his majesty's displeasure and distrust.

2. It sets forth the designe of this libel thus framed and published.

3. It avers the Plaintiff never was disaffected to the government nor a disturber of the peace: nor guilty of any of the matters contained in the libel charged against him.

4. It sets forth the ill effects of this libell upon the Plaintiff that the Plaintiff hath lost the grace and good opinion of his majesty: And divers false rumours and scandals are thereby stirred and spread among the nobles and other his majesty's subjects of the Plaintiff.

I shall have occasion in my Argument to make many observations upon this libellous writing, and shall then state the parts of it.

The Defendant's Plea consists of two parts.

1. The Defendant's being with others of a grand inquest 'ad sessionem Cestr'; and there presenting 'ad eandem sessionem' in the English words in the Declaration mentioned, which is their justification.

2. Their traverse joynted to this justification.

This Plea is insufficient and defective in that part of it, which is the Defendant's justification, and also in its other part which is his traverse.

The justification is insufficient and defective in these two things.

1. It doth not appear by the plea that the Sessio Cestr* mentioned in the plea was a court that had jurisdiction of the matters surmised to be presented by this inquest.

2. The matters mentioned to be presented in the manner set forth in this plea are not a presentment, and ought not to be received or taken in law for the presentment of a grand inquest upon this record.

3. The traverse is defective because it doth not take into it all the parts of the declaration which are not comprised in the justification; So the plea leaves part of the declaration unjustified, and untraversed, and consequently unanswered.

It doth not appear by this plea that this Sessio Cestr† was a court† for all sessions are

* "1. If this Sessio Cestr does not appear to this Court upon this record to be a court having jurisdiction of these matters alledged to be presented here, then the justification fails the defendant: 2. Though a court, yet if the writing called a presentment be not a legal presentment, the justification fails defendant." MS.

† "Sessio pacis, Session of Oyer and Terminer, Session of Geol Delivery, Session of Parliament, Sessio Postarum. The great Ses-

*As to this, see Lord Shaftesbury's Case, vol. 7, p. 105, of this Collection.

not courts: it signifies a sitting or meeting. What court was this whether a Court of Sessions, of Oyer and Terminer, Gaol Delivery, General Sessions of the Peace, or a Court of Exchequer, or the ancient monthly court held before the justiciar of Chester, or the court created by the statute 32 H. 8, cap. 43, and altered in some respects by the statute 33 H. 8, cap. 13, or the Court established by stat. 27 H. 8, cap. 5, of all which courts lord Coke in his 3 Inst. takes notice, and they are all sessions in common parlance.

This court hath not its stile in this plea. 'Sessio Cestr' no stile, any one of these courts may be holden before sir Geo. Jeffreys, knt. and bart. justice of Chester, and John Warren, esq. another justice of Chester; these are their titles, not the stile of the court; they have titles whatever court they sit in.

They are so named with these additions in special commissions of Oyer and Terminer and gaol delivery, and in the commission of the peace established in this county by the stat. 27 H. 8, cap. 5.

The courts in Westminster-hall are known by their stiles as King's-bench, Chancery, Common Pleas and Exchequer; and if the stile be mistaken it must be taken to be 'coram non judice.'

If this justification were in 'Cur' dowini regis tent. apud West. coram Georgio Jeffreys' and 'sociis suis' this would be naught, for there is no such court; and this court in pleading could not intend this for the King's-bench.

And if the Defendant will have advantage of this matter to excuse himself, that he did it in a course of justice in a court of justice, he must shew the court so as it may appear to this court, that such court had jurisdiction of such matters as are supposed to be presented in this paper.

Objection 1. As to the objection made by Mr. Holt, That this court ought to take notice of the courts in the County Palatine of Chester and of their course of proceeding, without special pleading of them or shewing them to the court.

Though this be admitted that the Courts of Westminster are obliged to take notice of the course of proceeding in the courts in Counties Palatine:

That is when the court is shown in pleading, but this court is not obliged to guess at the meaning of a plea touching the court without naming and stiling the court.

sions in Wales are enacted by the stat. 34 H. 8, cap. 26, which sessions shall be called the King's Great Sessions in Wales. No act gives this supposed Court the name of Sessions. Spelman's Glossaries, Sessio Hyemalis, Sessio quadragesimalis mentioned there not taken for a Court. Vide 'Owin' in his book. 2. if supposed a Court, it doth not appear upon this record what court of Sessions this was. 3. all courts are known by their stile: this is not the stile of this Court." MS.

The course of the Courts in Westminster-hall is the law of the land, and every court in Westminster-hall is obliged to take notice of the course of the other courts there, without shewing their course in pleading.* If a record of the Court of King's Bench comes before this court, you will take notice of the forms of that court; but the courts in Westminster-hall are not obliged to take notice of the stiles of the respective courts, if they be mistaken in pleading.

If the court be rightly stiled in pleading, the other courts are obliged to take notice of the course of that court.

It is manifest it doth not appear in the plea that this session had jurisdiction of the matters supposed to be presented, it doth not appear in the plea what court this was.

Neither is there enough set forth in this plea, for this court to intend that this session had jurisdiction of these matters.

A record in any court in Westminster is binding to other courts, so is a record in the Cinque Ports; but a record in Chester, Durham or Lancaster is otherwise, for they are another manner of franchises.

An outlawry in Durham or Chester shall be disallowed and are not pleadable in courts here, † because they are but private jurisdictions which extend not beyond their own precincts.

It must be admitted that Chester is a County Palatine, and that regal jurisdiction is incident to every County Palatine; and consequently hath courts which have jurisdiction in pleas of the crown and civil pleas.

And so far the Courts of Westminster-hall take notice there are courts of justice in the County of Chester, as incident to the County [qu. Palatine] of Chester.

But the Courts of Westminster do not take notice of all courts in a County Palatine, or allow of all their course in their courts of their presidents.

A Writ of Error to reverse an outlawry in the county of Lancaster, Error assigned 'quod ad comitat' Lancast' tent' ibid,' &c. Whereas it should have been 'tent' apud Lancast' in 'Comitat' Lancast' and the *ibidem* would not serve, though a hundred presidents produced out of that court to warrant it.

If this session mentioned in the plea be a session held by any commission either of Oyer and Terminer, gaol delivery, or peace, the authority and commission of the court ought to be set forth.

And this as well in the county of Chester as in any other court.

Because these courts by these commissions are not courts incident to the county Palatine, neither do the courts sit there upon any such commissions, issued out of the Exchequer in

* Lane's Case, 2 Coke's Rep. fol. 16.

† 12 Edw. 4, fol. 16.

‡ Davy's Rep. fol. 61. The Case of the County Palatine of Wexford.

§ Slade's Case, 4 Co. Rep. 91.

the county Palatine, but by commission from the Great Seal of England, by the Stat. 27 H. 8. c. 5.

And the court of Assizes so generally called, holden before the justice of Chester, is a court constituted by act of parliament of 39 H. 8. cap. 45; and not an ancient county Palatine court.

Since there are these various courts in the county of Chester, the authority and jurisdiction of the session mentioned in the plea, ought to be set forth by the defendant, who doth justify himself by proceeding as juror in that court; otherwise this court cannot take notice of that court. This *Session Peace* may be a session of oyer and terminer, peace, or gaol delivery; which, ought to be shewn.

The Plaintiff in his declaration doth alledge that the defendant with others by conspiracy did falsely and maliciously devise, frame, write and publish, a false scandalous libel against him, and set forth the tenor of it to be,

“We the Grand Jury sworn to inquire for the body of the county of Chester, at the assizes held in the Common Hall of Pleas in the Castle of Chester upon Monday the 17th Sept. 35 Car. 2.”

The defendant in his plea confesseth that he did present in ‘his Anglicanis verbis,’ in the declaration mentioned, so in the libel, he gives this court one stile, in his plea another name: he stiles the court the assizes in his libel, but the session in his plea.

Therefore to excuse this matter he ought to shew the jurisdiction of this session, and the authority of it; whereby this court may judge of it.

That this ought to have been so shewn, I shall endeavour to make out by authority, precedents and reason.

Lord Coke’s 1 Inst. fo. 303. Where a matter of record is the foundation or ground of the suit of the plaintiff, or of the substance of the plea, there it ought to be certainly and truly alledged; otherwise it is, where it is but conveyance.

The reason I take to be that the court in which the action depends, may have the matter of record so fully and clearly before them that this court may judge of the matter of record, whether it be sufficient in law to maintain the action or defend the plea, and not to trust to a hint of a record, for the court is to judge by the record before them, not by implicit faith of what was before another court.

Therefore it ought to appear to the court where the record is brought, that the court where the record was made had jurisdiction of the cause, and that the record is sufficient in itself to justify the matter alledged in the pleading.

Withall it is necessary it should be so; that the suitor may by plea or replication of ‘nulli record’ bring that record before the court, or at least wise have the truth of that record tried.

If this course of pleading be allowed, these

advantages are lost, and the subject will be concluded by the judgment of a court upon a record not sufficiently pleaded or produced or proved, as it ought to be by the methods of law.

Bushell’s Case, Vaughan’s Rep. f. 138.—The reasons in the argument of my lord chief justice Vaughan affirmed by the judgment of the court in that case do not only prove this, but do very much illustrate it. [See *Bushell’s Case* vol. 6, p. 999, of this Collection.]

A Habeas Corpus directed to the sheriffs of London to have the body of Edward Bushell, by them detained in the prison together with the cause of his caption and deteyner, in the court of common pleas.

Returned, that at the king’s court of session of oyer and terminer, held for the city of London before sir Samuel Sterling then mayor of London and divers other, his majesty’s justices, ‘by virtue of his Majesties Letters Patents under the Great Seal of England, &c. directed to enquire hear and determine the offences therein specified,’ among others the offences of unlawfull congregating and assembling, &c. the said Bushell was committed to the gaol of Newgate, under the custody of the sheriffs of London, by vertue of an order made by the said court as followeth:

‘Ordinat’ per cur’ quod finis 40 Mercar’ ponatur separatim super, Edward Bushell and eleven more, for that they being jurors &c. had acquitted certeyn persons of the trespasses contempts and unlawfull assemblies, in Jone contra ligem hujus regni Angliæ contra plenam et manifestam evidentiã contra directionem cur’ in materia legis, hic in curia hic aperte datam et declaratam de premissis.’

Committed till they pay the said forty marks or be delivered by due course of law.

The party was delivered upon this Habeas Corpus, by the court of Common Pleas, 22 Car. 2—

Because the court hath not knowledge by this return, whether the evidence given were full and manifest or doubtful, lame and dark:

Because it was not returned, what evidencẽ was given:

There was before the court of Common Pleas, only the judgment of the court of Oyer and Terminer upon the evidence before them, and not the evidence given before them:

And the judgment of the court of Common Pleas, is to be given and grounded upon their own inferences and understanding, and not upon others.

It was objected there that ‘Institutum est quod non inquiratur de discretione judicis.’

That the court of sessions in London is not to be looked upon as an inferior court, having all the judges commissioners:

That the court having heard the evidence it ought to be credited that the evidence was clear.

Yet the party discharged upon the said reasons.

Here is left in our plea.

It is not the judgment of the court, or the

discretion of the court that is here made sacred, but the judgment and discretion of a jury.

And that not in *materiâ facti*, but in *materiâ legis*, as I shall shew in its proper place.

Ought not the jurisdiction of this court [to] appear clearly and manifestly to this court, and not the court and the plaintiff [be] bound by this general allegation of *ad Sessionem Cestr'*, without shewing what court it is, or the power or jurisdiction of it, or the nature of it?

And this is a limited jurisdiction bounded within itself in its enquiry.

These precedents justifie and require the court should be set forth, in such pleadings as this is.

In an action of trespass,* the defendant sir Christopher Heydon, pleads specially, and makes a title to the lands in the Declaration, under an attainder of Dudley, for High Treason, upon an indictment taken before commissioners of Oyer and Terminer; whereby, and by act of parliament of attainder grounded on the conviction, those lands were forfeited, and granted from the crown to the defendant.

In that case the defendant in his plea, sets forth the commission of Oyer and Terminer; the names of the commissioners and their power to enquire 'per sacramenta' of 'prob' et 'legal' homin' &c.; he sets forth of what crimes they were to enquire.

Note the whole proceeding in that case upon that Record was void as a proceeding, 'coram non Judge;' which would not have appeared, had not the commission, and proceedings upon it, been set forth in the plea.

Therefore judgment was given for the plaintiff in that action.

In an action upon the case,† the plaintiff declares, that the defendant at the general Gaol Delivery for the county of Warwick, held at Warwick 6 August, 8 Jac. before sir Peter Warburton, one of the justices of the common bench, and sir Thomas Forster another of the justices of the common bench, justices of the peace 'necnon ad diversas felon' audiend,' 'et terminand' assignat' falso et malitiose absque 'ullâ verâ et legitimâ causâ procuravit,' &c. the plaintiff, and imprisoned and detained in prison, *quousque* he was 'debito modo acquietal'; judgment upon a Writ of Inquiry for the plaintiff.

Judgment arrested after writ of inquiry executed, for that the Declaration was not good, because it is grounded upon a malicious prosecution of an indictment at a Gaol Delivery, and it is not alledged in the Declaration, that they were justices 'ad Gaolam deliberand' assignat'—

Although shewn they were justices of peace and of Oyer and Terminer, and were in truth justices of assize and Gaol Delivery. Yet because this did not appear upon Record, the

* The earl of Leicester v. sir Christopher Heydon, Plowd. Comm. p. 384.

† See the Case of Lovet v. Fawkenor, Cro. Jac. 357, 1 Rô. Rep. 109, 2 Bulst. 270.

court would not help the plaintiff by intendment.*

Many presidents of actions † for procuring persons to be indicted, and indicting persons falsely and maliciously without cause, by conspiracy; several pleas by defendant that they were jurors and prosecuted the plaintiff, or indicted him without any conspiracy upon their oath as jurors:

In all these presidents;

The courts are set forth, their power to enquire, and of what crimes, with their other circumstances.

No president for this plea in all the books that I can meet with.

If this *Sessio Cestr'* shall be taken by this court to be such a court upon this record, as hath jurisdiction of the matters surmised in this libel, and that this inquest is duly impanelled, sworn, and returned, to enquire of these matters;

I conceive and shall endeavor to satisfy your lordship, that this writing set forth in the plaintiff's Declaration to be a libel, and mentioned in the defendant's plea to be their present averant; that it is no presentment, and ought not to be so called, or received in a court of law for a presentment, or to be so allowed in pleading upon record.

And consequently though this *Sessio Cestr'* was and shall be taken a court sufficient for this purpose, and this inquest a sufficient inquest to inquire, and present according to the oath and duty of a grand jury:

Yet this writing being in itself libellous, and no presentment, it hath lost the sanction of a presentment, and then cannot excuse the framers and publishers of it, though of the grand jury.

That it is not a presentment,

I offer these reasons against it.

This hath neither the form nor substance of a presentment; it is not positive in any part, to any thing, person, place, or other circumstance. I desire leave to state it.

It runs, 'we hold ourselves bound in this distempered juncture of affairs to present that we have strong apprehensions of danger from a dissatisfied party, who not only shewed their defection openly by an address made to Henry, Booth and sir Robert Cotton at the last election of knights of the shire, tending to alter the succession of the crown, &c.'

But also by their several meetings and cabals since, which administer greater suspicion from their arms.

And for that they assembled with schismatics, and disaffected, in the public reception of James duke of Monmouth.

* "Here are stronger circumstances to induce the court to take this proceeding to be before persons, who really had a commission of Gaol Delivery to warrant their proceeding, than there are in our case, to take this *Sessio Cestr'* to be a court authorized for this purpose." MS.

† Rastall's Entries, pp. 123, 124.

For remedy whereof with relation to the public peace, and also to wash our hands from all misprision, &c.

We conceive it expedient that the principal persons who promoted the said seditious address, and those that were notorious in abetting in the riotous reception of the said duke of Monmouth, &c. should be obliged to give security of the peace, and particularly Charles earl of Macclesfield, &c.

Here is no positive presentment, nay, here is no presentment, "Only we hold ourselves bound to present."

And they do not hold themselves bound to present because they know it, or have it proved to them; or hold themselves bound to present that there is any danger from a dissatisfied party in their county; but that they have strong apprehensions of danger from a dissatisfied party.

They do not present what this danger, is or wherein this danger lies, even in their apprehension; that they apprehend the peace of the country is in danger, that they apprehend any danger of rebellion or invasion.

In their motives assigned for their apprehension of danger they do not present positively any particular fact; they say "by an Address made to Henry Booth and sir Robert Cotton at the last election of knights of the shire to alter the succession."

They do not say there was any such address made.

"By their several meetings and cabals."

They do not say they did meet and caball.

"That they did unanimously meet with Schismatics and disaffected in the public reception of James duke of Monmouth."

But do not say he was publicly received.

And all their instances intimated in their writing are but evidence, leading and inducing a jury to believe and present a crime. And these crimes—to use their phrase,—this is but a climax of evidence, and all this at most is but a presentment of evidence of a crime, which is no presentment of a crime. In all this they do not name the earl of Macclesfield, nor any other person, to be a dangerous person or persons within their apprehensions, or to be a confederate, or actor in these addresses, meetings, or assemblies.

They accuse, by their apprehension, a dissatisfied party in their county only, without naming any particular person.

As they mention no particular person or crime, so they present no particular or other place or places, where this address, these meetings or assemblies were; and if all the other circumstances had been observed, if they had not named some place or places in their county, where these misdemeanors were acted or perpetrated, it would be a void and illegal presentment.

They being a county Palatine and limited jurisdiction, they ought to shew these crimes to arise within their own county, or else it is not within their inquiry, and therefore void.

The variety of matters and things offered in this presentment: The offences and crimes ayed at, if they were expressed so as they ought to be, and as circumstantially as the law requires;

They are crimes and offences of different nature, and ought not to be charged in any one presentment or indictment, but in several presentments and indictments, in respect that they are divers offences, of different nature, and ought by law especially in the case of a peer, [to] receive different ways of trial, and in every subject's case receive different judgments and different punishments, and executions; treason, riots, unlawful assemblies, breaches of the peace.

And here are many persons drawn into the same presentment, of different crimes, of different nature; and all are not accused of all the crimes.

As this writing hath neither the matter nor form of a presentment,

So it hath another form or purpose than a presentment. The purpose and design of a presentment is to accuse men of crimes by law; whereby they may be brought to tryal for such crimes, and be convicted or acquitted by legal tryal.

And process of law issue, out of course upon such presentment, to bring in the accused to appear and plead, and to bind the person to the peace or behaviour, or to bail, mainprise, or imprison the party, as the offence presented requires it.

But this presentment, and this Grand Jury, upon this signification of their apprehension of danger, in this uncertain manner, from a dissatisfied party, without any accusation of the earl of Macclesfield of any certeyn crime, do pass their judgment against the earl of Macclesfield and others, that he and they ought to be obliged to give security of the peace: they do not pray the court they may be obliged to give security for the peace; but give judgment upon them without any charge against them, there is no mention of them, till they come to their judgment: such a motion had been proper after a presentment. And why do they do this? They say they conceive it high time to manifest their separation from traitorous persons and treasonable principles, their favourers and abettors, together with their detestation of the climax mentioned in their presentment.

The Bill of Exclusion;*

Traitorous associations;

Ignoramus Juryes;

Seducing perambulations;

Matters not within their jurisdiction or enquiry if within their knowledge.

For remedy whereof with relation to the public peace, and also to wash our hands from all misprision by concealing proceedings that may encourage greater evils, in other parts of his majesty's dominions:

We conceive it expedient, that the principal persons who promoted the aforesaid seditious

* See 4 Cobb. Parl. Hist.

address, and the receivers of the duke of Monmouth, and the frequenters of conventicles, and harbourers and countenancers of non-conformist ministers* should be obliged to give security of the †

And particularly Charles Earl of Macclesfield, &c.

Having stated the parts and circumstances of this presentment, which is a very reflective paper, and hath more of the figure and force of a libel than the forme or countenance of a presentment;

Full of ambiguities, without any manner of certainty; becoming or necessary to constitute a legal presentment from a grand jury:

Though it sufficiently proves itself to be no presentment, yet I shall add some authorities to justify what I have said;

That the law requires matter legally presentable, and legal forms in presentments and indictments, and that without such matter and form they are void and nullities in law, and so received, and adjudged in all legal proceedings.

A certain intent in general is required in an indictment †. I shall shew hereafter that the like certainty is required in presentments, as to the matter and form of presentments.

A presentment is a verdict of the grand inquest, or of some other inquest; and ought therefore to present matter certainly.

A verdict finding matter uncertainly or ambiguously is insufficient, and no judgment can be given upon it. †

It is 'vere dictum quasi dictum veritas.' †

The meaning of the word indict or indictment; it signifieth an accusation found by an inquest of 12 or more upon their oath, it is the king's declaration. †

To shew the law requires the like certainty as to matter and form in a presentment, as in an indictment:

A demurrer in replevin, upon a distress taken by a lord for an americiament set upon a presentment in his leet; **

The question is stated there, whethert he distress is well taken for the americiament upon this presentment:

The case; a freeholder erected a new dovecoat upon his freehold, where there was not any before, and stored it with pigeons; this was presented at the leet for a nuisance, and a pain assessed to amove it by such a time, and for not amoving it he was amerced, and for the americiament a distress taken by the lord.

It was resolved in this case, that the presentment was not good, because it is not said in the presentment, that this erecting of a

dovecoat, and storing it with pigeons was, 'ad nocumentum ligueorum domini regis,' which ought to be in every presentment for a nuisance; although the party in pleading had averred it to be 'ad comune nocumentum,' yet that was not sufficient, for it ought to be in the presentment, which is the charge*: wherefore it was adjudged against the plaintiff, that his distress upon this illegal presentment was not warrantable.

This case sufficiently proves the matter and form of presentments are necessary and that such presentments as are defective in matter or form are void in law, and so taken and adjudged in legal proceedings.

This also proves that matter and form is required in presentments as well as indictments.

An indictment ought to be certain without ambiguity and is not to be taken by intendment. †

An indictment that 'A felonice ex malitia sua præcogitata occidit John Stiles' without the word *murdravit* not good; neither would such a presentment be good; and the clerk of the crown cannot supply that word in an indictment.

The like indictment against a person, that he 'rapuit et carnaliter cognovit' such a woman, without *felonice* not sufficient. Buckler was indicted and 'eo quod ipse tali die et anno apud in quendam Johannem insultum fecit ipsum cum quodum cutello felonice percussit occidit et murdravit.'

By the opinion of the court, the indictment was naught, without shewing a place where the murder was committed, as well as the place of the assault, for they are crimes of several nature, and the assault might be in one county, and the murder in another by the death of the person. †

If a man be indicted or appealed of treason or felony, or of trespass in a foreign country, and be acquitted of it, he shall have a writ of conspiracy against the procurers of his indictment. †

If a man be indicted of felony or treason, in a place, where in truth there is no such place in the county where the person is indicted, the party shall have a writ of conspiracy against the abettors, procurers, or conspirators for such indictment. †

I conceive the indictors themselves would

* "This appeared to the court in pleading to be a void presentment. So doth this presentment in our record; and the court ought to judge upon this writing set forth, if it be a sufficient presentment; for they are now as much to judge of it, as if the presentment were removed before them." MS.

† Fitzwilliam's Case, Cro. Jac. p. 19. S. O. Cro. Eliz. 915 Yelv. 32.

‡ Buckler's Case, Dyer 10. See also Hawk. Pl. Cr. B. 1, Chap. 64, Sec. 42.

§ Band's Case [Cro. Jac. p. 41.] recites and allows that case to be law.

¶ Fitz. Nat. Bre. p. 115. J.

¶ Fitz. Nat. Bre. p. 115. K.

* "They do not confine this to their own county." MS.

† So in the original. † Co. Litt. 303.

‡ Co. Litt. 227. a. § Co. Litt. 226. a.

¶ Co. Litt. 126. b.

** Pratt v. Stearn, Cro. Jac. 382. Godb. 250. 1 Ro. Rep. 139. 200.

not be excused in such cases, by being indicters of offences out of their inquiry* and that falsely and maliciously.

Because they are sworn to enquire for our sovereign lord the king for the body of their county; and their oath excuses them therein and no further.

All such indictments found of offences in another county, or in places which are not in their county, are void and 'coram non iudice;' and if such jurors should be questioned in actions upon the case, for making such presentments or finding such indictment falsely and maliciously, I suppose it would be no plea for them to say they did it as an inquest upon their oath and conscience according to evidence in the county of Chester.

The inquirys of all grand juries are circumscribed to the county for which the grand jury serve.

The inquiry of this grand jury is not only circumscribed to the county of Chester, but the jurisdiction for which they serve is a limited jurisdiction, and circumscribed to that county only, being a county palatine.

And whatever is done by the court or inquest either judicially or extrajudicially in any matter or cause criminal or civil, arising out of this county, or which in fact doth not arise within this county, is void and 'coram non iudice;' and the court as well as the jury is answerable for it.

* *Reasons.*—"Their charge and oath is to enquire only of offences and offenders within their county. The jurisdiction of the court goes no further, and if they go further, it is void, *et coram non iudice.*

"If they had named, that Charles earl of Macclesfield was guilty of treasonable Association† at Westminster; had not this been a libell?

"If they had presented that Charles earl of Macclesfield was one of the Ignoramus Jury for the county of Middlesex, or that he was for some unwarrantable Bill in the parliament, at Westminster or Oxford; had not this been a libel, had it not been a void presentment, would this plea defend them?" MS.

† See this Association in vol. 8, p. 781, Lord Shaftesbury's Case. Roger North (*Examen*, 112) says, "There was a paper found under his lordship's lock and key in his closet, being a draught of a treasonable Association. This the jurymen, who acted as counsel for the defendant, would have shuffled off, on pretence that mention had been made in parliament of a Bill of Association to be brought in. Whether this was intended to be that or not, was not material, so long as the import of it was treasonable: for one of the ends expressed, was to destroy the mercenary forces in and about London, which were manifestly the king's ordinary Guards; and then that, sitting the parliament, the government was to be in

Coke's 4th Inst. 311, Of the county palatine of Chester. It appears by these they never claimed jurisdiction of other matter than such as were arising within the county.

It appears even by this presentment that this inquest have charged the plaintiff with crimes out of their inquiry, out of their oath, out of the jurisdiction of this court; they accuse him to be one of the Ignoramus jury, an associator.

The traverse in the defendant's plea is insufficient and defective; it doth not take into it all the parts of the declaration, which are not justified by the plea.

Much of the material parts of the declaration, which are the ingredients of this action, is left unavoyded by the justification in the defendant's plea, and untraversed by his traverse and consequently unanswered in this case.

The justification in the plea goes no further than to justify what the defendant did as a grand juror at the session of Chester upon his oath and conscience according to his evidence. All that is charged in this declaration to be done falsely and maliciously by the defendant out of the county of Chester cannot be justified by his plea.

So that if the traverse do not reach all that is alleged to be out of the county, the traverse is short and defective.

Though the traverse be so full as to comprehend the charge of all the matters traversed by the declaration out of the county of Chester;

the majority of the members: but the thing itself did not import as if it were to be enacted by parliament. The author [Kennett] brings forth the authority of one of his choice counsel learned in the laws, sir John Haules, who is of opinion, that this paper was not proved a fact of the earl's, but only in his custody; true, and, for that reason, it was not entered in the indictment as an overt act, and, if that had been done and proved, it had been a sufficient conviction; but it was used only as a circumstance that made the direct evidence more credible; and, in these cases, some seditious practices at large, though not direct treason, are received in proof for the like intent. There was another found, which made more noise in town than this, but, by reason the title was enigmatic, it could not regularly be offered as evidence. It was a list of names of men, under the titles of 'worthy men,' and 'men 'worthy,' in two columns. The first, by interpretation, was ——— of preferment, and the other ——— to be hanged. But, in the observation of the public, that white and black list was a notable discovery; for it shewed by what sanguinary, as well as partial, measures, the party had proceeded, if their designs had taken effect, and quadrates exactly with the discoveries of the Rye Conspiracy, as the accounts of it shew." See also in the "State Tracts from the year 1660 to 1689;" published in 1692 (p. 73) "The Writing of Association entered into by the Protestants in the Reign of Queen Elizabeth."

Yet if any thing charged in the declaration against the defendant was done by him within the county of Chester otherwise than as a grand jury man, and upon his oath and conscience according to his evidence;

This ought also to come within his traverse for his justification cannot defend him in that matter.

Now let us consider the charge of the declaration and the traverse as to this matter: that part of the plea touching the defendants justification is sufficiently discoursed and observed already.

Though the facts in the declaration be laid in the county of Berks, yet they are in their nature transitory, and therefore they may be proved to be done by the defendant in any place in the county of Berks, or in the county of Chester, or elsewhere; and as the plaintiff hath this general liberty of proof by law upon this declaration, the defendant by his traverse cannot tie up the plaintiff to some places, and exclude him of his proof in other places.

As the charge of the declaration is general, so the defendant's justification is but particular, as to place and matter; the place is only the place of the session at Chester, the matter is only what he did as a grand jurymen there upon his oath and conscience, according to his evidence.

Then it necessarily follows, that if he be guilty of doing any thing that is charged in the declaration in any other place than where the session of Chester was held, or in any other manner than as a grand jurymen upon his oath, though in the county of Chester, and this is not within his traverse, then is his plea defective, and judgment ought to be given against him upon this record.

Now let us consider the traverse: I take it to be defective herein.

The traverse is this,

'Absque hoc quod prædictus Johannes Starkey est culpabilis de premissis in narratione prædicta superius specificatis et ei impositis in prædicto comitatu Berks, vel alibi extra prædictum comitatu Cestr' modo et forma prout prædictus comes superius versus eum queritur vel aliter vel alio modo quam prædictus Johannes Starkey per placitum suum prædictum allegavit et hoc etc.'

His traverse is that he is not guilty in the county of Berks or elsewhere out of the county of Chester, but he doth not traverse that he is not guilty in all other places within the county of Chester, out of the common hall of pleas at Chester in the county of Chester, where he says in his plea the session was held, and to which place he circumscribes his justification; and he doth not carry his justification beyond this place.

So that he may be guilty of the fact in the declaration in some place in the county of Chester, out of the common-hall of pleas in Chester; which comes neither within his justification or his traverse: for his justification goes to no other place in Chester or elsewhere

than to the common hall of pleas there; every other place; in the county of Chester is left out of his justification, for he hath made it local, and his traverse goes only to all places in the county of Berks and elsewhere out of the county of Chester, which still leaves the rest of the county of Chester, which is out of the common hall of pleas, untraversed.

And it is not to be intended that the common hall of pleas for the county of Chester contains in itself all the county of Chester.

Because I would endeavor to prevent, at least meet, what may be offered to supply this defect in the traverse.

That is, though there is not an express traverse as to all other places in the county of Chester, which are out of the Common Hall of pleas there;

Yet the words 'aliter vel alio modo' will supply this defect in the traverse.

The words, 'aliter vel alio modo' cannot do this; for the 'aliter vel alio modo' go to the fact charged in the Declaration, and to the manner of doing it, not to the place where the fact was done.

For, it may be, the Defendant might be guilty of this fact in the Common Hall of Pleas at Chester, at the sessions there, after the jury was discharged, 'aliter et alio modo,' than he doth justify in his plea, or before he was discharged, otherwise than he hath justified, by posting or publishing this libellous writing, in discourse with others who were not of the jury, and that not upon his oath or upon evidence; therefore it was necessary to make this 'aliter vel alio modo,' part of the traverse for this purpose, and without it this part of the traverse had been defective.

It hath been admitted by Mr. Holt, and even by the books cited by him it is very plain, that a juror whilst upon his oath, doing his duty as a juror according to his evidence, is not impeachable for such doings, by any writ of conspiracy; but if after he is discharged of this duty, he shall publish and aver his indictment or presentment is true, or shall falsely, or maliciously publish the same to the prejudice of any person, he is liable to a writ of conspiracy or case.* Fitz. Nat. Brev. 115, 21 Ed. 3. 17. 12 Co. Rep. 23; and not, cited by him, 40 Hen. 6. 5, and 33, warrant this.

To shew that the 'vel aliter vel alio modo' will not answer the place, but the manner of the doing of the fact. *Acce v. Sanderson*, Mich. 37, 38 Eliz. Croke Eliz. 433.

Trovez of 300 sheep; 1 December 36 Eliz. Defendant pleads he was Sheriff of the county of Lincoln, and that John Stiles recovered against the Plaintiff 100*l.* and a 'fieri facias' to levy that debt returnable 'crastino animarum' 35 Eliz. that he by virtue thereof, 30 Oct. 36 Eliz. took the said 300 sheep, and sold upon

* "A juror unduly labouring a juror punishable by action." *Ayres v. Sedgwick*, Palm. 142. S. C. Cro. Jac. 601. 2 Ro. Rep. 195. 197. 1 Danv. 78.

the 22d of Oct. 104 sheep for 40*l.* and that the other 193*, sheep remained in his hands 'pro defectu emptorum' and at the day returned this writ, which is the same conversion 'absque hoc' that he converted them 'aliter vel alio modo.' It was thereupon demurred: the whole court after argument, held the plea insufficient, because the Declaration supposed the trover and conversion to be the 1st of Decr. 36 Eliz., and the Defendant justifies the conversion in October 35 Eliz. so he meets not with the Plaintiff in time, and therefore he ought to have traversed it.

And, says the book, the traverse 'aliter vel alio modo' shall never answer to the time, but to the manner, of the conversion.

Wherefore says the book the plea doth not answer all that which is comprised in the Declaration, and for that cause is ill in all.

As the 'vel aliter vel alio modo' in that case would not answer the time of the fact, no more will it in our case answer the place where the fact was done, which is a like circumstance in pleading, but it must be applied only to the manner of the Defendants doing what he did, as he justifies, and no otherwise.

Having thus mentioned the Plaintiff's Declaration, and laid before the court the insufficiency of the Defendant's plea to defend himself against this Declaration in this action;

I shall proceed to answer some particular objections and observations made by Mr. Holt, in his argument of this case.

Obj. 1. His principal argument against the action is by justifying what the Defendant did in this case, was, as he hath set forth in his plea, as a Grand Juror upon his oath, according to his evidence and testimony given the inquest of the Plaintiff, and according to their consciences, † and to preserve the peace in the county.

And for his authorities to justify this he cited 21 Ed. S. f. 17. 8 H. 4. f. 6. Fitz. Nat. Brev. 115. Stamford Pl. Cor. 173, Coke 12. Rep. 23. Bridgman's Rep. 130. Agard v. Wild. To these may be added 20 H. 6. f. 5, et 33. 9 H. 4. fol. ultimo. 27 Aston, plac. 12. I need not take up the time of the court by answering these several books particularly and severally.

Stamford grounds his opinions upon 21 Ed. S. f. 17. and 8 H. 4. 6. and so is Fitz. Nat. Brev. upon the same reason with these books; and the cases in 13 Coke, Rep. and in Bridgman's Rep. all take notice of these books, and as they are an authority for the defendant to justify his proceeding as a grand juror to present and indict in due course of law, so they are an authority for the plaintiff that a grand juror warping from the duty of a grand juror, either in a matter which is not within the jurisdiction of the court or commission, or within his enquiry upon his oath, or after he is discharged of this duty, shall falsely and malici-

ously by conspiracy with others libel a subject, though he shall stile such libell a presentment;*

And that without the face, form or matter of any presentment or indictment;

That this will not defend such grand jurymen, against an action for such libell. †

For Mr. Holt to say, that this is a presentment, without proving it to be so, will no more make it so, than the grand jury's naming it or stiling it so will make it a presentment. If they had called this an indictment that would not have made,

† this is 'petitio principii.'

If defendant had called this an indictment in his plea, that would not have made it so; To allow that to be a presentment which I have endeavoured to make out cannot be so received or allowed in our law. || I am sure I never met with any such or like presentment.

Mr. Holt had done well to have justified this to be a presentment, either out of the matter or the forme, or figure of it, or by president or authority; and not to take it for granted, that it is so, till that be done, I hope this court will not, nay cannot receive or adjudge it so.

Obj. 2. Mr. Holt in defence of this writing did seem to insinuate to the court, that though this writing did want the form of a regular presentment, that it is the practice of all courts, and the officers of courts by their practice and offices to put presentments into forms.

And by that intimation of usual practice, he would shelter the weakness and defects of this presentment, to be supplied by the clerks and officers of the court of sessions, by their offices and places.

May the clerks translate an English presentment into Latin?

On my apprehension, if I did not mistake Mr. Holt, as the defendant misapprehended my lord Macclesfield; he did admit that this writing, as it is penned and formed, wants the form of a presentment, and hath need of another form, which it doth not appear it hath yet received, but remains still the same upon record, to the reproach of the earl of Macclesfield, without any alteration of it in form, or proceeding upon it in any legal course.

I desire it may be well considered, what Mr. Holt hath said in this case, touching this new moulding or new forming of this presentment, by the clerks of the court of sessions;

That they have power to transform it.

This may be of a more dangerous consequence to the law and the subject, than such presentments as these are, if the clerks, by their places, *ex officio* may supply irregular.

* "Palmer's Rep. f. 145. Ayre versus Sedgwick. If a witness shall upon his oath slander a matter not to the issue, it is actionable." MS.

† "A man ought to do justice 'juste' else he offends." MS.

‡ So in the MS.

|| "This is not called a presentment in the English writing: fit also to consider how valid an English presentment is? if it ought not to be in Latin per stat.?" MS.

* So in the MS. and also in Croke.

† "How can the Defendant say this presentment, was according to the conscience of his fellow jurors?" MS.

presentments and make them sufficient by new forming of them.

This presentment, as it is doth not charge or accuse the earl of Macclesfield of treason or felony, or any other specific crime or misdemeanor, or shall a clerk supply this defect in this presentment? If he shall, he is the indictor, not the grand jury; and there is one of the principal parts of our criminal law taken from juries, and put into the hands of clerks.

Grand Juries I think may order a clerk in their presence to alter a presentment or indictment in matter or form*; though it hath been sometimes scrupled by judges. If the bill be delivered to them by the court, they cannot alter it without the leave of the court.

But when an alteration is made, certainly the jury or inquest ought to allow and agree to such alteration, or else it ought not to stand so altered as an indictment or presentment.

I agree the clerks of the courts may insert the jurors names, and the stile of the court in the caption of the indictment or presentment; but that they can alter the substance or form, or add to or diminish from the presentment or indictment, I do not know any law or warrantable practice for it.

If this might be done by law,

What kind of presentment would a clerk make of this? Would it be for treason, felony or misdemeanor?

Mr. Holt, either in his plea or in his Argument, hath not yet informed us what presentment it is, or of what crime.

And I think it may puzzle all men what to make of it. I am sure it doth me. I can make nothing of it.

And therefore he that drew the plea, did well to say that 'presentaverunt in predict' Anglican' verbis in narratione pred' superius mencionat', without saying of what sort it is, or what it is for, whether treason, felony, or misdemeanor.

Mr. Holt in his Argument, in defence of the defendant, lays great weight upon that part of the plea, which says that the defendant among the rest of the grand inquest did this, 'Juxta eorum consciencias ac ad conservandam pacem dicti domini regis in comitat' Cest.' He places a great stress and emphasis upon the writing, that the grand jury apprehend the peace of the country to be in danger, and shall they not present this to the court?

There's not one word in the plea, that the peace of the country was in danger, at the time of this presentment; only say that they 'ac ad conservand' pacem domini regis in comitat' Cest' presentaverunt in predict' Anglican' verbis in narratione.'

They do not say in their writing that the peace of the country or kingdom, was in danger.

They say they have strong apprehensions of danger from a dissatisfied party in this county,

* "Usual for grand juries to direct their clerks, but not to be swayed or corrected by their clerks." MS.

but do not say what this danger is, or that the peace of the country is in danger.

For remedy of what they promised with relation to the public peace, we conceive it expedient that the plaintiff and others shall be obliged to give security of the peace.

The question is not upon this Record what presentment a jury may make by law, to secure the public peace, or what information they may give for that purpose, to a court of justice?

But the question is upon this course, whether this be a legal and warrantable proceeding by due course of law, to publish such a writing as this is, in this manner, against a peer of the realm.

To borrow or derive Arguments to justify this course, either from the power of grand juries, or from the necessity of conserving the public peace of the kingdom, or the peace of the country, or from the power of justices of the peace, or other ministers of justice, to binde persons to the peace in some cases at discretion, or from the fears and apprehension of danger to the public: (even at this time admitting all the conjunctions in the writing to be true, the law was not defective to have this suppressed and punished, without such new invention as this is.)*

These are very specious topics for Arguments to extenuate the errors of a grand jury; and may be put in balance with the circumstances of false and malicious illegal accusations, by conspiracy to libel a peer.†

But to argue, that Arguments derived from these considerations, shall justify the irregular proceedings of a grand inquest, by delivering such a writing as this is, to a court of justice, and to give it the sanction of a presentment, only by calling it so, so very reflective upon the honor of a great peer, so very pernicious to him, by bringing into question his life, his estate, and his liberty: and to expose him to the displeasure of his prince, and to raise and stir a disesteem of him, among the nobles and commons of the kingdom, as is layd in the Declaration;

And that by this new way and means;||

When there are ordinary ways to secure the peace of the kingdom and country, if in danger, or if apprehended to be in danger, without such presentments as these are: and there are ordinary remedies to secure men in their private or public fears, without such proceeding by grand juries.

The peace may be secured by the ordinary methods of justice; by complaints and inform-

* "The Arguments from danger and fear, will not justify this course of signifying their fears, if the law doth not know this method." MS.

† "This is a new way, it hath no warrant from any old president." MS.

|| "This is to invert the methods of law, and to confound the subject matter of juries and judges, and of other officers." MS.

ations to ordinary courts, and ministers and officers of justice;

By binding such persons to the peace upon security, or committing of them.

It is the duty and office of grand juries to present crimes and criminals circumstantially, and particularly; whereby offenders may be brought to trial and judgment.

By that means the innocent will be acquitted, and the guilty punished.

This way of accusation is not the work of a grand jury, this is no part of their office; there are other informers for such purposes, who are liable to answer for their informations when false and malicious.

Obj. 4. That this may be of ill consequence to the king and realm, to have presentments of grand juries thus impeached by actions.

1. That the public justice of the kingdom may be endangered by discouraging grand juries in their duty, by exposing them to actions for doing their duty.

2. That it is the right of grand juries to enquire into the miscarriages of their country.

3. That the whole kingdom is concerned in this privilege of a grand jury.

4. And every subject is interested in the benefit of it.

5. And if this action prevail, the privilege, the right and trust of a grand jury is impeached.

Ans. I answer this is an argument to support juries in their enormities; and the argument is of greater danger to the king and the realm, and to the law, to the right and liberty of every subject, than the action.

And that to pronounce such sanction for grand juries by law, in a supreme court of law, that it is not safe for the king or realm, to impeach their proceedings by action, may be a means to subvert the law, to injure the king in his justice, and to wound the subject in his right to all he hath.

The law doth allow grand juries to present and indict; and though they come together, and get themselves impannelled to present a person, falsely, and maliciously; yet says Mr. Holt, and hath cited books for it, this being in legal course upon their oath as jurors, the law purges the malice, and presumes; they were swayed by their oath to make such presentment, and that their first malice and conspiracy was no ingredient in such presentment.

No book in the law that I meet with, neither doth Mr. Holt cite any book; that carries this indemnity for a juror, beyond a presentment or indictment, and that strictly in the course of justice as juror, and whilst juror, and not after he is discharged.

Is there any reason to extend this indemnity, to all proceedings of grand juries be they never so irregular, be they never so defamatory to the subject?

Thus in time, and perhaps juries have presumed to make remonstrances against lords, and commons in parliament,* what may be

more sacred against that court, or any other court in Westminster Hall, against the council board, against the great officers of the kingdom.

And shall this be with impunity?

And this not by presenting or accusing any of these of any particular crime, in any form or method of law; but by the president of this presentment, without any certain or positive charge by way of remonstrance, without specifying any crime.

Mr. Holt hath asked some questions in his argument.—I presume to ask this question:

Is not this a course to set up a grand jury's proceedings,* be it never so irregular or illegal, never so scandalous or libellous, above the ordinary remedies of the law to right a subject thus injured.

I would not trouble the court with this sort of argument from general inconvenience, had not I been led to it by the former argument in this cause.

The laws that are made to punish juries by attain† are many, and grounded upon experience that juries were not to be trusted upon their oaths and evidence to do what they list, and give what verdicts they pleased, and to defend themselves by such surmises, as are in this plea, of oath evidence and conscience.

Therefore was that villainous and severe judgment formed by law in attainments for executing false verdicts; and it were well jurors would know or remember that they are liable to attain for excessive damages.‡

5 *Obj.* Mr. Hale made another objection that there never was such an action brought as this is against a juror which prevailed, therefore he would infer I suppose the action is not maintainable.

Answer. That actions have been brought: all the books cited by Mr. Holt do shew such actions were brought and defended, or at least endeavoured to be defended, by presentments and indictments upon oath, &c.

There are many precedents (Rastall's Entries fol. 123, &c.) where the actions did prevail upon such plea, upon the plaintiff's replication of nul tiel record of such presentments or indictments, and upon such failures of producing the records, judgment for the plaintiffs in the actions.

* "If these proceedings may not be questioned be they never so false, never so scandalous, never so much out of the inquiry of the jury, by action, the law will be defective, for there is no other remedy for the injured subject: he cannot traverse for no crime charged; he cannot acquit himself from such infamy, by having such libell taken off the record." MS.

† "Juries are liable to attain, so the law supposes they may err, and that wilfully and maliciously. Yet a Grand-jury cannot be attained. They may offend with impunity." MS.

‡ See Proceedings between the duke of York and Titus Oates, vol. 10, p. 125, and the Note there.

* As to this, see 1 Burn. 500. fol. ed.

I may also answer there never was such presentment offered by a Grand-jury as this is which can be traced in any old or modern record, and then if no such occasion or cause for such action, it was not to be expected.

The like objection was made in 20 Jac. and 1 Car. in that case,* that no action was ever known to be brought for a malicious and false prosecution of a person for treason, and that it would discourage the prosecution of persons for treason, which might hazard the justice of the kingdom as much as this action may humble a Grand-jury by this pursuit for right against them.

The action after great deliberation prevailed, because malicious and false prosecutions have much oppressed the subject.

And these actions are a means to prevent such prosecutions, and perhaps save the lives of some innocents, because of the dread of such actions, if they should be acquitted.

This by the way answers what Mr. Holt did offer in praise of the preventive part of justice, which is preferable to punishing justice; in which I agree with him, by allowing such actions it may prevent false and malicious prosecution, which begun is often seconded and supported by perjuries.

That famous case of a false and malicious prosecution by the Poulterers of London of an innocent person for felony in a very regular course and method of justice (9 Co. Rep. S. C. Stone v. Walter et al. Moor 813.)

The like objections made to the proceedings against the false and malicious prosecutors, that public justice was concerned, that it might be of ill consequence:

Yet the proceeding allowed.

And that case takes notice that at common law the Writ of Odio et Acia was for the security of the subjects liberty against malicious and odious prosecutions:

The common law did provide to secure men in their liberty against false accusations, especially by conspiracy.

Therefore was the Writ De Odio et Acia.

Therein the common law is a law of mercy, it provides to prevent as much as may be false accusations, and to defend men who are falsely accused.

6th Objection. Mr. Holt did rely very much upon the case mentioned in Dyer in an action De Scandalis Magnatum brought by the lord Beauchampe against sir Richard Crofts and others, (Dyer 285, Keilway 26.)

Sir Richard Crofts and others had a Writ of Forgery against the lord Beauchampe, pending which Writ [Ld. B.] brought his action De Scandalis Magnatum; the defendant justifies the slander in that action, which is depending: the justification allowed, because it is a regular action depending in a course of justice, and allowed a good plea.

Answer. That was a legal proceeding in a

* Smyth v. Crashaw, Cro. Car. 15. Palmer's Rep. 1, 315. Bulstrode's Rep. 2, 371, 372. vol. x.

course and court of law to try whether a deed was forged, and it is no more criminal than to bring an attaint against a lord for a false verdict, which is agreed in that case reported in Kelleway at large.

It appears in Keilway the defendant justifies by his Writ depending at the very time of the slander laid in the declaration, otherwise his pleading that it was the same slander which is in the writ 'de false faits forger,' and the slander in the declaration would not have served without traversing all other slanders before and after (p. 29.)

What comparison is there between these cases?

The Writ of forger de faux faits is a regular proceeding by writ in due course of law.

An ancient known course.

Yet the plaintiff if he shall proceed falsely and maliciously without cause is perhaps liable to case.

But here is no form of law, no due proceeding in course of law.

To conclude this matter, and to maintain this action upon this record, I shall depend much upon the resolution in the case of Bulkeley v. Wood [or sir Richard Bulkeley's Case] (4 Co. Rep. 14. Croke, Eliz. 230. 247. Moor 705), and the reason of that resolution.

The charging of sir Richard Bulkeley in a bill in the Star-chamber to be a maintainer of pirates and murderers, and a procurer of murders and piracies:

Which offences were not punishable or determinable in the Star-chamber, in an action upon the case for these words, it was no plea to say this was in a course of justice in a legal and supreme court, because the court had not jurisdiction of this matter, yet much of the matter of the bill was examinable in this court:

Yet because the party being so slandered in this high court, and that he cannot answer the same in this court; yet the libel shall remain upon record to the perpetual infamy of the party, and he has no other means to try the slander but in an action upon the case.

So allowed the action lies.

And if it should be otherwise it would be highly inconvenient; in our case, if it be true what I have premised there is no way to try this libel if false, but in this action upon the case.

There hath been no proceeding upon this presentment from the making of it.

He cannot have it taken off the file in that court.

He cannot bring it to trial, for it imports no certain crime.

He must for ever lie under the obloquy of it.

He cannot traverse this presentment, what shall he traverse, the apprehension of the jury, or what shall he traverse?

He hath no remedy to right himself and his honor but in this action, which he hath brought for this purpose.

He hath in this action, by his averment in his declaration of the falsities of this present-

ment, and of his own innocency, given the defendant an opportunity to justify this accusation, which will prove or disprove this writing, all which this defendant hath avoided by this insufficient plea.

There is no declaration that ever I met with that suits better with the words and design of the stat. of 2 Ric. 2, than this declaration; here is a peer slandered by devisors of false and horrible lies, whereby debates and discords may arise between the Lords or between the Lords and Commons; therefore it doth enact, that such devisors or tellers of such false lies, shall be taken and imprisoned till he and they have found him by whom the words were moved.

This action is not brought for a hasty passionate word, as many are brought upon this statute; but upon this premeditated and prepared libel against this peer, which he calls false and libellous in this declaration, no person daring to enter it in any due form of law:

Whereby the plaintiff may have an opportunity to acquit himself of this false, scandalous, and malicious accusation.

As this declaration doth agree with the words and design of the statute, to deliver the lords and peers of the realm from scandal and reproach occasioned by devisors of false news and lies of them;

So the occasion of this action, [qu. statute] if history be consulted, doth suit with the temper of many devisors of such false news at the time of the making of this statute:

For whose punishment this law was instituted.

If this course be allowed, here is a new way found and adjudged to libel an innocent peer falsely and maliciously, by conspiracy, when he is without remedy: this is a repeal of the statute, 2 Ric. 2.

I shall mention to the court, and but mention, a roll I lately found in a table to some of my lord chief justice Hale's Records, mentioned in his books in Lincoln's-inn Library.

M. 9 Edw. 2. Conspiracy. "On gist vs. Coroners et Indicters, Ignorantia legis, Slander."

Hill. 8 Edw. 3. Rot. 75. Ibid, action sur case, "vers Jurors que verdict al court et al auters: Conspiracy."

I had not time to look into these Records, yet mention them, that I may have liberty to attend the court with them, if I shall find them of use in this matter.

To conclude, I presume to say,

The plaintiff hath a good cause of action well alledged in his declaration against the defendant, upon a false and scandalous writing against a peer, for which he hath brought a proper action upon the Statute De Scandalis Magnatum.

The defendant hath not sufficiently answered this declaration.

1. His plea is defective, for that it doth not

appear the *Sessio Certa* mentioned in the plea to be a court having jurisdiction of this matter.

2. This writing in itself appears to be a libel against the plaintiffs, and is neither presentment nor indictment, nor ought to be so received in a court of justice.

3. The traverse in the defendant's plea is defective.

4. And that this court will consider how this great peer had no other course to right him against this libel, but by this action.

5. That this action doth naturally consist with the provision and design of the Statute De Scandalis Magnatum.

6. That it will be of dangerous consequence to the king, to the Peers and Commons, and to the true execution of the law, to give judgment against this action, and to establish grand juries in such unprecedented presentments even against the † the statute 2 Ric. 2.

Upon the Writ of Inquiry the circumstance of this accusation will appear to aggravate or lessen this offence against the plaintiff.

And what is offered in bar to the accusation, may, if true, be a means to alleviate the damages, but cannot defend and justify this writing.

Then will appear the malice and falsity of the accusation, or the zeal and inadvertency of it, to greater or lessen the damages.

Therefore I pray judgment for the plaintiff and for the statute 2 Ric. 2, upon this libellous writing against the defendant.

Palmer's Rep. f. 145, *Ayres v. Sedgwick*, 18 Jac.

If a witness upon his oath shall speak slanderous words which are not pertinent to the issue, or to the point to which he gives evidence, an action upon the case lies for the person slandered.

Obiter f. 143, *Jerom and Masin's Case*, 43 Eliz.

If one juror shall labour another juror unduly to give his verdict, an action upon the case lies against him, for this is in nature of a conspiracy, because this is *dehors* the oath of a juror, by undue course.

Ruddock and Sherman's Case, 16 Car. Bane's Regis, Roll's Abridg. Case, f. 112, pl. 9. [S. C. 1 Danv. 209.]

Case lies against Churchwardens, for falsely and maliciously presenting a person with intention to draw him within the censures of the Ecclesiastical Court for adultery;

Though before the archdeacon of Sudbury, and not averred that it was within his jurisdiction, yet the action lies, and the vexation the greater.

† Here in the MS. a word or two are illegible.

MR. JUSTICE STREET'S NOTE OF THE PLEADINGS,
JUDGMENT, AND AUTHORITIES, IN THE CASE,
EARL OF MACCLESFIELD AGAINST STARKEY.

[Obligingly communicated by Mr. Hargrave.]

EXCHOSER.

Berks.—COMES MACCLESFIELD v. STARKEY, IN
SCANDALUM MAGNATUM.

Plaintiff declares, quod est per regni et unus
gubernatorum regis majestatis cubiculi, et cum
fiduciâ et fidelitate se gessit erga dominum
regem, et quod le defendant ex merâ malitiâ
et invidiâ suâ, habiti et præcogitâ, 17mo
Sept. 35 Car. 2, per conspirationem inter ipsum
et quosdam Thomam Grosvenor, Petrum Sha-
rkeley, &c. quendam scandalosum libellum
contra Querentem, falsè et malitiosè, per ipsos
machinatum et inventum, falsè et malitiosè,
absque aliquâ legali seu rationabili causâ, scribi
causavit et sic machinatum et scriptum publi-
cavit, &c. ad defamandum et scandalizandum
Querentem, cujus tenor sequitur, &c. ' We,
' the Grand-jury, sworn to inquire for the body
' of the county of Chester, on 17th September,
' 35 Car. 2, having heard his majesty's De-
' claration, concerning the treasonable conspi-
' racy against his person and government, read
' to us, &c. present our apprehensions of danger
' from a dissatisfied party in this county, pro-
' moting a seditious address to the knights
' lately chosen for parliament for our county,
' and unanimously assembled with schismatics
' and disaffected in the reception of James duke
' of Monmouth, who has appeared a prime con-
' federate in the late treasonable conspiracy, the
' concourse of armed persons attending him to
' the terror of his majesty's good and peaceable
' subjects. For remedy whereof, with relation
' to the publique peace, wee conceive it expe-
' dient that the principal promoters of the said
' seditious address and routous reception of the
' duke of Monmouth and his associates in this
' county, should be obliged to give security of
' the peace, and particularly Charles earle of
' Macclesfield, Richard lord Colchester, Charles
' lord Brandon, Henry Booth, esq. sir Robert
' Cotton, sir Willoughby Aston, sir Thos. Man-
' waring, &c. eam alius, &c.' Quem libellum
continentem in se falsa mendacia, le defendant
legi et publicari causavit et procuravit, ubi re-
râ idem Comes nunquam fuit disaffectedus ad
regimen hujus regni, nec perturbator pacis ad
damnum 10,000 lib.

Le defendant plead quod mesme jour et ann.
al. Session de Chester pro comitatu Chester, de-
vant les Justices de notre Seigneur le Roy, &c.
le defendant, et le dits Thomas Grosvenor, &c.
in le declaration nominat', cum quibusdam aliis
impanellet' et retornat' fuerunt fore juratores
magne inquisitionis, &c. ad inquirendum pro
Domino Rege, et pro corpore Comitatus Cestrue,
&c. Quod ad eandem sessionem, debito modo
presentaverunt in predicta Anglicanis verbis,
in Narratione mentionatis, prout ei bene licuit:
Absque hoc, quod est culpabilis de premissis

in Comitatu Berks, seu alibi extra Comitatum
Cestrise, vel aliter vel alio modo, quam præ-
dictus Johannes Starkey, per placitum præ-
dictum allegavit, et hoc paratus est verificare
unde petit iudicium si predictus Comes ac-
tionem suam predictam versus eum habere
debit.

Pit' demur'.

Judicium per totam Curiam pro Defendente.

Fitzh. N. B. 115. C. et D. si Juror soit
Jure denquire il ne serra puny pour ce que il
fist quant fuit Jure, 30 Ass. 21. Bone Plea in
conspiracy quod defendants fueront indictours
et ce que ils fieront fuit per force de lour se-
rement.

Br. Conspiracy, Fla. 1.

4. 35 H. 6. 14.
11. 7 H. 4. 31.
83. 12 E. 4. 18.
30. 20 Ass. 21.
27. 27 Ass. 12.
15. 21 E. 3. 17.

Coke 12 Rep. 23. Lloyd v. Barker.
Bridgman's Rep. 151. Agard v. Wylde
et auters.

Br. Cons. 27.

I apprehend that the earl of Macclesfield,
the Plaintiff in the above Case, and lord
Brandon his son (who is sometimes called
lord Brandon Gerard, and sometimes lord Ge-
rard of Brandon) were the only two earls of
Macclesfield of the House of Gerard. The
former of them was afterwards outlawed; and
the latter, whom I conceive to have been hus-
band to the celebrated mother of Savage the
poet, was, in 1685, tried for high treason. Of
this Trial,* I have not seen any full report;
but Narcissus Luttrell, in his MS. "Historical
Relation," in the Library of All Souls, Ox-
ford, gives a short account of it; which, to-
gether with other particulars relating to these
lords, I here insert, as follows:

"Aug. 9th, 1685, was published his ma-
jesty's Proclamation for apprehending Charles
earl of Macclesfield for high treason, forbidding
all persons to receive or harbour him at their
peril.

"Nov. 14th, 1685. Lord Brandon came
from the Tower by Habeas Corpus to the
King's-bench bar, and was arraign'd on an in-
dictment of high treason against the late king;
he pleaded Not Guilty, and his trial was ap-
pointed the 25th inst. so he was remanded
again.

"Nov. 25th. The lord Brandon Gerard was
brought to his trial at the King-bench bar,
upon an indictment of high treason against the
late king. He was tried by a jury of the

* See Comberbach's Reports, pp. 3, 5, from
which book it appears that a motion in Arrest
of Judgment was made on the part of lord
Brandon and overruled.

county of Middlesex, of which he challenged 35 peremptorily: there were many of the nobility and gentry to hear his trial. The witnesses against him were Mr. Keeling, who gave an account of the general conspiracy only; then against him more particularly were colonel Rumsey and the late lord Grey, and one Sexton. Colonel Rumsey swore as to several discourses he had with the prisoner about his seizing the king as he went to the parliament house, or as he came from Newmarket, that he would provide twenty men for it, and furnish (as small an estate as he had) five thousand pounds towards carrying on the insurrection. The lord Grey gave a very handsome account of the Plot in general; then as to the prisoner that his post was in Cheshire, that he was to secure the fort in Chester, of which he had heard him discourse with sir Thomas Armstrong* several times; that at a meeting at the George and Vulture in the city, where several were met, we had a discourse of the insurrection intended; and upon the whole he never saw one so forward for a rebellion, who had not the courage to rise when there was an opportunity. Thomas Sexton† testified the prisoner should tell him over a pot of ale that they intended, (since this king came to the crown) to set up Monmouth, and therefore they did intend to rise, and for that purpose writ a letter to Monmouth, which the prisoner shew'd me, and I saw it after in Monmouth's hand in the west, when he landed. Now the prisoner's defence consisted: 1. Of objections against the witnesses; as to Keeling's evidence, he said, that touch'd him not, but he did believe as much as any one the general conspiracy: as to Rumsey, he objected why he had not discover'd this sooner; whereas he had been in prison formerly and came out, none of this being objected against him: then he proved by two or three lords that Rumsey had sworn differently at Mr. Cornish's trial, than what he did at the lord Russell's, as to the meeting at Shepherd's about the declaration, this very fully: then as to the lord Grey, he objected he was outlaw'd for treason, so could be no witness; but this the court held was salv'd by a pardon which his lordship had: then against Saxton, he protested he knew him not, nor was ever with him, objecting how unlikely it was he should communicate such matters to so mean and inconsiderable a fellow, and with whom he had no acquaintance; but beside the evidence he gave could not be taken notice of on this indictment, for that was for treason against the late king, and his evidence went only as to his present majesty. Then he produced several noblemen and gentlemen, who gave an account of the loyalty of his father and himself, that he had a very mean opinion of Monmouth; and that when Monmouth landed in the west,

he offered his life and fortune to his present majesty, and had the honour to kiss his hand; which being done, the jury withdrew for about half an hour, and then returned and found the defendant guilty.

"Nov. 28. The lord Brandon came up and had sentence past upon him, as usual, in cases of treason, and that he should be executed on Friday next.

"Jan. 1687. The lord Brandon (who was some time since convicted of high treason) was lately bailed out of the Tower by order from the king.

"Oct. 24th, being the 1st day of the Term, the lord Brandon Gerard pleaded at the King's-bench bar his majesty's pardon for his attainder of treason.

"Nov. 26. The lord Brandon appeared in the Court of King's-bench, and delivered into court his Writ of Error to reverse his attainder, which his majesty had been pleased to grant him, and accordingly it was revers'd, the attorney general consenting thereto.

"April 18, 1689. The earl of Macclesfield hath revers'd his outlawry in the Court of King's-bench."

Of James's lenity to lord Brandon, sir John Reresby says, "The king, as if he had a mind to shew us his disposition for clemency, declared he had reprieved the lord Brandon, who was to have been executed three days afterwards, which it must be owned was a great act of mercy in his majesty, this lord having been pardoned in the late reign for breaking a boy's neck, when he was in his cups, of which, being convicted, he was condemned as guilty of murder." *Memoirs*, 222.

Of the Trial for Murder to which Reresby alludes, I know nothing more. The following indictment is printed in Tremaine, 39 :

REX versus COMIT. MACKLESFELD.

Hill. 4. Jacobi Secundi.

ss. Quod Carolus Comes Macklesfeld nup' de, &c. existen' p'son' seditiosa et prave mentis necnon impie iniquitate turbulenta factiose et seditiose disposition' ac machinans practicans et falso malitiose illicite nequit' injuste et seditiose intendens pacem Dom' Caroli Secundi nup' Regis Angli' &c. ac communem tranquillitatem hujus, Regni Angli' inquietare molestare et p'turbare et sedition' et rebellion' infra hoc Regn' Angli' suscitare movere et p'curare ac gubernation' dict' nup' Dom' Regis in hoc Regn' Angli' in pericul' inferre Quodq; pred' C. Comes Macklesfield ad nequissimas nefandissimas et seditiosas' intention' suas pred' perimplend' perficiend' et ad effectum redigend' 30 die Maii Anno Regni Caroli Secundi nup' Regis, &c. 35 et diversis al' diebus et vicibus tam autea quam postea Vi et Armis, &c. apud paroch', &c. falso illicite injuste nequit' malitiose factiose et seditiose se assemblabat conveniebat consultabat et confederabat cum Ford

* See his Case, p. 106, of this volume.

† See in this Collection, the Case of lord Delamere, A. D. 1685.

nup' Dom' Grey et diversis al' maledisposit' p'son. p'fat' Attoꝝ dict' Dom' Regis nunc general' adhuc incognit' et cum eisdem person' ad tunc et ibid' tractabat de eisdem suis nefandissimis et seditiosis compassation' imagination' et proposit' p'implend' p'ficiend' et ad effectum redigend' Et quod p'd' C. C. M. ulterius ad nequissimas nefandissimas et seditiosas machination' practication' et intention' suas p'd' p'implend' p'ficiend' et ad effectum redigend' ad tunc et ibidem scilt. dicto 30 die Maii Anno, &c. et diversis al' diebus et vicibus tam antea quam postea apud paroch', &c. Vi et Arnis, &c. falso illicite injuste nequit' malitiose factiose et seditiose consultabat consentiebat conspirabat et confederabat cum pred' Ford Dom' Grey et diversis al' male disposit' person' de insurrection' et rebellion' infra hoc Regn'

Anglie fiend' et de p'curation' et p'vision' armor' et hominum armator' p'parandor' in diversis locis infra hoc Regn' Angl' ad eandem nefandissimas et seditiosas intention' compassation' et p'posita sua pred' perimplend' p'ficiend' et ad effectum redigend' Quodq; pred' C. C. M. ulterius ad nequissimas nefandissimas seditiosas et diabolicas machination' practication' et intension' suas pred' perimplend' p'ficiend' et ad effectum redigend' postea scilt' dicto 30 Maii Anno, &c. apud, &c. falso illicite injuste nequit' factiose et seditiose sup' se assumpsit et pred' male disposit' ignot' p'misit se fore assistent' et p'sonalit' Auxiliant' ad eandem nequissimas nefandissimas et seditiosas intention' et compassation' suas p'd' perimplend' et p'movend' in contemptum legum &c. in malum exemplum, &c. Ac contra pacem, &c.

END OF VOL. X.

