

Sheriff that was employed to divide the City, and to raise Men within the City, having discourse with Mr. *Cornish* about the settling that matter, he liked it very well, and promis'd he would be assisting to him, and you may easily presume Mr. *Goodenough* the Under-Sheriff was very privy to all the Acts of Mr. *Cornish* at that time. We will call our Witnesses. Mr. *Rumsey*.

Mr. *Cor.* I desire the Witnesses may be kept apart.

Mr. *At. Gen.* They will prove it upon you at two times.

Mr. *Cor.* You will find me guilty of neither; I am as innocent as any Person in this Court.

Mr. *At. Gen.* So was my Lord *Russel* to his Death, Mr. *Cornish*: do you remember that?

Mr. *Cor.* Mr. *Attorney General*, I speak in the Presence of the great God, I am as innocent as any Man in this Court.

Mr. *At. Gen.* Mr. *Rumsey*, pray will you give my Lord and the Jury an account of the Insurrection that was to have been in *England*, in the late King's Time, and what concern the Prisoner had in that Affair.

Mr. *Rumsey*. My Lord, about the latter end of *October*, or the beginning of *November*, my Lord *Shaftesbury* desired me to go to Mr. *Sheppard's* House, where there was a Meeting of those Gentlemen that I did name before, the Duke of *Monmouth*, my Lord *Russel*, my Lord *Grey*, Sir *Thomas Armstrong*, and Mr. *Ferguson*, and Mr. *Sheppard*, and accordingly I went; I came late there myself, for they were just going away, when I came in. I told them my Message, and they told me they were disappointed by Mr. *Trenchard*. I had not been there a quarter of an hour, but we were going away, and Mr. *Sheppard* was call'd for by his Man, and he went down Stairs and brought up Mr. *Cornish*; and when he came into the Room, he told the Gentlemen there met, that Mr. Alderman *Cornish* was come; so as soon as Mr. Alderman *Cornish* came into the Room, he made his Excuse to the Gentlemen that he did not come sooner, and that he could not stay with them; the Reason why he could not stay with them, he told them, was, that they were to meet that Night about their Charter, and there was never another Alderman in Town but himself, and therefore he could not stay, there was a Necessity of an Alderman to be there. And upon that Mr. *Ferguson* opened his Bosom, and from under his Stomacher pull'd out a Paper; they told him, they had that Paper read, and desired to read it to him: Mr. *Ferguson* read it, and Mr. *Sheppard* held the Candle all the while that it was reading; and after they had read it, they asked him how he liked it, and he did say he liked it very well.

L. C. J. Jones. What were the Contents of that Paper?

Mr. *Rumsey*. The first part of it was complaining of the Misgovernment of the late King; there were two Points in it that I do remember very well, that they would declare for: One was *Liberty of Conscience*; and t'other was, That all those that would assist in that Insurrection, that had any Lands of the Church, or the King's, in the late War, should have them restored to them.

L. C. J. Jones. Was there any thing in that Paper that did engage any body to an Insurrection?

Mr. *Rumsey*. I did not hear all the Paper, nor did I take great notice of it; but those two Points were in it, to engage them that would assist.

Mr. *At. Gen.* What was the Effect of the Paper?

Mr. *Rumsey*. It was to be a Declaration upon the Rising; when the Rising was to have been, this was to have been dispersed abroad.

Mr. *At. Gen.* Mr. *Rumsey*, was there a Rising intended at that time?

Mr. *Rumsey*. Yes, and they met there for that Purpose; and Mr. *Trenchard* was the Man to manage the Business about *Taunton*, and he disappointed them.

Mr. *At. Gen.* What was your Message from my Lord *Shaftesbury* to them?

Mr. *Rumsey*. It was to know what issue they had come to about the Rising, and to press them to it, for such a matter as that was not to be long kept a-foot; either let them come to a Resolution to rise, or let it fall for good and all.

Mr. *At. Gen.* After Mr. *Cornish* had expressed his liking of this Business and Declaration, what follow'd?

Mr. *Rumsey*. He did say he liked it very well; and that poor Interest he had, he would join with it.

Mr. *At. Gen.* Speak that again.

Mr. *Rumsey*. Mr. *Cornish* did say, he did like the Declaration, and with the small Interest he had, he would appear to back it, or Words to that Effect.

Mr. *Cor.* My Lord, since he takes the Freedom to charge me with these things, I never was at a Consult in my Days.

Mr. *Just. Lewinz*. You were not then at Mr. *Sheppard's* that Night?

Mr. *At. Gen.* Will you deny you were at Mr. *Sheppard's* that Night?

Mr. *Cor.* I do declare, I never was at Mr. *Sheppard's* in any Consult in my Life, as he declares; but I have had great dealings with Mr. *Sheppard*.

L. C. J. Jones. You shall be allowed your Liberty; pray, Sir, be not transported with Passion. I doubt, before this time, notwithstanding the Confidence you seem to have, there are few believe you to be as innocent as any Person present.

Mr. *At. Gen.* You will hear more from his Oracle.

Mr. *Just. Lewinz*. Were you there when my Lord *Russel* was there?

Mr. *Cor.* I was not there when my Lord *Russel* was there, as I remember.

L. C. J. Jones. Were you present, hear, hear, Sir: were you present at *Sheppard's* when *Ferguson* was there?

Mr. *Cor.* My Lord, I have been at *Sheppard's* several times, but I never liked the Man for his Morals, and therefore never liked to be in his Company.

L. C. J. Jones. He pull'd the Paper out of his Bosom.

Mr. *Cor.* It is as great an Untruth as ever was told in the World; but, my Lord, seeing he takes this Freedom to charge me, I desire to know whether he stands here as a lawful Evidence?

L. C. J. Jones. What is your Exception?

Mr. *Cor.* He stands charged guilty of Treason.

L. C. J. Jones. That it self does not disable him to be a Witness.

Mr. *Cor.* Before he hath his Pardon, my Lord?

L. C. J. Jones. I dont know whether he hath his Pardon or not.

Mr. *At. Gen.* There is no Indictment at all upon him.

Mr. *Just. Levinz.* If he were convicted, or outlawed of Treason, it were something; an innocent Man may be charged.

Mr. *Rumsey.* My Lord, Mr. *Cornish* and I have been very well acquainted these fourteen Years or thereabouts, and have had great concerns together; for during the time that I managed the King's Customs at *Bristol*, six Years I was there Collector, he did return between three and four hundred thousand Pounds for me; he is a very honest Gentleman, and I appeal to himself, whether I take delight to appear here to accuse him.

Mr. *Cornish.* But Colonel, what is the reason that you have not accused me all this while?

Mr. *Rumsey.* Mr. *Cornish*, I hope that is not an Objection, I think I suffer for it and not you; it was Compassion, and the same Compassion makes you deny it to save others; if you would deal openly, I make no doubt, but you might partake of the King's Favour yet, as well as I have done.

Mr. *Cornish.* I do thankfully accept of his Majesty's Favour at all times, but I thank God I am innocent in this matter, and do not stand in need of it.

Mr. *Rumsey.* And you say I accuse you falsely; then Mr. *Cornish*, you don't stand there, nor I here.

Mr. *At. Gen.* Pray, will you ask him any Questions?

L. C. J. Jones. But pray don't enter into a long Harangue.

Mr. *Cornish.* My Lord, I do humbly conceive, that he does not stand here as an Evidence.

L. C. J. Jones. You have the Judgment of the Court for that.

Mr. *Cornish.* Before he is pardon'd?

L. C. J. Jones. I don't talk of a Pardon; what Record have you against him?

Mr. *At. Gen.* You were present and heard that resolv'd before in my Lord *Russel's* Case.

Mr. *Cornish.* My Lord, Mr. *Rumsey* did upon his Evidence give in, and he was obliged by his Oath to speak the whole Truth —

L. C. J. Jones. Now you are making your Speech, it is not your proper time; you shall urge any thing against Mr. *Rumsey's* Evidence, or the Credibility of it when it is your time.

Mr. *Cornish.* My Lord, I do here design it.

Mr. *At. Gen.* Mr. *Rumsey*, pray recollect; had you never any Discourse with him at other times?

Mr. *Rumsey.* We have had a long Acquaintance, fourteen Years; but in my Life, I never heard him speak any thing before or since that, to my knowledge.

Mr. *At. Gen.* Mr. *Cornish*, will you ask him any more Questions?

Mr. *Cornish.* I desire to know —

Mr. *Rumsey.* What would you know?

Mr. *Cornish.* Whether did you and I discourse of these matters at any other time?

Mr. *Rumsey.* No.

Mr. *Just. Levinz.* You must not stand to dialogue between one another, but speak as we may hear you.

L. C. J. Jones. You shall argue if you will, when you come to make your Defence in the proper time, the Improbability of any thing that he hath said, or the Impossibility, or Repugnancy to any Truth, or any Evidence that you can give to the contrary; but I say, this is not your time.

Mr. *Cornish.* I never was at any Consult in my Life.

Mr. *At. Gen.* That is a Name he gives it; was you never at a Meeting about a Rising?

Mr. *Goodenough* sworn.

Mr. *At. Gen.* Mr. *Goodenough*, are you acquainted with Mr. *Cornish*?

Mr. *Goodenough.* Yes, Sir.

Mr. *Cornish.* My Lord, I humbly conceive he is not a Witness, he stands indicted upon an Outlawry; I can produce it.

Mr. *At. Gen.* We do admit it.

L. C. J. Jones. They admit your Exception, and will answer it by producing a Pardon.

Mr. *Cornish.* I need not say any thing against him, he is known well enough.

Mr. *Just. Withins.* He was your Under-Sheriff, Mr. *Cornish*.

Mr. *Cornish.* Much against my Will; I oppos'd him to the utmost; and this is nothing but Malice against me.

[Mr. *Goodenough's* Pardon read.]

Mr. *Cornish.* I do humbly conceive this can't be done, but by a Writ of Error, or an Act of Parliament.

L. C. J. Jones. Can't the King pardon an Outlawry?

Mr. *Just. Withins.* That is no piece of Law, I am sure of it.

Mr. *At. Gen. Goodenough*, pray what do you know of a Rising intended against the late King?

Mr. *Goodenough.* All that I have to give an account of, is a Discourse —

Mr. *At. Gen.* Answer what I ask you; what do you know of a Rising by others?

Mr. *Goodenough.* I know nothing of that Business of my Lord *Russel's*; but there was a Design to rise, Sir, in *London*; we design'd to divide it into twenty parts, and out of each part to raise five hundred Men, if it might be done, to make an Insurrection.

L. C. J. Jones. What were these Men to do when they were raised?

Mr. *Goodenough.* They were to take the *Tower*, and drive the Guards out of Town.

Mr. *At. Gen.* Pray, acquaint my Lord and the Jury what Discourse you had with Mr. *Cornish*.

Mr. *Goodenough.* Before this was agreed on by us, I chanced to be at Alderman *Cornish's*; Sir, said I, now the Law won't defend us, tho' we be never so innocent; but some other way is to be thought on. Upon this, said he, I wonder the City is so unready, and the Country so ready. I said to him again, Sir, there is something thought of to be done here; but, says I, in the first place, the *Tower* ought to be seized, where the Magazine is: upon this he made a little Pause, and said, I will do what I can, or what good I can. To this purpose he answered me; and about some time after, he met me upon the Exchange, and asked me how Affairs went? which I understood to be relating to what we discours'd; this is all that I can say. I never met after this, but only upon the *Exchange*, he ask'd how matters went.

Mr. *At. Gen.* Was there any Discourse about seizing the Guards?

Mr. *Goodenough.* I have told you the whole Discourse.

Mr. *At. Gen.* Pray, repeat it.

Mr. *Goodenough.* I told him, says I, Sir, now it is plain, the Law will not defend us, though we are never so innocent, or to this purpose.

Mr. *Sol. Gen.* Upon what occasion was that Discourse?

Mr. *Goodenough.* Every thing going against us.

Mr. *Sol. Gen.* How?

Mr. *Goodenough.* This was in *Easter Term*, as near as I can remember, 83.

Mr.

Mr. *At. Gen.* Ay 83.

Mr. *Goodenough.* Therefore, says I, something else is to be thought on, some Course else is to be taken: to this purpose he answer'd me, I wonder the City is so unready, and the Country so ready.

L. C. Baron. What Country?

Mr. *Goodenough.* He had been in the Country, as I understood before, that I don't know.

Mr. *Cornish.* What time was this, Sir?

Mr. *Goodenough.* In *Easter Term*, or thereabouts, 83. I told him then, Sir, there is something thought of to be done here in *London*, to this purpose; but says I, in the first place, the *Tower* is to be seized, where the Magazine is; so he answered me, after some Pause (he paused upon it) says he, I will do what good I can, or what I can, to this purpose.

Mr. *Sol. Gen.* Did he seem to dislike seizing the *Tower* at all?

Mr. *Goodenough.* Not at all, Sir, it did not appear so to me.

Mr. *Sol. Gen.* What Discourses had you any other time?

Mr. *Goodenough.* I never had any Discourse of this matter, or any thing relating to it at any other time, but only when I came upon the *Exchange*, how things went.

Mr. *Sol. Gen.* And did you give him an account?

Mr. *Goodenough.* I said, well. I gave him a general Answer, for that was not a place to talk in, and that I apprehended of this Discourse.

Mr. *Sol. Gen.* Had you any other matters?

Mr. *Goodenough.* I had some other matters of managing the Riot, that was brought against him, and several others, and my self also.

L. C. J. Jones. Will you ask him any Questions, Mr. *Cornish*?

Mr. *Cornish.* Whether his Pardon be allowed?

L. C. J. Jones. We heard it read.

Mr. *Cornish.* This being a Court inferiour to the King's Bench ———

L. C. J. Jones. Here is a Pardon under the Great Seal, Sir, and here is a Pardon of that Offence which you charge him with, and which you take to be a sufficient Exception against his being a Witness, we are satisfied it is sufficient.

Mr. *Cornish.* Pray, my Lord, is not this Pardon special?

L. C. J. Jones. What do you mean by that?

Mr. *Cornish.* Because, my Lord, he hath been in an Act of Treason since; therefore, my Lord, if he be not pardoned of that ———

L. C. J. Jones. No, no, he is not indicted for it; we can't try him now for any Treason of that nature.

Mr. *Cornish.* I humbly conceive he hath not had a Pardon for his last Treason.

L. C. J. Jones. I must tell you, if he be guilty of Treason, till he is tried and convicted, it doth not take off his Testimony.

Mr. *Corn.* Pray, Mr. *Goodenough*, remember all your Tricks, whether or no, was there any body present when this Discourse past between you and I?

Mr. *Goodenough.* No body but you and I.

Mr. *Corn.* You were not so conversant in my House, I know.

Mr. *Goodenough.* Sir, I came to you about the Business of the Riot.

Mr. *Corn.* How many times might you be at my House? Not three times, I believe.

L. C. J. Jones. You ask a Question, and answer it your self.

Mr. *Corn.* My Lord, I desire to know, where it was these Words were spoke.

Mr. *Goodenough.* Sir, in your lower Room.

Mr. *Corn.* In my own House?

Mr. *Goodenough.* Yes, Sir.

Mr. *Corn.* And no Company there?

Mr. *Goodenough.* And no Company.

Mr. *Corn.* That is very strange, and that afterwards you should meet me, and discourse this matter again.

Mr. *Goodenough.* No, Sir, all I say, it this, you met me upon the *Exchange*, and asked me how things went.

Mr. *Corn.* That might be in reference to the Suit you were managing for the Rioters; I know of nothing else.

Mr. *Just. Withins.* And I tell you, Mr. *Cornish*, that was a Branch of the Plot; take that from me.

Mr. *Corn.* My Lord, he was Attorney in that Cause, and I might ask, how matters went in reference to that Trial; but I take God to witness, nothing else, as I remember.

L. C. J. Jones. But here you say, it was a strange thing that Mr. *Goodenough* and you should be in a Room alone, when you acknowledge him to have been the Attorney in a Cause of mighty Consequence among you.

Mr. *Corn.* He was concern'd for all, and I stedfastly believe he was never with me twice about that Suit; but he hath been at Sir *Thomas Player's*; there he often went about that Affair; and I do not believe that ever he came to me about that Business.

L. C. J. Jones. Is that all you have to say to him, Sir?

Mr. *At. Gen.* Will you ask him any more Questions? if not, go on, we have done.

Mr. *Corn.* My Lord, Colonel *Rumsey* is a Person that hath acquainted the Court, that there was a long acquaintance between him and me. I have served his Majesty in my Place, and do it to this day. My Lord, it is a very improbable thing, that I should meet him at Mr. *Sheppard's*, where I saw such wicked horrible Doings; and that he should never afterwards speak to me about that Affair. He came to my House, I remember, about the return of some Monies for his own private Use; for he was then out of his Majesty's Employment. He does declare here, he never said a Word to me, never spake to me any thing of it but there. My Lord, it is a very strange thing, that there should be such a Contrivance to ruin the King and Kingdom, and that I should be one in this Business, this Villany, and not be consulted how to carry it on; it is very strange, they should see me, and never say a Word of it afterwards to me. My Lord, I hope, and you Gentlemen of the Jury, that you will consider the Improbability of it; it is as improbable as any thing in the World. I hope it doth appear to your Lordship and this Bench, that there is no probability in it; he owns we had a great deal of Freedom; he owns we were acquainted for fourteen Years together, and that I should be at such a wicked villainous place once, and see him so often afterwards, and never speak of it, and never say any thing of it, the Great God of Heaven and Earth, before whom I stand, knows that I know nothing of all that he hath sworn against me: He must swear these things to save his own Life; if he will take away my Life, he will take away many others, without question, if he can save his own. I should not urge this, but God

is my Witness, I never heard any thing of a Contrivance or Plot, till my Lord *Ruffel's* Trial: These are very strange things, if so be so good a Government as we have, shall not protect such innocent Men; truly, my Lord, I am as innocent as any Man in this Court, if I were to appear before the Great God in Judgment this Moment.

L. C. J. Jones. Look you, Mr. *Cornish*, I would with all my heart allow you all the Liberty imaginable, to speak pertinently to your Defence, but to oppose Confidence, and very great Assurance, upon your being in the Presence of Almighty God, against express Testimony, is the weakest Defence that can be; if you have any Witnesses, if you have any thing to urge against the Testimony of any of these Persons, besides the Improbability of it, which you have often mentioned over and over again, you shall be heard with all Patience: if you have Witnesses that you will call, we will hear them likewise.

Mr. *Corn.* My Lord, I think his Treason being confessed, and not being pardoned——

Mr. Just. *Withins.* Is that all you will say, Mr. *Cornish*?

Mr. *Corn.* I hope you will bear a little with me, I am highly concerned.

L. C. J. Jones. You are so.

Mr. *Corn.* I have had no help, and it is well known, I am not skilful in the Law. I don't understand what to say, nor how to plead my Cause, having no help, nor no assistance allowed me. My Lord, it is a most improbable thing that I should be at this place, where this horrible Wickedness was, and that it should lie all this time never mention'd: I have been, my Lord, several times in Prison this Year, and I think my Virtue will be so much the greater, to be again and again purged, as I have been; that which hath pleased me very much, hath been my Innocency: Would any Man in my Circumstances have staid and continued in this Nation, if he had not known himself perfectly innocent? Others have gone away, and I could as freely have gone, after I have been taken up four times.

L. C. J. Jones. I doubt there are a great many are not gone, Mr. *Rumsey* hath told you plainly, it was Compassion to you, though Injury to himself, that he did not accuse you sooner.

Mr. Just. *Levinz.* Here is *Gaunt* staid here till within this Week or Fortnight, and never stirr'd.

Mr. Just. *Withins.* Mr. *Cornish*, my Lord hath put you in the right Way for your Defence, if you can invalidate the Testimony, or call any Witnesses, do it; but to talk at this rate, you may do it this Month (for ought I know) and 'twill signify no more than it hath done already.

Mr. *Corn.* The Improbability is so manifest.

L. C. J. Jones. Is it enough to say, Improbability, Improbability, Improbability? Is that enough? Have you said any more?

Mr. *Corn.* My Lord, I have said this, that this Gentleman that should be so conversant in the Town, I in his Company, and he in mine; is it not improbable?——

Mr. Just. *Levinz.* Look you, Mr. *Cornish*, I will tell you what the Method is, to give Evidence first, and then apply it in summing up the Evidence; if you were summing it up, the Court hath all the reason in the World to hear you; if you have Evidence, the Way is to give your Evidence, and apply it if you can.

Mr. Just. *Withins.* Have you any Witnesses?

Mr. *Corn.* Against Mr. *Rumsey*?

Mr. Just. *Withins.* Against any body, Mr. *Rumsey* if you will.

Mr. *Corn.* My Lord, I humbly conceive that this Witness, Mr. *Rumsey*, ought not to stand; if your Lordship satisfies me, I shall be very much obliged to your Lordship: He declared upon his Oath, when he swore against my Lord *Ruffel*, that he had nothing else to swear against any Man.

Mr. Just. *Withins.* How does it appear?

Mr. *Corn.* I will produce it, if your Lordship please to give me time.

Mr. Just. *Withins.* But afterwards he discover'd a great deal more.

L. C. J. Jones. Look you, Sir, if you have any Exception against Mr. *Rumsey's* Testimony, we will hear you, propound a legal Exception.

Mr. *Corn.* My Lord, I humbly conceive, he not producing his Pardon, his Evidence is not good.

L. C. J. Jones. You have had the Opinion of the Court.

Mr. *Corn.* If your Lordship over-rule me.

L. C. J. Jones. We must over-rule you.

Mr. *Corn.* If that will not be granted me.

L. C. J. Jones. Then you have no more to say?

Mr. *Corn.* But for my Innocency, for that (I know) I have enough to say.

L. C. J. Jones. That is in your own Breast, the Jury can't see that; will you call any Witnesses?

Mr. *Corn.* I have some Witnesses to call here, as to Mr. *Goodenough*, my Lord.

L. C. J. Jones. What is your Exception against Mr. *Goodenough*?

Mr. *Corn.* My Lord, it was my most great Unhappiness and Misfortune, that this *Goodenough* was admitted into the Office of Under-Sheriff; and my Lord, that I might fully convince your Lordship and this Court, all that I desire is, some few Men may be call'd; besides, I think there are a thousand, I may say, that will bear me witness, I did oppose him.

L. C. J. Jones. But pray, Mr. *Cornish*, is that an Exception that he does not swear true, because you would not let him be your Under-Sheriff?

Mr. *Corn.* It looks like Malice.

L. C. J. Jones. You did admit him to be Under-Sheriff, all the World knows that.

Mr. *Corn.* But I can set forth that I did oppose him, and the Reasons why I did oppose him.

L. C. J. Jones. You may, if you will, give Evidence, what an Instrument he was to you, and how he served you in your Office, when you were Sheriff: is this to the purpose?

Mr. *Corn.* Yes.

L. C. J. It is not at all the purpose.

Mr. *Corn.* My Lord, I was imposed upon by my Partner.

L. C. J. Jones. You could not be imposed upon, you had equal Power with your Partner.

Mr. *Corn.* If your Lordship pleases to consider the Temper of that Man.

L. C. J. What Man?

Mr. *Corn.* *Bethel*, I mean, what an obstinate Man he was. My Lord, I hope I can purge myself greatly in these matters.

L. C. J. Jones. If you will, tell to what you will call them.

Mr. *Corn.* The great Aversion that I had.

Mr. *At. Gen.* We will admit that he did oppose him, because he would have had more Money.

Mr. Just. *Withins.* You have heard the Opinion of the Court.

Mr. Just.—It is not material whether he came in with or without your Consent.

Mr. Corn. Mr. Gosfricht, will you be pleas'd to declare to my Lord, how I was impos'd upon by suffering *Goodenough* to be Under-Sheriff?

Mr. Gosfricht. My Lord, after that *Bethel* and *Cornish* were chosen Sheriffs, they had some Meetings together concerning an Under-Sheriff; Mr. *Bethel* he named *Goodenough*, Mr. *Cornish* he named another; they could not agree, the Difference did arise in three or four, or more Days Debate, as I remember, and Mr. *Cornish* did tell Sheriff *Bethel*, he was resolv'd if *Goodenough* were Under-Sheriff he would fine, and not hold, and told him the reason why: He said he was a Man that he would not trust a Hair of his Head with, and he had no Knowledge he believ'd of the Business; but withal, he told him, he was a Man obnoxious to the Government, and he was an ill Man, and had done ill things, and he would not trust his Estate and his Reputation in the hands of such an Under-Sheriff. *Bethel* he insist'd upon it, and he was resolv'd he would have *Goodenough*, and *Cornish's* Man should not be.

L. C. J. Jones. Who was *Cornish's* Man?

Mr. Gosfricht. I know the Man, but forget his Name. ————*Millman*.

L. C. J. Jones. Can you tell what *Goodenough* was to give for the Under-Sheriffwick?

Mr. Gosfricht. No, indeed.

L. C. J. Jones. Was there no Discourse?

Mr. Gosfricht. Not in my hearing.

L. C. J. Jones. Was *Goodenough* Under-Sheriff to *Cornish* at last?

Mr. Gosfricht. Yes, Sir.

L. C. J. Jones. How did they agree?

Mr. Gosfricht. I believe the Animosities were so great, that they were never reconciled; for *Cornish* had so bespatter'd *Goodenough*, that he was so ill a Man, that *Goodenough*, I believe, could never digest it well.

L. C. J. Jones. Did you hear any angry Words, after he was admitted to be Under-Sheriff?

Mr. Gosfricht. Truly, I never was at Alderman *Cornish's* while he was Sheriff: But I heard that Character of him.

L. C. J. Jones. And what was the Reason you did not go to Mr. *Cornish's*?

Mr. Gosfricht. No, I believe *Goodenough* never came there, but I was at neither of their Houses.

Mr. Just. *Levinz*. Pray, how many Juries did you help him in?

Mr. Gosfricht. Truly I was so little acquainted, I could not help him.

Mr. Just. *Levinz*. I hear other People say the contrary.

Mr. Gosfricht. I was but newly come into *England*, and could know no Man.

Mr. Corn. Alderman *Love*.

L. C. J. Jones. To what purpose do you call him, Sir? To the same?

Mr. Corn. It is evidently to declare how much I was impos'd upon.

L. C. J. Jones. Psha! I will tell the Jury, I will do this for you, upon this Man's Testimony, that you were unwilling that *Goodenough* should be Under-Sheriff.

Mr. Corn. My Lord, there is a great deal more in it.

L. C. J. Jones. What is there more? he never heard an angry Word between you, during the time, he says, afterwards you admitted him to be Under-Sheriff?

Mr. Corn. Mr. *Love*, will you please to declare to the Court, what aversion I had to Mr. *Goodenough* being the Under-Sheriff.

Mr. *Love*. My Lord, I did receive a Subpœna last Night, and I wonder'd at it, I confess; ever since I was so happy to get out of publick Employment, having apply'd my self to my private Affairs, I never came to *Guild-Hall*. But all I can say, is this, that when it was publickly talk'd upon the *Exchange*, meeting Mr. *Cornish* upon the *Exchange*, I did hear him inclined to have another Man (one I don't know,) to be his Under-Sheriff, and that he did not like Mr. *Goodenough*, but was inclin'd to another Man: but it is so long ago, I believe I might perswade him, having been Sheriff above twenty years ago, to Mr. *Hastings*, an honest Man; I got my *Quietus est*, without trouble: But I must say this for the Gentleman, I did hear him complain, that he was impos'd upon to take this Man.

L. C. J. Jones. How long was it after the time?

Mr. *Love*. It was before they had pitched upon a Man, and he was much inclined to one Mr. *Milbourne* or *Millman*, or some such name, that is all I can say.

L. C. J. Jones. Do you think we sit here to hear Impertinencies? God forbid, Sir, I should hinder you from giving any Evidence; but this is not at all material.

Mr. Corn. If your Lordship please to let Mr. *Jekyl* come, he will tell you what this Man did declare, why I was against him.

L. C. J. Jones. If you had not entertain'd Mr. *Goodenough*, then there might be something of Malice in it, but you did receive him.

Mr. Corn. I had private Covenants with *Bethel*, before I would let him come into the Office. Mr. *Jekyl*, pray will you declare to my Lord, and the Jury, what aversion I had against Mr. *Goodenough's* being Under-Sheriff?

Mr. *Jekyl*. Truly, my Lord, Alderman *Cornish* and I, living near together, I had occasion to go to him, several times, about Bills of Exchange; and he told me, when he was Sheriff, how he was troubled with *Bethel*, because he would put *Goodenough* upon him, for I don't intend to have him, says he, for I know he is obnoxious to the King and Government, and desired me to speak to Mr. *Bethel* about it, but I had no acquaintance with him till he was Sheriff: And some came to me, to desire me to speak to Alderman *Cornish* to receive *Goodenough*. Truly, says I, I find him so averse against him, that it is not for me to persuade him, to take a Servant he must put such trust and confidence in; for I saw Alderman *Cornish* was so averse to it, that I would not do it.

Mr. Sol. Gen. Pray do you think in your Conscience, he was more obnoxious to the Government than his Partner, Sheriff *Bethel*, was?

Mr. *Jekyl*. I must confess, I have heard much of Sheriff *Bethel*, but I never heard that *Cornish* was any disaffected Man to the Government.

Mr. Sol. Gen. But which was the most disaffected Man to the Government, *Bethel*, or *Goodenough*?

Mr. *Jekyl*. Truly, as I remember, he said, he would not have him, because he was obnoxious to the King and Government.

Mr. Just. *Withins*. This Gentleman was in a Limb of the Plot himself, as great a Rioter, and as hot as any of them, this Evidence that they call: I remember you, Mr. *Jekyl*, I'll assure you.

Mr. Corn. If Sir *William Turner* be upon the Bench, I desire him to speak.

L. C. J. Jones. We will hear Sir *William Turner* any thing.

Mr. Corn. I desire he would declare how I was used.

Sir William Turner. I don't remember that ever I saw *Mr. Goodenough's* Face before this time, so I have nothing at all to say against him, nor can I say any thing, but what *Mr. Cornish* told me; and that was, he once came to my House some time after he was chosen Sheriff, and told me, that *Mr. Bethel* pressed very much for taking *Goodenough* to be his Under-Sheriff; that he had no mind to accept him, and he would propose another, and it caused a great Difference, but it was at last composed, but how, I can't tell.

L. C. J. Jones. Now, *Mr. Cornish*, by my consent, if you will, call all the Aldermen upon the Bench; whether they will, or will not, say the same thing, for my part, I will agree, that they have given Evidence (if they will be contented themselves) to the same purpose.

Mr. Cornish. My Lord, I shall not give your Lordship unnecessary trouble, but I think it is convenient to call some Witnesses, to prove the Manner of my Life and Conversation.

L. C. J. Jones. Your Life hath not been in the dark.

Mr. Cornish. The Dean of *Canterbury*, *Dr. Tiltson*. (who did not appear.)

L. C. J. Jones. Will any Man attest your Loyalty in *London*?

Mr. Cornish. The Dean of *Norwich*, *Dr. Sharp*. Is the Dean of *Norwich* here?

Officer. No, Sir.

Mr. Cornish. My Lord, here is *Mr. Lane*, I desire he may be asked what he knows.

Mr. Lane. Upon the Trial of my Lord *Russel*, according as *Mr. Cornish* desires I may be heard, it is with respect to Colonel *Rumsey's* Evidence; Colonel *Rumsey* says, in my Lord's *Russel's* Trial, he did not hear the Declaration read, because it was read before he came there.

Mr. North. Were you present at my Lord *Russel's* Trial?

Mr. Lane. No, Sir.

Mr. Just. Levinz. Sir, that signifies nothing.

Mr. Cornish. That is a very material thing, my Lord.

L. C. J. Jones. What is? it is no proof at all.

Mr. Cornish. Not the printed Trial?

L. C. J. Jones. No.

Mr. Cornish. It is by Authority.

L. C. J. Jones. Any body that was present may swear it.

Mr. Cornish. My Lord, I desire I may have the Minister of the Parish, *Dr. Calamy*, for my constancy at my Parish-Church, and receiving the Sacrament, according to the Rites of the Church of *England*, that I am, to all appearance, a Person that does as well affect the Government as any Man.

L. C. J. Jones. I doubt you are all Appearance.

Dr. Calamy. My Knowledge of *Mr. Cornish* hath been since I came to be Minister of the Parish, which is about two Years, a little above two Years; whenever he was in Town he did use to come to Church as constantly as any one, and come with his Family to Prayers; and did come to the Sacrament, and he did not only come at *Easter*, to save himself from a Presentment, but at our monthly Communion; and since I have been Minister of the place, I have often conversed with

him: All that I can say, is, that I never heard him say a disrespectful Word of the Government.

L. C. J. Jones. I hope he took you to be a Man of another Kidney.

Dr. Calamy. I marked his words, because of the Character I had heard of him.

Mr. At. Gen. Pray, what was the Character he had before those two Years.

Dr. Calamy. That was, what was publick.

Mr. Cornish Joseph Reeve, Esq;

Mr. Reeve. My Lord, I received a Subpoena, from the Prisoner at the Bar, yesterday. I have been acquainted with him about fourteen or fifteen years, and had a considerable trade with him, and sometimes we had some Conversation, and drank a Glass of Wine together; I thought he was always very Loyal, and drank the late King's Health, and this King's Health, and all the Royal Family. I have no more to say.

Mr. Cornish. *Mr. John Cook.*

L. C. J. Jones. What do you examine this Witness to?

Mr. Cook. My Lord, I have dealt with him for these twenty Years last past, I always found him a very honest Man, and a just Man, and very upright in his dealing, I always reckon'd him a very honest just Man: I have dealt with him for great Sums, and always knew him very just and upright.

L. C. J. Jones. Your Observation of him, as to the Government.

Mr. Cook. I never knew any thing to the contrary, but that he was always very Loyal.

Mr. Cornish. *Mr. John Knap.*

L. C. J. Jones. *Mr. Cornish*, it is not impossible for you to produce Men enough, that shall say, they know nothing against you, concerning the Government, and that you have been a Loyal Man, sure those you chuse, will say so, you have chosen them; and, perhaps, if it were the Business of the King's Counsel, they could do contrary: you are not accused touching your general Conversation, but concerning a particular Fact.

Mr. Cor. It is improbable I should be a Person ever concern'd in these matters; if you consider, you find *Cornish* mentioned only about being there.

L. C. J. Jones. Does not *Mr. Rumsey* tell you the meaning why?

Mr. Cor. It is very strange a Man should be at such an Hellish Meeting, and I see him over and over so many times, and never speak of it again.

L. C. J. Jones. *Mr. Cornish*, do not you know that *Goodenough* could not be produced, till the Rebellion in the *West*?

Mr. Cor. Is it probable that I should entertain any Treasonable Discourse with *Mr. Goodenough*, when I had so much oppos'd him in coming into the Office?

L. C. J. Jones. But you let him in.

Mr. Cor. It is known to hundreds in this Town, that I was impos'd upon by an unreasonable Man; my Innocency is as great as any Man's and my Virtue should be considered, when I have been under these Impositions: I have been Loyal and Dutiful to my Prince, and Faithful to the Government in all respects; I have oppos'd all manner of Heats, as much as any Man whatsoever; I can bring hundreds to shew, that where I heard Heats I allay'd them, and it is strange I should be such a Man as I am represented here.

L. C. J. Jones. Have you done, Sir?

Mr. Corn. My Lord, I have thus much further to say, that I do think there is no probability that I could be at this Meeting; though a man should have a care how he takes God's Name in vain, I have said it, and I do in the presence of the great God of Heaven declare it, I was never at the Debate about these Affairs; I take the great God to Witness, I would not do it for a whole World, if I were not innocent. My Lord, it is most improbable what *Mr. Rumsey* says.

L. C. J. Jones. It is a probable thing that *Rumsey* should forswear himself, it is a probable thing that *Goodenough* should forswear himself, who have taken the great God to Witness to the Truth of what they swear against you; but it is improbable that *Mr. Cornish* should not speak the Truth.

Mr. Corn. I will call some other Friends, if your Lordship please, to prove my Loyalty.

Mr. Knap. I ever found him a fair, good Paymaster.

Mr. At. Gen. He calls you for his Loyalty. Did you never hear him speak any thing against the Government?

Mr. Knap. I have not been in his Company but now and then.

Mr. Corn. Did you ever know me speak any thing against the Government?

Mr. Knap. No, Sir.

L. C. J. Jones. I marvel that you who have been an Alderman a great while, don't call some of the Aldermen; you have call'd Sir *William Turner*, a very worthy Alderman, I wonder you don't call some others of your Brethren, that are known Persons.

Mr. Corn. *Mr. Carleton.*

Mr. Carleton. I have been acquainted with my Cousin *Cornish* ever since the Year 61, when, being a Merchant, trading in Cloth, I began my acquaintance with him, and afterwards, he recommended me to the Party I married, and being Relations, we had great intimacy together; I have been several times at his House, he did always assure me of his Loyalty: I have told him what I have heard People say abroad, but he did assure me he was Loyal, and I do hope the very same of him.

L. C. J. Jones. But you remember you have heard that he was not a Person of such eminent Loyalty.

Mr. Carleton. That was upon the account, my Lord, of his being in with *Bethel*; but he did always assure me of it.

Mr. Corn. My Lord, I hope your Lordship will consider what temper the Man was of that I was to be with, and how obstinate he was; and I hope I shall not answer for his Crimes.

Mr. Just.—*Mr. Corn.* why did you qualify yourself to serve with him? for you were not at first qualified.

Mr. Corn. I had been travelling up and down in the Country.

Mr. Just.—At that time to qualify your self to be an Officer, then you could lay aside all your Scruples, and receive the Sacrament.

Mr. Corn. *Joseph Smart, Esq;*

Mr. Smart. I have known *Mr. Cornish* above these twenty Years, and dealt with him considerably, I never knew him but a very fair Dealer,

Mr. Corn. *Mr. William Crouch.*

Mr. Crouch. I have had acquaintance a great while with *Mr. Cornish*, and have had several Dealings; I found him a very honest Dealer, and a good Pay-master.

L. C. J. Jones. What know you of his Loyalty?

Mr. Crouch. For his Loyalty, I took it as the Town did, though I never knew any Disloyalty from him.

Mr. Corn. *Mr. James West.*

L. C. J. Jones. Do you think you profit your self with this Testimony?

Mr. Corn. I would not offend you.

L. C. J. Jones. No, no, you don't offend, I would gladly hear you, if there were any thing pertinent to your Defence.

Mr. Just. Withins. *Mr. Cornish*, you have this Happiness, that you will be tried by your Fellow-Citizens, of very good Quality and Understanding, I must needs tell you.

Mr. Corn. I am satisfied I have appeared here with all the Care and Caution that becomes an honest Man; I have spoke nothing but what I have consider'd as I have been in presence of the great God; I never was at any Meeting, nor never heard any thing of this till the Trial about my Lord *Ruffel*, never heard one Word.

L. C. J. Jones. Gentlemen of the Jury, the Prisoner at the Bar, *Mr. Cornish*, is indicted, that knowing that there was an Insurrection intended to be against the late King, of blessed Memory, he did promise to be aiding and assisting in it; this is the Substance of the Indictment. There have been two Witnesses produced, *Mr. Rumsey*, and *Mr. Goodenough*: *Rumsey's* Testimony (so far as I am able to remember, after so long a Discourse and so much time that hath been spent) was to this purpose; That the Duke of *Monmouth*, the Lord *Ruffel*, *Ferguson*, and others, being in *Mr. Sheppard's* House, there came at length *Mr. Cornish*, and excus'd himself for coming late, and said, That he was to depart from them very speedily, because he was to go to attend the Business (as I take it) of the Charter, where the Presence of an Alderman was necessary, and none like to be there but himself; That *Ferguson* pull'd a Paper out of his Bosom, so says *Mr. Rumsey*, and upon the desire of the Company, it was read to *Mr. Cornish*, and *Sheppard* held the Candle; there were these two Points, *Rumsey* says, they had agreed on in that Paper, when the Rising should be, they would declare for Liberty of Conscience, and for the Restitution of those Lands, Bishops Lands, and King's Lands, to those Persons from whom they had been taken after the King's Restauration. This Paper being read to *Mr. Cornish*, he said, He did like it very well, (these were the very words of *Rumsey*) and with that poor Interest that he had in the World, he would join in the Assistance of them, for those Ends and Purposes that were mentioned in that Declaration. Then comes *Goodenough*, and he tells you, that he came to him in his Parlour, when he was Sheriff, said, Now there was no Safety, no Defence at all by Law, all was gone, there must be some other Course taken, for the Law would not sufficiently protect them: Why, says *Mr. Cornish*, I marvel they are so slow in the City, when they are so ready in the Country. Ay, but says *Goodenough* again to him, there hath been something done in the City; this was after the time that the City had been put into

into several Divisions. I don't see there is any Testimony from Mr. *Goodenough*, that Mr. *Cornish* knew any thing of that; but says he, there is something done here, the *Tower* is to be seiz'd, there is the Magazine, and that is to be seiz'd upon, and then we shall be able to do something: says he, I will do what good I can; or, says he, what I can; he is not confident whether of these Expressions he did use, I will do what good I can, or I will do what I can. Afterwards he meets Mr. *Cornish* upon the *Exchange*: here, I confess, it is not so expressly to be applied to this Purpose, that it doth fasten directly upon the point in the Indictment; but says he, How do Affairs go? How do our Affairs go? says he, very well: This is the Testimony given against him. If this be true, notwithstanding Mr. *Cornish's* Protestations of his Innocency, sure there is nothing doth more plainly prove this Indictment, than this Testimony. He says it is improbable, very improbable that I in my Circumstances, that I should say so; it is improbable, because Mr. *Rumsey* had Acquaintance with me for fourteen Years together, that I have dealt with him for vast Sums, and that I should say it in his presence never but once; and that *Rumsey* does say, He never heard him speak any thing to that purpose, but that one time; and therefore it is mighty improbable I should say so. But what is the Reason, says he, that this was not discover'd before? To this *Rumsey* gives a positive Answer, Truly says he, Mr. *Cornish*, I had more Compassion for you, than for my self, I have suffer'd for it, you have not suffer'd for my silence. Then *Goodenough* ought not to be allowed to be a competent Witness, because when Mr. *Cornish* and *Bethel* were chosen Sheriffs of the City, Mr. *Cornish* was much against receiving *Goodenough* to be his Deputy, and *Goodenough* must say all this maliciously against him, because he so much opposed his being Under-Sheriff to him and *Bethel*. He hath produced several Witnesses to that Purpose, and they say there was some reluctancy in him to the receiving *Goodenough* to be his Under-Sheriff; but it is plain and clear to you all, Gentlemen, and every body in the City knows that *Goodenough* was his Under-Sheriff, and how well he serv'd him, and to what purposes, I believe many of you very well know. Another Improbability is, that he should admit *Goodenough* to come into his Parlour alone, a Man that he had so much displeas'd; but if so be he was once against him, he did afterwards take him not only to be his Under-Sheriff, but employ'd him to be his Attorney, and then he might very well admit him into his Parlour alone, to discourse of his Business as an Attorney, and this might fall in among other Discourse. Gentlemen, there are several other Witnesses produced concerning the Honesty of his Dealing, and the Honesty of his Conversation, that they have nothing at all to say against; but Gentlemen in a popular City, where he is, and hath been so well known, it is a very easy matter to bring millions of Men to give the very same Testimony, and certainly he will bring none, having the choice of them, but such as shall speak in his Favour; but he speaks in the Presence of God, he speaks from the bottom of his Heart, that he never had any such disloyal Thought enter'd into his Mind. Gentlemen, hath no body any Sense of the Presence of God but Mr. *Cornish*? Hath not *Rumsey* call'd God to be a Witness to his Oath? and *Goodenough* hath done the like?

Why is it maliciously against the Life of Mr. *Cornish*? for I don't know he does, in the least, object any thing against *Rumsey*, that there was ever any Displeasure between them two: Why should he deliver this Testimony, if it were not the Testimony of his Heart? and that which he says himself, he had too long concealed out of the Compassion he had for him. Gentlemen, if a great many Protestations and Affeversions should make a Man as innocent as confident, no Man should die by the Sentence of the Law; it is an easy Matter for any Man to take up the same Assurance and Confidence that he hath done: And for his being such a Church-man, as he now pretends himself to be, for that is one thing by which he would argue the Improbability of the thing, and he would have you believe very much of his Loyalty from it; Gentlemen, all the Evidence he hath given, is but of two Years standing, and since the Trial of my Lord *Ruffel*: and such a Man as he, and many Men that were conscious to themselves of their Guilt, did think it very fit to purge themselves that way, to gain themselves a good Opinion that they were loyal to the Government. But it is not deny'd by Mr. *Cornish*, that before that time he did not frequent the Church, nor receive the Sacrament.

Mr. *Cornish*. These seven Years, my Lord.

L. C. J. *Jones*. Who did say so? Sure no body said so yet. I repeat the Evidence truly, all you said of that was out of the mouth of Dr. *Calamy*.

Mr. *Cornish*. Dr. *Calamy* came in but lately, and his Predecessor Dr. *Whitchcot* is dead.

Mr. Just. *Withins*. Sir, you were not qualified for your Office if you had not took the Sacrament.

L. C. J. *Jones*. You did lay aside all your Scruples to qualify your self to be Sheriff by receiving the Sacrament, which otherwise you could not have been. Others that have spoken of your Conversation likewise say, that the Report was abroad, that you were not so loyal and firm to the Government as you ought to have been. Gentlemen, you have heard the Evidence; I have done my endeavour to repeat it faithfully: If you believe that he did promise to aid or join, or agree with that Rebellion or Insurrection, then you ought to find him guilty of this Indictment.

Mr. *Cornish*. I am as innocent as any mortal Man.

Then the Jury withdrew, and after a considerable time return'd.

Mr. *Cornish*. My Lord, I hope I may have one Word.

Mr. Just. *Withins*. No, not till your Verdict.

Mr. Bar. *Gregory*. No, no, Mr. *Cornish*, we can't.

Mr. *Cornish*. I had a Witness more that was very material, but I would not offend your Lordship: Mr. *Rumsey* said Mr. *Sheppard* held the Candle.

Mr. Just. *Withins*. Why did not you call him? You call'd a great many impertinent Witnesses.

Mr. *Cornish*. I was not come to him, I would have call'd them in Order.

Mr. Bar. *Gregory*. Why did not you produce him then?

Mr. *Cornish*. Because your Lordship seem'd to be angry.

Mr. Bar. *Gregory*. No, not at all.

Mr. *Cornish*. I did forbear purely upon that Account. I pray, my Lord, let him be call'd.

Mr. Bar. *Gregory*. Here were eight Judges and my Lord Chief Justice, and now here is only two: Do you think we will defer things of this Nature? It is never asked. Apply your self to the Judges: It is a strange thing.

Mr. Just. *Withins*. This is only to delay Time.

Mr. Bar. *Gregory*. If he does so, the Jury must go out again.

Mr. Just. *Withins*. After the Jury hath been out an Hour, we must have new Allegations.

Mr. *Cornish*. I was tender of offending.

Mr. Just. *Withins*. That is a Reflection upon the Court; under favour, Mr. *Cornish*, I told you my self over and over to call your Witnesses.

Clerk. *Elizabeth Gaunt*, hold up thy Hand.

Mrs. *Gaunt*. My Lord, I beseech you, hear me, you won't take Advantage I hope of me.

Mr. Just. *Withins*. I declare my Opinion freely, it ought not to be done.

Recorder. I think she ought to have it as well as t'other.

Mr. Bar. *Gregory*. You call never a Witness.

Mrs. *Gaunt*. No, Sir, I could not tell, I have some to call.

Mr. Just. *Withins*. I am of that Opinion you ought to take the Verdict.

The Judges came again upon the Bench, and the Jury found Mrs. *Gaunt* guilty.

L. C. J. *Jones*. Is *Rumsey* come in?

Captain *Richardson*. I have sent for him, he will be here presently.

Mr. *Cornish*. My Lord, I must pray your Lordship, to consider my Tenderness in offending you, which made me omit calling Mr. *Sheppard*; I had him in my Paper, he is in my Paper.

L. C. J. *Jones*. Don't you begin your Preface something untowardly, as though the Court would not do you all the Kindness possible; half a dozen Times you were admonish'd to call for pertinent Witnesses. You did call, I am sure, a great many impertinent Witnesses. Had you Mr. *Sheppard*'s Name in your Paper?

Mr. *Cornish*. Yes my Lord, but I was tender of offending; pray my Lord, be pleased to remember Mr. *Rumsey*'s Evidence.

L. C. J. *Jones*. Is Mr. *Rumsey* here? Sir, pray hold your Tongue.

Mr. At. Gen. I would acquaint you, my Lord, I sent a Subpœna for Mr. *Sheppard*, but could not find him, but I understand that Mr. *Cornish*'s Son was with him yesterday, and he has absconded; this I will give an Account of upon Oath: This my Lord, is a dangerous Practice after Examination, and after the Jury is withdrawn.

Mr. *Cornish*. I pray do not aggravate the Matter.

Mr. At. Gen. I must do my Duty for the King.

Mr. *Cornish*. My Son went to him, and found him at Church.

Mr. At. Gen. Now Mr. *Atterbury* is gone. I desire you should have all your right, but not have Tricks put upon the King's Evidence.

Mr. *Cornish*. His Evidence was, Mr. *Sheppard*'s holding the Candle.

Mr. Just. *Levinz*. For God's sake, could you examine so many to your Reputation, and forget an Evidence that was material? but I must tell you, if you will bring Mr. *Sheppard* to be exa-

mined, sure it is requisite, that the Witness that swears what you did there, should be face to face with him; therefore Mr. *Rumsey* should be here certainly.

Mr. Just. *Withins*. It is fit to have *Atterbury* here, to enquire if he did abscond; if Mr. *Cornish*'s Son was with him, and he absconded upon that Account, it is very material. This is a meer Trick put upon the King's Evidence.

L. C. Baron. Mr. *Cornish*, if you intend to produce Mr. *Sheppard* for that, to contradict *Rumsey*'s Testimony, I wonder that you should miss him, without you have had some Notice since.

Mr. *Cornish*. My Lord, I was not come to him: my Lord, though I have such a vile Charge, I am perfectly innocent.

Mr. Just. *Withins*. Now you may see what we have got.

Mr. *Cornish*. I beseech you, my Lord, consider me, it is as improbable a thing as any in the World.

L. C. J. *Jones*. This is running over the same thing twenty Times. Where is *Sheppard*?

Mr. *Cornish*. He was here within this quarter of an Hour.

Mr. Just. *Withins*. Mr. *Cornish*, is this fairly done, when you said he was upon the Spot?

Mr. At. Gen. He was subpœna'd by you, he would not be found to be subpœna'd by the King.

Mr. Just. *Levinz*. To make the Court come down, and then to have no Notice of the Person at all; sure you may give the Court leave to take Notice, that they are not civilly dealt with.

L. C. J. *Jones*. Who told you he was here?

Mr. *Cornish*. This Gentleman says, he saw him. Pray, my Lord, don't be offended.

L. C. J. *Jones*. I never saw such a thing, the Time was, you and your Partner would not have allowed it.

Mr. At. Gen. If he comes, I will give him his Oath.

Mr. *Cornish*. My Lord, here is Major *Richardson* can bear Witness, I said I must subpœna Mr. *Sheppard*; I named him before Major *Richardson* again and again, and said, I must not omit him.

Mr. Just. *Levinz*. Sir, I tell you what; you han't shewed so little Skill to-day here, but that you could maintain so long a Discourse with Mr. *Rumsey* as you were allow'd to do, and should not offer to call *Sheppard* to contradict him; you dwelt half an hour upon it.

Mr. Bar. *Gregory*. And relied only upon the Improbability of the thing.

Mr. *Rumsey*. There is another Gentleman in the Tower, the late Lord *Grey*, that was in Company when the Declaration was read.

Mr. Bar. *Gregory*. Have you been in Company at *Sheppard*'s?

Mr. *Cornish*. I have been at *Sheppard*'s very often. Pray, my Lords, don't be offended, my Life will do you no good, I don't know but here is a Gentleman that hath been in my Company forty Times over since that Business.

Mr. *Rumsey*. Pardon me, Mr. *Cornish*, not above three Times since, and then there was other Company.

Mr. Just. *Withins*. It is impossible for any, but those that were Complices with you, to give such Evidence; and, because they were your Complices, now you won't believe them.

L. C. J. Jones. Are you subpcena'd by Mr *Cornish*?

Mr. Sheppard. I have a subpcena from the King.

L. C. J. Jones. But were you subpcena'd by Mr. *Cornish*?

Mr. Sheppard. Yes.

Mr. At. Gen. When?

Mr. Sheppard. Last Night; this Morning I was not at home.

Mr. At. Gen. Was Mr. *Cornish's* Son with you yesterday in the Afternoon?

Mr. Sheppard. Yes, Sir.

Mr. At. Gen. And what Discourse had you with his Son?

Mr. Sheppard. He was very pressing and urgent with me to be here to-day, and I told him, I could not tell whether I could or not.

Mr. At. Gen. Is there any Account between you and Mr. *Cornish*?

Mr. Sheppard. Yes, Sir.

Mr. At. Gen. To what Sum?

Mr. Sheppard. We were always Trading.

Mr. At. Gen. That is very true, you were Trading——To what Value?

Mr. Sheppard. About one or two hundred Pounds.

Mr. At. Gen. Who is Debtor?

Mr. Sheppard. I am Debtor.

Mr. Sol. Gen. Mr. *Sheppard*, since when did you contract that Debt?

Mr. Sheppard. Since when, Sir?

Mr. Sol. Gen. Ay.

Mr. Sheppard. I believe it was some six or eight Months ago.

Mr. Sol. Gen. For what was it? Upon what Account?

Mr. Sheppard. For Cloth, Sir?

Mr. Sol. Gen. Was there no Money lent?

Mr. Sheppard. Money lent me?

Mr. Sol. Gen. Ay, Sir.

Mr. Sheppard. No, Sir.

L. C. J. Jones. Is the Debt due to Mr. *Cornish*?

Mr. Sheppard. My Lord, the Debt is due to him.

L. C. J. Jones. Or some body for whom he is a Factor?

Mr. Sheppard. I am indebted to Mr. *Cornish*, for whom it is I can't tell.

Mr. Sol. Gen. Did you leave Word, whither you went, when you went out yesterday?

Mr. Sheppard. No, Sir.

Mr. Sol. Gen. Which Subpcena was served first upon you?

Mr. Sheppard. Mr. *Cornish's* yesterday.

Mr. Sol. Gen. What time was it served upon you?

Mr. Sheppard. Presently after I came out of Church in the Afternoon, Sir.

L. C. J. Jones. What have you to say?

Mr. Cornish. My Lord, Mr. *Rumsey* was pleased to give in his Evidence, that I had been at a Consult or Meeting at Mr. *Sheppard's* House, where Mr. *Ferguson* should pluck out a Declaration out of his Bosom, and should read it by the Candle, and Mr. *Sheppard* should hold the Candle to him while he read it.

L. C. J. Jones. Do you remember Mr. *Cornish* was ever at your House?

Mr. Sheppard. At one of those Meetings that was at my House, Mr. *Cornish* came into the House to speak a few Words with the Duke of *Monmouth*, or some other, I can't be positive in that, it is so many Years ago, and did not stay half a quarter of an Hour in the House; I came up Stairs, and went out with him, and there was not one Word read, and no Paper seen while he was there.

Mr. Just. Levinz. Was Mr. *Cornish* in the Room with the Duke of *Monmouth* and those others?

Mr. Sol. Gen. Mr. *Sheppard*, do you remember that the late Duke of *Monmouth*, the Lord *Ruffel*, the Lord *Grey*, and Sir *Thomas Armstrong* were there together, and the Declaration read?

Mr. Sheppard. I remember there was a Declaration read, *Ferguson* pull'd out a Declaration out of his Shoe, he pull'd off his Shoe, and pull'd it out there.

Mr. Sol. Gen. Do you remember Mr. *Cornish* was by, any Time that Night?

Mr. Sheppard. Truly I can't say whether it was that Night when the Paper was read, but I do positively say, that there was no Paper read, for he was not looked upon to be of the Company: Mr. *Ferguson* told me positively, there is the Duke of *Monmouth*, my Lord *Grey*, my Lord *Ruffel*, Sir *Thomas Armstrong*, Col. *Rumsey*, my self, and you.

Mr. Sol. Gen. Who did Mr. *Cornish* come to speak with, when he came to your House?

Mr. Sheppard. Truly I don't know whether it was with the Duke of *Monmouth*.

Mr. Sol. Gen. How came Mr. *Cornish* to know the Duke of *Monmouth* was there?

Mr. Sheppard. Truly my Memory will not call it.

Mr. Sol. Gen. Did his Coach stand publickly at your Door?

Mr. Sheppard. Whose Coach?

Mr. Sol. Gen. The late Duke of *Monmouth's*.

Mr. Sheppard. No, Sir, they all came private, there was no Coaches at the Door as I saw, I let none of them in.

Mr. Sol. Gen. Was Mr. *Cornish* but once there, when the Duke of *Monmouth* was there?

Mr. Sheppard. But once.

Mr. Sol. Gen. Did he call the Duke of *Monmouth* out to him.

Mr. Just. Street. How came you to carry him up to the Duke of *Monmouth*, if he were none of the Company?

Mr. Sheppard. Mr. *Cornish* did go up into the Room and spake to the Duke of *Monmouth*, or some other Person, but I think the Duke of *Monmouth*.

Mr. Sol. Gen. Do you remember he was there in Company, when Col. *Rumsey* was there?

Mr. Sheppard. No, I can't remember that.

Mr. Rumsey. My Lord, when I came to Mr. *Sheppard's* House, Mr. *Sheppard* came down and fetch'd me up, and I deliver'd my Message I had to the Duke of *Monmouth*, and to the Company, and indeed I was not a quarter of an Hour there, I believe; but by that Time I had spoke my Words, some-body knock'd at the Door, and Mr. *Sheppard* went down, and immediately brought up Mr. *Cornish* into the Room, without asking a Question of any body: and when he was come into the Room, Mr. *Cornish* said, he could not come sooner, because he had Business; and could not stay, because there was a Committee for the Management of the Charter, to meet that Night, and there was a Necessity of his being there, because there was never another Alderman in Town, and there must be an Alderman there.

Mr. At. Gen. Mr. *Sheppard*, do you remember any thing of that?

Mr. Sheppard. No, Sir, I do not remember it, I'll assure you.

Mr. Sol. Gen. Did you let him in at the Door?

Mr. Sheppard. No, Sir, I had Word brought me up Stairs, that Alderman *Cornish* was below; and I went down, and brought him up.

Mr. Sol.

Mr. Sol. Gen. Did you ask for Mr. Cornish to come up?

Mr. Sheppard. I don't remember I did: When Mr. Cornish was there, there was not above three Persons.

Mr. Sol. Gen. Who were they?

Mr. Sheppard. There was the Duke of Monmouth, and there was Mr. Ferguson, and truly I can't tell whether t'other was my Lord Russel or my Lord Grey.

Mr. Just. Levinz. You acknowledge now, Sir, you did carry the Prisoner up to the Duke of Monmouth and those Persons: Did you use to carry all Persons up there?

L. C. J. Jones. There was a Cabal of Rebels met together, and you go and bring up this Man to them, without any leave or licence from them; which is incredible certainly, unless you knew him to be one of the Company, and equally engaged with them.

Mr. Sol. Gen. Mr. Sheppard, you say, when Mr. Cornish came up, there was not half the Company there. Had they been there, or were not they yet come?

Mr. Just. Withins. Look you, Sir, it is marvellous how Mr. Cornish, if he were none of the Parties, should have notice that the Duke of Monmouth was there, who came in privately at the Back-Door, and came to speak with him there.

Mr. Sheppard. My Lord, I have no Back-Door.

Mr. Just. Withins. He came in privately.

Mr. Just. Levinz. Mr. Sheppard, I think I heard you say; they came privately without their Coaches.

Mr. Sheppard. Yes, Sir, they had no Coaches.

Mr. Just. Levinz. They came privately, I suppose, that no body should know they were there.

Mr. Sheppard. I suppose so, Sir.

Mr. Just. Levinz. Why then did you carry Mr. Cornish up? If you were below in the House, he might come about your own Business; but to be carried into the Chamber where they were, looks as if it were about their Business.

Mr. Cornish. I never heard any thing of the Business, my Lord.

Mr. At. Gen. So far, Gentlemen, you remember he confirms what Mr. Rumsfy says; that Gentleman denied he was there with the Duke of Monmouth.

Mr. Cornish. Pray Mr. Attorney don't strain, I have Dealings with Mr. Sheppard, and have often been there, but never at any Meeting.

Mr. At. Gen. He says, you spake with the Duke of Monmouth.

Mr. Cornish. I never saw the Declaration, he declares it.

L. C. J. Jones. Had you any Dealings upon account with the Duke of Monmouth?

Mr. Cornish. Never for a Farthing.

Mr. Just. Withins. What Business had you with him then?

Mr. Cornish. I don't know but I might enquire for him in other Places.

L. C. J. Jones. Your own Witness carried you up.

Mr. Cornish. My Lord, if he did, I did not stay; he says Mr. Sheppard held the Candle.

Mr. Just. Withins. Mr. Cornish, he confirms great part of what Mr. Rumsfy says.

Mr. Cornish. Not one Tittle, for he declares I was not of the Company.

L. C. J. Jones. He says no such thing.

Mr. Sheppard. My Lord, to my Knowledge, I can safely say, he knows nothing of it.

L. C. J. Jones. And yet you could bring him up among them.

Mr. Sheppard. My Lord, I declare I never spake any thing to him in my Life about the Business, nor never in any Company.

Mr. Just. Withins. It is plain, Mr. Rumsfy says he was the Man that brought you up: How should Mr. Rumsfy know that?

Mr. At. Gen. Mr. Sheppard, I will ask you this Question: Had you order from that Company not to bring up any Person? Do you remember you swore so at a former Trial?

Mr. Sheppard. I remember when I was there, they desired I would let none of my Servants up, and that I would go down and fetch up what they wanted, and I fetch'd up Wine and what they wanted.

Mr. Sol. Gen. Mr. Sheppard, why were none of your Servants to come up?

Mr. Sheppard. Because they were in private, Sir.

Mr. Sol. Gen. Were Strangers to come up therefore?

Mr. Sheppard. It is so long ago, I cannot remember.

Mr. Just. Levinz. They came privately, without Coaches, because none should know they were there, and you carry Mr. Cornish up to them.

Mr. Cornish. I think this Witness is confronted.

L. C. J. Jones. Hold your tongue, Sir, he hath not done yet.

Mr. Rumsfy. My Lord, as soon as Mr. Cornish had made his excuse for his not coming sooner, and that he could not stay, I could not make that, and Mr. Cornish can't say I would do any thing maliciously or spitefully against him; my Lord, as soon as he had done, all the Company went about him, and some-body did tell him, They would tell him what they had done: they told him the Declaration had been read; that Mr. Ferguson had prepared it, and they said, Look you, Mr. Cornish, you shall hear it read; and with that, this Gentleman, though he denies it, did take the Candle, and held it: they did not come to the Table, but the Company stood round while Mr. Ferguson pull'd it out of his Bosom.

Mr. Just. Withins. Mr. Sheppard, you are very forward.

Mr. At. Gen. My Lord, I would ask Mr. Sheppard a Question.

Mr. Rumsfy. My Lord, the Declaration was read, and Mr. Cornish did approve of it, and did say, with that small Interest, or little Interest, or Words to that effect, that he had, he would assist.

Mr. At. Gen. I wonder why you did not give me notice when you came in the Morning. Why did not you give notice?

Mr. Sheppard. I was here attending from eleven a-clock till half an hour after three.

Mr. At. Gen. Did you send in any Word?

Mr. Sheppard. I could not tell who to send in: I was here expecting to be call'd.

Mr. Just. Street. You have had a favour that no Man ever had.

Mr. Sol. Gen. Gentlemen, there hath been a very great Indulgence given to the Prisoner, and it is to shew you what Tendernefs a Court of Justice hath, and always will have, of the Lives of the King's Subjects: After a full Evidence, though he had neglected his Defence, yet you were again sent for into Court, to hear what further Evidence he had to offer to you. I cannot but observe,

serve, this looks like a subtle Contrivance on the Prisoner's Part; you see what Endeavours have been made by Mr. Attorney-General, to have had him here a Witness for the King; you have observed he told you he had a Subpœna for him, but he was absent; in what Company he was absent yesterday he hath told you, with Mr. Cornish's Son: this Morning he was not to be found, after he had received this Subpœna, and a Subpœna from Mr. Cornish; he stays without, and gives no notice, but when you are withdrawn, can send Intelligence to Mr. Cornish, that he hath something to say, that he hopes will excuse him: now what that is, I must beg you a little to observe. Truly I am very glad for the Satisfaction of all Men, that Mr. Sheppard hath now been here, and he is so far from invalidating any one part of the Testimony, that by all the Circumstances you can collect from this Evidence that is given, it is a Corroboration of it. Mr. Cornish was accused of being present at Consultations that have been held against the Life of the King, and for raising Rebellion at Mr. Sheppard's House; his excusing his not coming there is a sufficient Argument to prove he was privy to their Meeting; he hath gone on further, and proved to you the reading the Declaration. Now what says Sheppard to this Witness? Mr. Cornish, by the way, I must observe to you, before did deny his being there; he had been sometimes in company with *Ferguson*, but he did not like the Man, he says, because of his Morals: now the Witness he hath produced hath given you this Testimony, that Mr. Cornish hath been there in that Company, that he came in such a Manner, that no Man but must be satisfied he was privy to their Designs, and did know of their Meeting, for he comes when the Duke of *Monmouth*, and the rest of the Conspirators were there met in private, with a direct charge to Mr. Sheppard, that is the Witness, that they should be so private, that no one Servant should come up into the Room: yet Mr. Sheppard tells you, that when Mr. Cornish came he carried him up into the Room, without so much as acquainting any one of the Company that Mr. Cornish had a desire to come, but brings him up as if he were (and I make no doubt but you will imagine, he was) one of the Company. When he comes there, he says his Business is with the Duke of *Monmouth*, the Head of that Conspiracy, and he himself tells you he never had any Dealings with the Duke of *Monmouth* in his Life. What can a Man imagine of that Man that had no Dealings with the Duke of *Monmouth*, to find him out in a place, where no Mortal could know, and none was to know, and coming to him at that Time and at that Place, under those Circumstances of Concealment, no Man almost but out of his own Mouth must believe that he was privy to that Conspiracy: therefore though this Witness doth seem to forget some Part of the Evidence, the reading the Declaration, and holding the Candle; yet these are such Circumstances that in themselves do carry a Proof of the Charge, and do confirm all the rest that the Witness hath said; and this must be a great Satisfaction to you, that he was there present and privy to that Design. And so I leave it to your Consideration.

Then the Jury withdrew for a short time, and returning, brought Mr. Cornish in guilty, and found

One Hundred and Forty Pounds for the King in Mr. Sheppard's Hands.

Clerk. Set *Elizabeth Gaunt* to the Bar.

[Which was done.]

Cryer. O-Yes, all Manner of Persons are commanded to keep silence, whilst Judgment is giving, upon Pain of Imprisonment.

Clerk. *Elizabeth Gaunt*, hold up thy Hand, thou standest guilty of High-Treason, &c.

Recorder. You *Elizabeth Gaunt*, you have here been indicted for that great Crime of High-Treason, and that particular Part of it, for harbouring, and comforting, and assisting, and cherishing of Traitors, more especially of one *Burton*; you have had your Trial, and a very fair Trial, and upon that, the Jury have found you Guilty: It is the Duty of my Place to pronounce the Sentence the Law hath provided for such high Crimes as these are, and that is no other but this:

That you are to be carried back to the Place from whence you came, from thence you are to be drawn upon a Hurdle, to the Place of Execution, and there you are to be burnt to death; and the Lord have Mercy upon your Soul.

Mrs. *Gaunt*. I say that this Woman did tell several Untruths of me.

Recorder. Is that all you have to say?

Mrs. *Gaunt*. I don't understand the Law.

Clerk. Bring *Henry Cornish* to the Bar. *Henry Cornish*, hold up thy Hand, &c.

Mr. *Cornish*. My Lord, now the Law hath past upon me, I do humbly pray your Lordship, and this honourable Bench, that you will be pleased to intercede for me with his Majesty, I shall lead a peaceable, quiet, and dutiful Life: and I hope, when you come to reflect upon what hath been said to-day, that perhaps you will be of another Mind, and have more Charity for me than you had upon my Trial; for in the Simplicity of my Heart, and in the Presence of God, I do declare, I am innocent: and if your Lordship, and this honourable Bench, intercede with his Majesty, it will be an eternal Obligation upon me, and I shall live faithfully, peaceably, and loyally as long as I live. I presume to beg this, and I promise myself, and hope it will stir up the Hearts of some Persons, that they will not leave me destitute of Friends in such a Case as this; having a Wife and several Children, it will be an Act of Charity.

Recorder. The Court does give you your Request, and if there be any Misery brought upon your Family, it is done by yourself*.

Clerk. *William Ring*, hold upon thy Hand, &c.

Mr. *Ring*. I had no notice given me, an't please your Lordship.

Recorder. Where is the Executioner, is he here?

Executioner. Yes.

Recorder. Why don't you do your Duty to Mr. *Cornish*?

Clerk. *John Fernley*, hold up thy Hand; thou standest convicted of High-Treason, for traitorously harbouring one *James Burton*; what canst thou say for thyself? &c.

Mr. *Fernley*. It is very hard measure I have had, I have nothing to say, but the King's Mercy.

Recorder. Is that all you have to say?

Mr. *Fernley*. I have nothing but the King's Mercy.

Recorder.

* See State Trials, Vol. VIII. p. 457.

Recorder. Tie him up then, tie him up.

Cryer. O-Yes, all manner of Persons are commanded to keep silence, whilst Judgment is giving, upon pain of Imprisonment.

Recorder. You, the several Prisoners at the Bar, you have been severally indicted here of the high Crime of Treason. For you, Mr. Cornish, I apply myself first to you, your Crime is for Treason that was committed in his late Majesty's Lifetime, being one of those notorious Conspirators that designed to raise Rebellion, and others some of them immediately designed the Life of his Majesty that then was, and his present Majesty, that was the Design of some of them; and others, they had another part, that was to raise Rebellion, and particularly some of them in and about this City, and it was carried on some time before it was discover'd, may be a Year or more, under Colour and Pretence of Law: For so did they invade the Government first of all by packing of Juries, there was the Foundation laid whereby to bring on that Business, which they had at last design'd, when they could bring it to a ripe Head. Too many Persons in that business, I believe, were very busy, meddling with that they had not to do with; clubbing and caballing how to bring their Designs about, in opposition to the Government, not to support it in the least, but to overthrow it if it were possible: But then, at last, they must take another Course, for no longer could they carry it on by pretence of Law, as you have heard to-day: Now we must take other Measures, and take down-right Blows. This is the Business, Mr. Cornish, that you have been indicted for; and, I must tell you, whatever Apprehensions you have to the contrary, and may please yourself in, I am sorry to see such a sort of Pleasure in your Countenance, as if you had had no Favour shewed you. I believe the Court hath shewed you more Favour, and had more Patience with you, than ever any Man that stood in your Place had; for calling a Witness after the Jury hath been out, is a thing I never saw a Precedent for: And I am glad it was done, for I think it hath clear'd the thing beyond all manner of Contradiction; before it looked something dark for want of *Sheppard*, and so it is a Happiness that that Man was called to convince you, of many things that you protested so solemnly against, which I am sorry to see in you, in this Condition that you are, to make such solemn Protestations, and afterwards call a Witness to confront you in them. For the other two, here is Mr. Ring, is very notorious for harbouring a couple of Traitors, knowing from whence they came; and if it were not for such Persons as these are, that do harbour them when they fly, it may be there would not be so many bold Attempts to commit such Crimes as these are: To provide for them, and nourish them, and comfort them, after they have committed their Villanies, this does encourage them to commit their Villanies as they do, and so I reckon Harbourers to be worse than Traitors themselves, they are like Receivers to Thieves; there would not be so many Traitors, if there were no Harbourers: You have been convicted of these great Crimes; it is too late, and not fitting to spend time any longer, but to pronounce the several Sentences against you, which is this:

You must, every one of you, be had back to the Place from whence you came, from thence you must be drawn to the Place of Execution, and there you must severally be hanged by the Necks, every one of

you by the Neck till you are almost dead; and then you must be cut down, your Intraills must be taken out and burnt before your Faces, your several Heads to be cut off, and your Bodies divided into four Parts, and those to be disposed of at the Pleasure of the King; and the Lord have Mercy upon your Souls.

*Fernley** and *Ring* were reprieved, but *Cornish* and *Gaunt* were ordered for Execution; accordingly four days after, viz. *October 23.* *Henry Cornish* was drawn on a Sledge to *King's-street* end in *Cheapside*, where a Gibbet was erected on purpose, at which Place he spoke as follows:

“ I Am come here this Day, condemn'd to die;
 “ but God is my Witness, the Crimes laid to
 “ my charge were falsely and maliciously sworn
 “ against me by the Witneses; for I never was at
 “ any Consult, nor any Meeting, where Matters
 “ against the Government were discours'd of: I ne-
 “ ver heard nor read any Declaration, nor ever act-
 “ ed wilfully any thing against the Government. I
 “ confess, through the Justice of God, my private
 “ Sins have brought me to this infamous End; yea,
 “ it were just with God, not only to deprive me
 “ eternally of his Presence, but to condemn me to
 “ eternal Torments; but thro' Christ, I hope to be
 “ eternally bless'd: Yet, as to the Crimes for which
 “ I suffer, on the Word of a dying Man, I am al-
 “ together innocent. I bless God I was from my
 “ younger Years brought up in, and have for some
 “ Years continu'd a Protestant, in the Communion
 “ of the Church of *England*; in which Communion
 “ I now die. I have often partaken in the Ordi-
 “ nances, the blessed Effects and Comfort thereof
 “ I now feel in this my Agony. I bless God I was
 “ born under a Government, in the Constitution of
 “ which I did ever acquiesce, and in which I was
 “ once a Member; at which time I did, according
 “ to the best of my Understanding—[*Here he was*
 “ *interrupted by the Sheriff.*—] I bless God I was
 “ born in a Land of Light, where the Gospel hath
 “ been preach'd in Power and Purity; he might
 “ have brought me forth in a Land of Darkness and
 “ Ignorance; but blessed be God for Jesus Christ.—
 “ *Then he intreated the Sheriff to intercede with his*
 “ *Majesty to be kind to his poor Wife and Children:*
 “ *The Sheriff promised him to wait on his Majesty the*
 “ *next Day about it.* He reply'd, Mr. Sheriff, I
 “ thank you, the Lord reward you a thousand fold;
 “ the Lord put it into the Hearts of you to be kind to
 “ the Widows and Fatherless; it is your Duty: The
 “ Lord put it into the Hearts of all good People to
 “ pray for me.”

More could not be taken, by Reason of the Noise of the People, and Interruption of one of the Sheriffs.

When he had made an end of Speaking, the Executioner did his Office; his Head was afterwards fix'd upon the *Guild-Hall*. His Attainder was reversed by Act of Parliam. first of *Will. & Mar.* † and the Witneses lodg'd in remote Prisons.

The same Day *Elizabeth Gaunt* was executed according to her Sentence. She left the following Paper.

Newgate, 22 October, 1685.

“ NOT knowing whether I should be suffered
 “ or able, because of Weaknesses that are
 “ upon me, through my hard and close Imprison-
 “ ment, to speak at the place of Execution, I write
 “ these few Lines, to signify I am well reconciled
 “ to the Way of my God towards me, though it
 “ be in Ways I looked not for, and by terrible
 “ things,

* *Fernley* was afterwards executed at Tyburn.

† See State Trials, Vol. VIII. p. 518.

“ things, yet in Righteousness ; for having given
 “ me Life, he ought to have the Disposing of it,
 “ when, and how he pleaseth to call for it ; and I
 “ desire to offer up my All to him, it being but my
 “ reasonable Service ; and also the first Terms that
 “ Christ offers, that he that will be his Disciple, must
 “ forsake all and follow him. And therefore, let
 “ none think it hard, or be discouraged, at what
 “ hath happened unto me ; for he doth nothing
 “ without Cause, in all that he hath done unto us ;
 “ he being Holy in all his Ways, and Righteous
 “ in all his Works ; and it is but my lot in com-
 “ mon with poor desolate *Sion* at this day : neither
 “ do I find in my Heart, the least Regret of any
 “ thing that I have done, in the Service of my Lord
 “ and Master Jesus Christ, in favouring and suc-
 “ couring any of his poor Sufferers, that have shew-
 “ ed favour to his righteous Cause ; which Cause,
 “ though it be now fallen and trampled on, as if
 “ it had not been anointed, yet it shall revive,
 “ and God will plead it at another rate, than yet
 “ he hath done, with all its Opposers and malicious
 “ Haters : and therefore let all that love and fear
 “ him, not omit the least Duty that comes to hand,
 “ or lieth before them, knowing that Christ hath
 “ need of them, and expects that they should serve
 “ him. And I desire to bless him that he hath made
 “ me useful in my Generation, to the comfort and
 “ relief of many distressed ones, that the Blessing of
 “ those that have been ready to perish, hath come
 “ upon me, and I have been helped to make the
 “ Heart of the Widow to sing ; and I bless his holy
 “ Name, that in all this, together with what I was
 “ charged with, I can approve my Heart to him,
 “ that I have done his Will, though I have crossed
 “ Man’s Will ; and the Scripture that satisfied me
 “ in it, is the 16th of *Isa.* 3, 4. *Hide the Out-casts,*
 “ *betray not him that wandereth ; let my Out-casts*
 “ *dwell with thee.* *Obadiah* ver. 13, 14. *Thou shouldst*
 “ *not have given up him that escaped, in the Day of*
 “ *Distress.* But Man saith, You shall give them up,
 “ or you shall die for it. Now whom to obey,
 “ judge ye. So that I have cause to rejoice and be
 “ exceeding glad, in that I suffer for Righteousness
 “ sake, and that I am accounted worthy to suffer
 “ for well-doing, and that God hath accepted any
 “ Service from me, that hath been done in Sincer-
 “ ity, though mixed with manifold Weaknesses
 “ and Infirmities, which he hath been pleased for
 “ Christ’s sake to cover and forgive. And now,
 “ as concerning my Fact, as ’tis called, alas, it is
 “ but a little one, and might well become a *Prince*
 “ to forgive ; but, *He that sheweth no Mercy, shall*
 “ *find none* : and I may say of it, in the Language
 “ of *Jonathas*, I did but taste a little Honey, and
 “ lo, I must die for it ; I did but relieve a poor,
 “ unworthy and distressed Family, and lo, I must
 “ die for it. I desire in the Lamb-like Will, to
 “ forgive all that are concerned ; and to say, Lord
 “ lay it not to their Charge ; but I fear and be-
 “ lieve, that when he comes to make Inquisition
 “ for Blood, mine will be found at the door of the
 “ furious * Judge, who, because I
 “ * Within. “ could not remember things, through
 “ my Dauntedness at *Burton’s* Wife and Daughter’s
 “ Witness, and my Ignorance ; took advantage
 “ thereat, and would not hear me, when I had
 “ called to mind, that which I am sure would have
 “ invalidated their Evidence ; and tho’ he granted
 “ some things of the same nature to another, yet
 “ he granted it not to me. My Blood will be
 “ also found at the door of the unrighteous Jury,
 “ VOL. IV.

“ who found me guilty upon the single Oath of an
 “ outlawed Men ; for there was none but his Oath
 “ about the Money, who is no legal Witness, tho’
 “ he be pardoned, his Outlawry not being recall’d :
 “ and also the Law requires two Witnesses in point
 “ of Life ; and then, about my going with him
 “ to the Place mentioned, it was, by his own
 “ Words, before he could be outlawed, for it was
 “ two Months after his absconding ; and though
 “ in a Proclamation, yet not High-Treason, as I
 “ have heard : so that I am clearly murdered by
 “ you. And also bloody Mr. *Aterbury*, who so
 “ insatiably hunted after my Life ; and tho’ it is
 “ no Profit to him, yet through the Ill-will he
 “ bore me, left no Stone unturned, as I have
 “ ground to believe, until he brought me to this ;
 “ and shewed favour to *Burton*, who ought to
 “ have died for his own Fault, and not to have
 “ bought his Life with mine. And lastly, *Richard-*
 “ *son*, who is cruel and severe to all under my Cir-
 “ cumstances, and did at that time, without all
 “ Mercy or Pity, hasten my Sentence, and held up
 “ my Hand that it might be pronounced ; all which
 “ together with the * Great one of all,
 “ by whose Power all these, and mul- * *K. James II.*
 “ titudes of more Cruelties are done, I do heartily
 “ and freely forgive, as done against me : But as ’tis
 “ done in an implacable Mind against the Lord
 “ Christ, his righteous Cause and Followers, I leave
 “ it to him who is the Avenger of all such Wrongs,
 “ and hath said, *I have raised up one from the*
 “ *North, and he shall come upon Princes as upon Mor-*
 “ *tar, and as the Potter treadeth Clay,* *Isa.* xli. 25.
 “ *He shall cut off the Spirit of Princes, and be ter-*
 “ *rible to the Kings of the Earth,* *Psal.* lxxvi. 12.
 “ And know this also, that tho’ you are seemingly
 “ fixed, and because of the Power in your hands,
 “ and a weighing out your Violence, and dealing
 “ with despightful Hand, because of the old and
 “ new Hatred, by impoverishing, and by every
 “ way distressing those you have got under you ;
 “ yet unless you secure Jesus Christ, and his holy
 “ Angels, you shall never do your business, nor
 “ your hands accomplish your Enterprizes ; for
 “ he will come upon you e’er you are aware, and
 “ therefore, O that you will be wise, instructed,
 “ and learn, is the Desire of her that finds no
 “ Mercy from you,

Elizabeth Gaunt.

P O S T S C R I P T.

“ SUCH as it is, you have it from her, who
 “ hath done as she could, and is sorry she can
 “ do no better ; hopes you will pity and cover
 “ weakness, shortness, and any thing that is want-
 “ ing, and begs that none may be weakned or
 “ humbled at the lowliness of my Spirit ; for God’s
 “ Design is to humble and abase us, that he alone
 “ may be exalted in this Day : and I hope he will
 “ appear in the needful time, and it may be re-
 “ serves the best Wine till last, and he hath done
 “ for some before me ; none goeth to Warfare at
 “ his own Charge, and the Spirit bloweth, not
 “ only where, but when it listeth ; and it becomes
 “ me, who have so often grieved, quenched, and
 “ resisted it, to wait for and upon the Motions of
 “ the Spirit, and not to murmur : but I may
 “ mourn, because through want of it, I honour
 “ not my God, nor his blessed Cause, which I have
 “ so long loved and delighted to love ; and repent
 “ of nothing about it, but that I served him and
 “ it no better.

Y

The



CXXXVII. *The Trial of CHARLES BATEMAN, Surgeon, at the Old-Bailey, for High-Treason, December 9. 1685. 1 Jac. II.*

THE Sessions of Peace, Oyer and Terminer, and Goal-Delivery of *Newgate*, for the City of *London* and County of *Middlesex*, beginning at *Justice-Hall* in the *Old-Bailey*, on the 9th of *December*, 1685. *Charles Bateman*, against whom an Indictment of *High-Treason* had been found, for conspiring the Death of the late King, &c. was brought in the Custody of the Keeper of *Newgate* in order to his Arraignment; and being ordered to hold up his Hand, he desired that he might first say something for himself, in order to put off his Trial, but was told by * Mr. Recorder, he must plead before he could be heard. Whereupon desiring to know whether he might have the same advantage after his Pleading as before, as to gain longer time for his Trial; and being answered he might, he held up his Hand, and then the Indictment was read.

Mr. *Bateman* pleaded not guilty, and desired his Trial might be put off, saying, *He was not prepared to make his Defence*, and therefore prayed a longer time, saying, *He had been close Prisoner for the space of ten Weeks, and was over and above very much indisposed*; and further alledged, *he had had no Notice nor Pannel of the Jury*. As for Notice of Trial, he was answered, that it was not usual to give any in that Court, but that he ought to have expected it, and prepared for it accordingly; and as for the Pannel, it was not deny'd him. Then he pray'd a Copy of the Indictment, but was told it could not be allowed; and upon his further alledging his unpreparedness and no notice of Trial, and the like, the King's Counsel urged that he had Opportunity enough to take notice of his Trial, for that it was upon an Indictment of the precedent Sessions. Then he asked what time he might have between his Arraignment and Trial; and was answered, as much as would stand with the conveniency of the Court: and after several Hours respite, he a second time was brought to the Bar, and then upon his humble Request, Pen, Ink, and Paper was allowed him, and his Son to assist him; and then were sworn to try the Issue,

<i>Richard Aley Esq;</i>		<i>Edward Rbedish</i>
<i>Richard Williams</i>		<i>George Lilburn</i>
<i>John Cannum</i>		<i>Daniel Fouls</i>
<i>Patrick Barret</i>		<i>Peter Floyer</i>
<i>John Palmer</i>		<i>Lawrence Cole</i>
<i>James Raynor</i>		<i>John Cooper.</i>

And he making no Exceptions to them, then the Indictment was read.

The Jurors, &c.

THAT *Charles Bateman*, late of the Parish of *St. Dunstan* in the *West*, in the Ward of *Faringdon Without*, *London*, Surgeon, as a false Traitor, against the most illustrious and excellent Prince, *Charles the Second*, late King of *Eng-*

land, Scotland, France and Ireland, Defender of the Faith, and his natural Lord; not having the Fear of God in his Heart, nor weighing the Duty of his Allegiance; but being moved and seduced by the Instigation of the Devil, the cordial Love, and true, due and natural Obedience, which a true and faithful Subject of our late Lord the King, towards him should, and of right ought to bear, altogether withdrawing and practising, and with all his Strength intending the Peace and common Tranquillity of this Kingdom to disquiet and disturb, and War and Rebellion against our late Lord the King, within this Kingdom to stir up, move, and procure; and the Government of our late Lord the King, of this Kingdom to subvert, and our said late Lord the King, from the Stile, Title, Honour, and Kingly Name, of the imperial Crown of this Kingdom to depose and deprive, and our said late Lord the King to Death, and final Destruction to bring and put; the 30th Day of *May*, in the 35th Year of his Reign, and divers other Days and Times, as well before as afterwards, at the Parish and Ward afore said, falsely, maliciously, devilishly, and traitorously, with divers other Rebels and Traitors to the Jurors unknown, did conspire, compass, imagine, and intend our said late Lord the King, then his supreme and natural Lord; not only of his Kingly State, Title, Power and Government of his Kingdom of *England*, to deprive and depose, but also our said late Lord the King to kill, and to Death to bring and put, and the ancient Government of this Kingdom to change, alter, and subvert; and a miserable Slaughter amongst the Subjects of our said late Lord the King to cause and procure, and Insurrection and Rebellion against our said late Lord the King to procure and assist. And the same most wicked Treasons and traitorous Conspiracies, Compassings, Imaginations and Purposes afore said to effect, and bring to pass; he the said *Charles Bateman*, as a false Traitor, then and there, (to wit) the said 30th Day of *May*, in the 35th Year afore said, and divers other Days and Times, as well before as afterwards, at the Parish and Ward afore said, falsely, unlawfully most wickedly, and traitorously, did promise and undertake to the said other false Rebels and Traitors then and there being present, *That he the said Charles Bateman would be assisting and aiding, in the taking and apprehending the Person of our said late Lord the King, and in taking and seizing the City of London, and the Tower of London, the Savoy, and the Royal Palace of White-Hall, against the Duty of his Allegiance, against the Peace, &c. and against the Form of the Statute in this Case made and provided, &c.*

Mr. *Phipps*. Counsel for the King, opened the Nature of it, and was seconded by Mr. Serjeant *Selby* and Mr. *Charles Moloy*; after which, Mr. *Josias Keeling* was sworn, whose Evidence was, that he

he had been at divers Meetings and Consults, where the Methods had been proposed for the Purposes aforesaid; and more particularly one time with *Rumbold* the *Malster*, since executed for *High-Treason*, and that then, three Papers were produced by *Rumbold* and opened, containing the Model of the Design, to divide the City into twenty Parts, and to raise five hundred Men in each Part, to be under one Chief, and nine or ten Subordinates whom he should appoint, the Names of the Lanes and Streets of each Division being likewise inserted therein; and at that time *Rumbold* proposed the business of the *Rye-House*, saying, *He had a House very convenient to plant Men in, to seize the King in his return from New-Market*, but that he somewhat boggled about the killing of the Postillion, which had been proposed the better to stop the Coach, because it looked too much like an Exploit in cold Blood. He further deposed, that he had been at divers other places where it had been discoursed to the same Effect, and that *Mr. Bateman* was looked upon as a Person fitting to manage one Division in order to an Insurrection, to seize the *Tower*, *City*, &c. This being the Sum of *Mr. Keeling's* Evidence; *Mr. Bateman* said, that what he had sworn, did not affect or charge any Treason upon him; and was answered by the Court that it did not, and bid the Jury take notice, that what *Mr. Keeling* had sworn, was only to the Conspiracy in general, and did not affect the Prisoner in particular.

Then *Thomas Lee* was sworn, and gave Evidence, That he being made acquainted with the Design by *Mr. Goodenough*, &c. and how the City was to be divided into twenty Parts and managed; and being asked who was a fit Man to manage one part, he nominated *Mr. Bateman*, and thereupon was desired to go to him, and speak with him about it as from *Mr. Goodenough*; and when he came to discourse him about that Affair, he apprehended very plainly, and that he was no Stranger to it, nor boggled to give his Assent, and seem'd much desirous to speak with *Mr. Goodenough* about it: That he likewise went one day to the late Duke of *Monmouth's* House with *Mr. Bateman*; and *Mr. Bateman*, after he had had some Discourse with one of the Duke's Servants, came to him and told him, the Duke was willing to engage in the Business, and assur'd him, that he had divers Horses kept in the Country, to be in a readiness when matters should come to Extremity; and from thence he went with him to the *King's-Head Tavern*, and there had discourse to the same effect: and from thence they came to the *Devil-Tavern* within *Temple-Bar*, where *Mr. Bateman* proposed the seizing the *City*, *Tower*, *Savoy*, *White-hall*, and the Person of the late King, and promised not to be wanting therein. At another time, he met him at the *Half-Moon-Tavern* in *Aldersgate-street*, where discoursing about the Condition the Conspirators were in, as to the intended Insurrection, he said, *If he could but see a Cloud as big as a Man's Hand, he would not be wanting to employ his Interest*: and that there were other Discourses tending to the Insurrection, but were broke off by the coming in of one *John Almege*, before whom *Mr. Bateman* would not discourse, because he knew not of his coming.

Mr. Lee being asked the Design of that Meeting, reply'd it was upon the account of carrying on the Conspiracy, and that *Mr. Bateman* had

told him, that he intended to take a House near the *Tower*, to place Men in, in order to surprize it, and that he had held divers Conferences with some Sea-Captains on that Affair; and that he had been with them at *Coffee-Houses*, &c. at sundry other times; but there, to prevent discovery, they spoke of the Design at a great distance.

To this Evidence, *Mr. Bateman* objected, that if he had been conscious of what was laid to his Charge, he was fit for *Bedlam*; saying, *He wonder'd if he had heard him speak such words, he had not accused him sooner*: but was answered that *Mr. Goodenough* was not to be had till after the Rebellion in the *West*; and that *Lee's* single Testimony in Case of *High-Treason* in so high a nature, was not sufficient.

Then *Mr. Richard Goodenough* was called, who being sworn, deposed, that being in Company with *Mr. Bateman* (to the best of his Remembrance) at the *King's-Head Tavern* in *St. Swithin's-Alley* near the *Royal-Exchange*, and having some Discourse about the intended Insurrection, and of *Wade* and others that had engaged to promote it; *Mr. Bateman* not only approv'd of the Design, but promised to use his Interest in raising Men; and not only to be assisting in the Division allotted him, but in surprizing the *City*, *Savoy*, &c. and in driving the Guards out of Town. To this he objected, that he was not at the *King's-Head*, with *Goodenough*; to which *Mr. Goodenough* reply'd, *He had not sworn positive to the place, though he verily believed that was the place; but however, as to the Discourse and Words then spoken by Mr. Bateman, he was positive.*

The Evidence being thus full against *Mr. Bateman*, and Liberty granted him to make what Defence he could, he desired that *Sir Robert Adams* might be heard, in relation to a false Report the said *Mr. Lee* had raised of *Sir Robert* and others; and *Sir Robert* being in Court, gave Evidence that there had been a Report abroad, said to be raised by *Mr. Lee*, that he (*viz. Mr. Lee*) had beaten three Knights, and that *Mr. Lee* came to him and asked his pardon, acknowledging the thing in it self was altogether false.

To the same purpose *Sir Simon Lewis* was called, but appeared not.

Amos Child being called by *Mr. Bateman*, to testify his Knowledge of *Mr. Lee*, and being asked what he could say against him, declared, *That he knew nothing to the contrary, but Mr. Lee was an honest Man.*

One *Baker* being called by *Mr. Bateman*, to testify that *Mr. Lee* would have suborned him against him to his Prejudice, some Years since, of which he had made an Affidavit before *Sir William Turner*, and the said *Baker* not then appearing in Court, he desired *Sir William Turner* to give some account of *Baker's* Examination, which the said *Sir William* had taken; but it being about two Years since, *Sir William* declared, *He could not charge his Memory with any of the Particulars contained therein.*

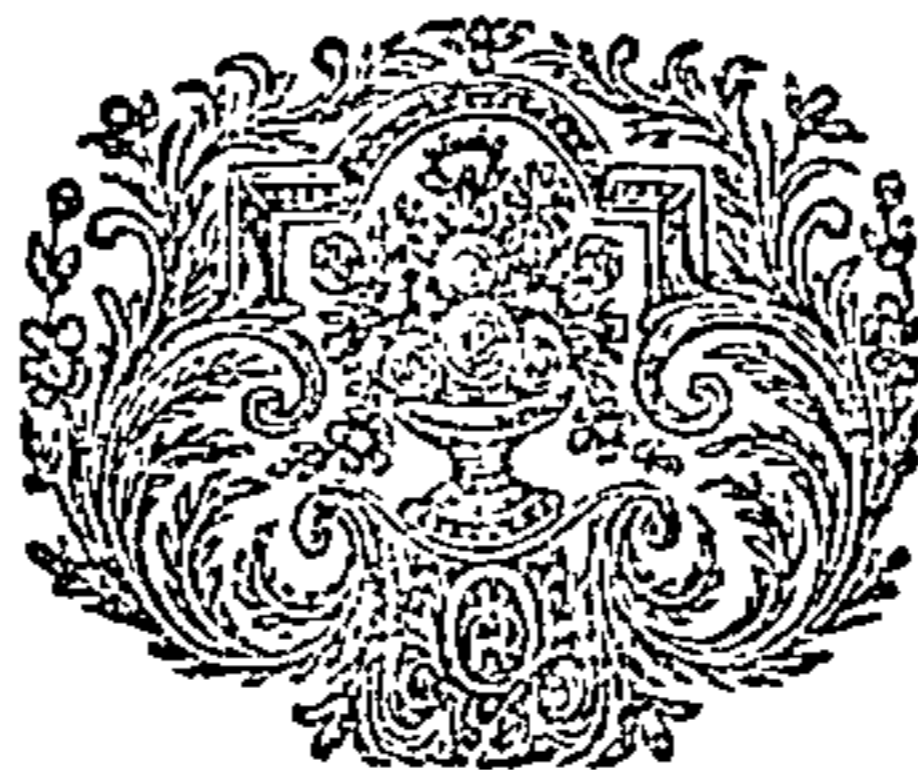
Mr. Tompkins, *Sir William Turner's* Clerk, being called, and asked what he could say concerning any Examination of *Baker's* taken before *Sir William*, that related to *Lee*; he said *there was an Examination taken Anno 1683, wherein Mr. Lee was mentioned; but to the best of his Remembrance it was returned before the King and Council, and he could not give any account of the Particulars.*

Then Mr. *Bateman* desired to know upon what Statute he was indicted, and was informed by the Court, That *the Treason wherewith he stood charged, was comprehended within the 25th of Edward the III, and the 13th of Car. II. by Overt-Act*; and having little more to say in his own Defence, after a favourable hearing of all he had materially to offer, and his Son having been allowed by the Court to assist him, in looking over his Notes, and calling his Witnesses, by reason he through sickness pretended himself incapable: Then the *Lord Chief Justice of the King's Bench* summ'd up the Evidence at large, and omitted nothing that might be for the advantage of the Prisoner, whereby the matter was fairly, fully, and clearly left to the Jury; and thereupon Mr. *Bateman* was taken from the Bar. After which the other Prisoners being called and tried, and the Jury ready to go forth to consider of their Verdict, Mr. *Bateman's* Daughter come in and besought the Court, that *Baker, whom she said she had found out, might be heard against Mr. Lee*; but Mr. *Lee* being gone and the Trial already over, the King's Counsel opposed it, unless Mr. *Lee* could be found (which he could not be at that time) and the Court having deliver'd their Opinion that it was not convenient to examine any Witness after the Jury had received their Charge, it being a very ill Precedent and of dangerous Consequence; yet some of the Jury desiring it, the Court, to prevent any Objections that might be made, consented, and *Baker* had leave to speak: whose Evidence was, *that being in Company with Mr. Lee, some time in the Year 1683, and discoursing about divers matters, he bid him go to the Sign of the Peacock, and to the Angel and Crown, to a Surgeon and a Linnen-Draper whom he named, the former of which he remembered to be the Prisoner, and to insinuate himself into their Company and discourse them; and when he demanded of Mr. Lee to what end he should do it, or about what he should discourse them, he told him it might be about State-Affairs, and by that means he would find a way to make him a great Man; and when he excused his attempting to intrude into such Company as was above him, he being but a Shoe-maker, Mr. Lee told him he knew that he kept Company with such and such Men, and why could he not as well do it with those he had mentioned.* And of this he said his Examination was taken before Sir

William Turner; but this being nothing to the purpose, but was rather looked upon as a Design Mr. *Lee* had to make a discovery of the Conspiracy, if he could have procured further Evidence to have corroborated his own, and *Baker* being looked upon as a broken Fellow, and that he lodged near the *Sessions-House*, and yet came not in before, though often called; the Consideration of the whole matter was left to the Jury, and an Officer being sworn to attend them went out, and after about half an Hour's debating that, and what else was before them, gave in their Verdict, *that Charles Bateman then at the Bar, was Guilty of the High-Treason as laid in the Indictment*; which Verdict was accordingly recorded, and the Prisoner re-conveyed to *Newgate*: And being again brought to *Justice-Hall*, on *Friday* the 11th of *December*, in order to receive Sentence; and upon holding up his Hand, being asked *What he could say for himself, why the Court should not give Judgment against him according to the Law*; he desired to know whether Mr. *Goodenough* was fully pardoned, and was told, *that as for the Out-lawry he was pardoned, and that his Pardon hath been allowed and approved of in that Court, and in the Court of King's-Bench, and for any thing else he was not prosecuted.* Then he said *his Opinion was altogether for Monarchy, and that he hoped he should have an Advocate with the King*; but had nothing more material to offer.

Then Mr. *Recorder*, after having spoke several things in aggravation of that great Crime, whereof, after a fair and favourable Trial, he was convicted, advised him not to flatter himself with hopes of Life, and thereby delay his Repentance necessary for his future Happiness; pronounced the Sentence, which was, *That he should return to the place from whence he came, from thence be drawn to the Place of Execution, there to be hang'd by the Neck, and whilst alive be cut down and his Bowels to be taken out and burnt; his Head to be sever'd from his Body, and his Body divided into four Parts, and that his Head and Quarters be disposed at the Pleasure of the King.*

Upon this he prayed a Divine might have leave to come to him, as likewise his Relations; which being allowed, he departed the Court, and was on *Friday* the 18th of *December*, executed at *Tyburn* according to the Sentence.





Remarks upon the Trials of Edward Fitzharris, Stephen Colledge, Count Coningmark, the Lord Ruffel, Col. Sidney, Henry Cornish, and Charles Bateman; as also on the Earl of Shaftesbury's Grand Jury, Wilmer's Homine Replegiando, and the Award of Execution against Sir Thomas Armstrong. By Sir John Hawles, afterwards Solicitor-General.

THE strange Revolution which hath of late happen'd in our Nation, naturally leads one into the Consideration of the Causes of it. The Danger of subverting the establish'd Religion, and invading Property, alone could not be the Causes. For if it be true, that the same Causes have generally the same Effect; it is plain, that in the Reign of a precedent Monarch, the Subversion of the establish'd Religion was as much design'd, or at least was believ'd to be so, as of late; and it is not material whether what was suspected was true, or not; and Property was as much invaded as of late, by imposing Ship-Money, and other Taxes in the Nation, but more especially Ship-Money; which at first was light and easy, but in Progress of Time was increas'd, according as it was found the Nation would bear it. And at length it was feared, as there was just Reason so to do, that it would become as burdenson as what is now imposed on the French Nation by the French King; and yet, when the War broke out, if the History of those Times, or the Persons who lived about those Times, are to be believ'd, the Majority of the Nation took part with the King. There was therefore some other Reasons for the Disaffection of the Nation to the late Government, and they may be rank'd under these six Heads.

Exorbitant Fines; cruel and illegal Prosecutions; outrageous Damages; seizing the Charters; dispensing with the Test and Penal Laws; and undue Prosecutions in criminal, but more especially in capital Matters.

For the First, I shall only observe, that when the House of Commons, in the Parliament 1680, took that Matter into Consideration, and intended to impeach several Persons for the same, the highest Fine, at that Time complain'd of, was but 1000 *l.* and yet in few Years they were heighten'd to

10,000 *l.* 20,000 *l.* 30,000 *l.* and 40,000 *l.*

For the Second, the Punishment of *Oates*, *Dangerfeld*, and *Mr. Johnson*; and the close Imprisonment of *Mr. Hampden*, *Sir Samuel Barnardiston*, and of several other Persons, as they were against the Law, so they were without Precedent.

For the Third, tho' the Damages given to *Bolsworth* were the first outrageous Damages given, which were taken Notice of, and in Truth were such; yet in little Time Damages for Matters of like Kind were quickly improved to 10,000 *l.* 20,000 *l.* 40,000 *l.* nay 100,000 *l.* the Truth of which a great many living Witnesses, to their Sorrow, can testify.

For the Fourth, the seizing the City, and other Charters, upon the Pretences on which they were question'd, was without Example.

For the Fifth, the dispensing with the Test and Penal Laws, was as mischievous as it was illegal; it making Persons capable, who were incapacitated by Law of being in Places, of exercising Offices, for whom the Persons who had Power to confer or bestow the same, had more Affection, than for the Persons who at that present enjoy'd them: The Consequences of which were quickly seen, in turning out the present Possessors, to make Room for others; which was the Thing, which, as a *Scotch* Bishop said of another Matter, *set the Kiln a-fire*.

Of these five Particulars something hereafter may be said; at present, this Treatise is only to consider how far the Proceedings in capital Matters, of late Years, have been regular or irregular: And as to that, I shall not at all consider how far the Persons hereafter mention'd were guilty of the Crimes of which they were accus'd, but how far the Evidence against them was convincing to prove them guilty, and what Crimes the Facts prov'd against them in Law were.

Remarks on Fitzharris's Trial.

THE first Person I shall begin withal shall be *Fitzharris*; and that it may not be wonder'd, that the Trial and Condemnation of a Person who was confessedly an *Irish Papist*, should be complain'd of; and one whose Crimes were such, that if the Law declar'd had not made Capital, it had been just, in respect of the Malefactor, for the Legislative Power to have enacted, that he should suffer the severest Punishment

usually inflicted for the highest Crime: yet, in respect of the common Good, it had been just and fit to have pardon'd him, if he would have confess'd who were his Conspirators and Setters on; for I am apt to think, that if that Matter had been thoroughly look'd into, some Persons, afterwards Witnesses in the *Lord Ruffel's*, *Colonel Sidney's*, and *Mr. Hampden's* Trials, had either never been produc'd, or had not been credited if produc'd;

nor would my Lord of *Essex's* Throat have been cut; and my Lord *Ruffel*, and Colonel *Sidney* might have worn their Heads on their Shoulders to this Day.

All will agree, that there was a great Struggle between the *Whigs* and *Tories*, as they were then call'd, for hanging or saving that Man: Both agreed he deserv'd to be hang'd; the first thought it their Advantage to save him if he would confess, the last thought it was fit to hang him for fear he would confess. And to explain the Matter, it is fit to go a little higher: It cannot but be remembered, that before the breaking out of the Popish Plot, Mr. *Claypole* was imprison'd in the *Tower* for designing to kill the King, in such Place and Manner as *Oates* afterwards discover'd the Papists intended to do it. In *Trinity* Term, 1678, he had an *Habeas Corpus* to the *King's Bench*, and was brought thither in order to be bail'd, and produced Persons of Worth to bail him; but the Penalty of the Bail set by the Court was so high, and the Court so aggravated the Crime for which he was committed, and the Likelihood of the Truth of it, that the Bail refus'd to stand, and *Claypole* was remanded to the *Tower*. But the Term after, when the Matter, of which he was accus'd, appear'd bare-fac'd to be the Design of other People, he was let go, for fear the Examination of it should go further in proving the Popish Plot, than any thing at that time discover'd. And if it were now discover'd, upon whose and what Evidence he was committed, it would go a great way in discovering the Truth of many Matters, as yet in the Dark, (but that Design miscarry'd, because the Intrigue was discover'd before it took Effect; and yet a like Design was still carried on, and many of the Clergy of the Church of *England* had been prevail'd with to cry the *Popish* up as a *Fanatick* Plot.) The *Papists* and the Clergy of the Church of *England* being in the late Times equally Sufferers, and oppress'd by the *Fanaticks*, they naturally grew to have a Kindness for each other, and both join'd in hating the *Fanaticks*; and therefore pretended, at least, that they did not believe any thing of the *Popish Plot*, but that Report was given out by the *Fanaticks*, whilst they themselves were designing something against the Church of *England*. The *Papists* having so great a Part of the Clergy of the Church of *England*, ready to believe any thing of a *Fanatick Plot*, which they should forge, and observing that that which gave Credit to the *Popish Plot*, was Writings concurring with Oral Testimony, which it did; for very little of the Truth of the *Popish Plot* depended on the Credit of *Oates*, *Bedloe*, or any other Person, most of the Facts of that Design, when discover'd, proving themselves: To instance in one; *Oates* discover'd *Coleman* had Intelligence with *Le Chaise*, of a Design on *England*, and that *Coleman* had Papers testifying as much; when those Papers were seiz'd, and own'd by *Coleman*, and the Purport of them was what *Oates* said they were, it was not material, whether *Oates* was a Man of Truth or not, the Papers, without *Oates's* further Evidence, sufficiently prov'd the Design: I say, the *Papists*, having observ'd what the Evidence was which gave Credit to that Plot, resolv'd to pursue the same Steps, and therefore *Dangerfield* was made use of to leave Papers in Colonel *Mansel's* Lodging, who was an Acquaintance of my Lord *Shaftesbury's* importing a † Plot;

but that was so foolishly carried on, and the then * *Attorney-General*, who had the Examination of that Matter, not being qualify'd with the Assurance his Successor had, to carry on a Thing that had neither Sense nor Honesty in it, made such a scurvy Report of the Matter to the King and Council, that they were enforc'd to vote *Mansel* Innocent, *Dangerfield* Guilty, and that it was a Design of the *Papists* to lay a Plot to the *Dissenters* Charge, and a further Proof of the *Popish Plot*. But that *Attorney-General* being remov'd to a Place of more Honour, though of less Profit, and * another put in his Place, the *Papists* resolv'd to carry on the same Design; and no Person a fitter Instrument than *Fitzharris*, in respect of his Religion and his Acquaintance; but before his Design came to Perfection, it was discover'd.

He was first imprison'd in *Newgate*, where some Persons (amongst whom Mr. *Cornish*, as I remember, then Sheriff, was believed to be one, and it was not the least of his Crime, that he endeavour'd to look into that *Arcanum*) went to examine him as to the Particulars of that Design; which was quickly taken Notice of, and the Prisoner, in Breach of the *Habeas Corpus* Act, remov'd from thence to the *Tower*, where he was kept close Prisoner.

The Parliament at *Oxford* meeting soon after *Fitzharris's* Apprehension, and the House of Commons being inform'd of as much of his Design as was then discovered, they thought themselves highly concern'd to examine him; but how to do it they knew not: only they resolv'd (upon a Report which one of their Members made them of one *Hubert*, who confessed himself guilty of firing the City of *London*, upon which it was resolv'd to examine him in the House of Commons the next Morning, but before the House sat *Hubert* was hang'd) that *Fitzharris* should not be hang'd without their Knowledge and Consent; and to effect it, they remember'd a Design to try the five *Popish* Lords in the *Tower* upon Indictments; whereupon, if they should be acquitted, it was thought that those Acquittals might be pleadable to Impeachments. To prevent which, the House had exhibited general Impeachments of High-Treason against them in the House of Lords; which had such Success, that the Lords were never, and the Judges gave their Opinion, that they could not be tried on the Indictments, as long as the Impeachments were in Being; for which Reason, the House of Commons exhibited a general Impeachment of High-Treason in the House of Lords against *Fitzharris*, which was receiv'd; after which the House of Lords made an Order, that *Fitzharris* might or should be try'd in the *King's Bench* for the same Treason: suddenly after which, that Parliament was dissolv'd. Whether *Fitzharris's* Business was the Break-neck of that Parliament, I know not, but it was shrewdly suspected it was.

There was at that Time a * Chief Justice in the *King's Bench*, who was himself under an Impeachment of High-Treason, and had not, for that Reason, sat in Court for some Terms preceding; and the Trial of *Fitzharris* being generally look'd upon to be as illegal as it was odious, it was thought convenient to carry it on by a Person of better Credit; whereupon * one who

* Sir Crefwel Levinz.

* Sir Robert Sawyer.

* Sir William Scroggs.

* Sir Francis Pemberton.

had

had been a Puisne Judge of that Court, and had behaved himself very plausibly, and had gained Credit by being turn'd out, was thought to be the fittest Person to undertake it; and accordingly the then present Chief Justice was remov'd, and the other was preferred to his place.

It being resolv'd that *Fitzharris* should be try'd, the Business was how to get Witnesses to give Evidence to a Jury, and how to get Juries to find the Bill, and to convict the Prisoner, which were difficult Preliminaries.

A * Person who had been one of the House of Commons, which had exhibited the Impeachment, was a principal Witness; but if he should give Evidence on the Indictment, he knew not how far he might be hereafter questionable and punishable for it, when a Parliament should sit again; but at last that Person was prevail'd upon to give Evidence, but by what means is best known to himself. And as for the Juries, Grand and Petty, they were satisfy'd with the Direction of the Court, that they not only might, but ought to find the Bill, and Verdict, according to their Evidence. And I think the Court was so far in the right.

That Matter being adjusted, a Bill of High-Treason was found against the Prisoner; whereupon he was presently arraigned, and after much Contest and Declaration of the Court, that they could hear nothing till he had pleaded in chief (which if he had done, the *Plea* he afterwards pleaded, which was the Jurisdiction of the Court, had come too late) he had Leave given him to plead the special Matter of the Impeachment; and accordingly Counsel were assign'd him to draw up and argue his *Plea* put in to the Jurisdiction of the Court; which was, *That he was impeach'd in a superior Court for the same Treason.*

Great Endeavours were used to have the *Plea* over-ruled, without so much as hearing the Prisoner's Counsel for the maintaining it. The Pretences were, that the Prisoner on his *Plea* ought to have produced the Record of his Impeachment, and that the *Plea* of the Impeachment for High-Treason in general was naught, without specifying what the High-Treason was, for which he was impeach'd; for an Impeachment, or an Indictment of High-Treason in general was naught; that the King had power to proceed on an Impeachment or Indictment for the same thing, at his Election: That the Allegation, *that Fitzharris was impeach'd, which Impeachment stood in full force*, not having mention'd an Impeachment before, was naught. But afterwards the *Attorney-General* demurred, and the Prisoner join'd in the Demurrer. And then a Day was given to argue the *Plea* till Saturday the 7th of May, at which time the *Attorney* added to the Exceptions he took to the *Plea*, Whether a Suit in a superior Court can take away the Jurisdiction of another inferior Court, who had an original Jurisdiction of the Cause, of the Person, and of the Fact, at the time of the Fact committed?

To maintain the *Plea*, the Counsel for the Prisoner alledged, that an Impeachment differ'd from an Indictment; the first was at the Suit of the Commons of *England*, and was like an Appeal, or rather an Appeal resembled an Impeachment; that the Proceedings were different in the Trials: In the first, the Trial is by the House of Lords; in the last, of a Commoner, by a Jury of Commons. In the last, but little time was allowed for giving or considering of the Evidence; in the first,

a much longer time. That this Matter was never practis'd before; that the King may pardon a Criminal prosecuted by an Indictment, but not by an Impeachment, no more than if prosecuted by an Appeal. If he should be acquitted on the Indictment, it might be a Question whether that may be pleaded in Bar to the Impeachment; and if not, the Prisoner should be brought twice in jeopardy of his Life for the same Crime, contrary to the Rule of Law.

To the Objection, that the *Plea* was not certain; it being pleaded as an Impeachment of High-Treason, not setting forth the High-Treason in particular; it was answer'd, that an Impeachment differ'd from an Indictment: For by the Custom of *Parliament*, which is the Law of the Land, such a general Impeachment is good; but by the Law, a general Indictment of High-Treason, without specifying what, when, where, or how, is not good; and therefore the *Plea* of an Indictment and an Impeachment is variant.

To the Objection, that there was no Impeachment mention'd before the Averment of *quæ quidem impetio*, it was frivolous; for it was before mention'd that he was impeach'd, and then by a necessary Consequence there was an Impeachment.

As to the Objection, that the King might, in which Court he would, prosecute for High-Treason, it was little to the purpose; for the Case did not come up to it, the Impeachment being the Suit of the Commons, and not of the King; and that the Courts of *Westminster-Hall* had refus'd to meddle with matters relating to the *Parliament*. That though the Impeachment was general, yet it was made certain by the Averment; that it was for the same Crime for which the Indictment was: That the *Attorney-General* might have taken Issue, that there was no such Impeachment as was pleaded; or else he might have said, that the Impeachment was not for the same Treason for which he was indicted; but having demurr'd, he had confess'd both to be true. That at common Law, if an Appeal of Murder had been brought, the King could not proceed on the Indictment, till the Appeal was determin'd; that the Judges, whereof some were then in Court, had given their Opinions to the King and Council, concerning the five Popish Lords, that they could not be try'd upon Indictments, so long as general Impeachments were depending for the same Treason: and yet their Cases and this differ'd; there the Indictments were found before the Impeachments preferr'd, and here, after the Impeachment.

In the reply to vitiate the *Plea*, it was insisted, that it did not conclude *si Curia procedere debeat* as well as *vult*, as was usual for *Pleas* of that nature to do; that perhaps this Matter, if the Prisoner had been acquitted upon the Impeachment, might have been pleaded in bar to the Indictment, but it was not pleadable to the Jurisdiction of the Court; that in the Case of the five Lords, the Indictments were removed into the House of Lords; that Appeals in Treasons are taken away by the First of *Henry* the IVth; that in the *Plea* it ought to be averr'd, what *Lex & Consuetudo Parl.* are; that till Articles carried up, no Man impeach'd is oblig'd to answer: that in all Cases of Appeals, a Man is put twice in jeopardy of his Life, if he be try'd upon an Indictment within a Year.

To take a short Review of what hath been recited, it was thought the King's Counsel run the Court upon a Rock, and it was hard for them to

get off. The Court had advis'd them to take time to consider what Course they would take; but the King's Counsel were hasty, as they always were when they were resolv'd to carry a Matter right or wrong; and having three bad Ways, they chose the worst.

If they had taken Issue on the Record, or the Averment, that the Impeachment and Indictment were not for the same Treason, they might have pretended that the Journal of the House of Lords was not a Record, or that the Debates in the House of Commons were not good Evidence; or if they had reply'd, the Order of the House of Lords for trying the Prisoner in the *King's-Bench*, to the Plea, they might have insisted on the Power of the House so to do: but having demurr'd, they confessed the Truth of all the Matter of the Plea, and wav'd the Benefit of that Order, and stood upon Points of Law, either conceded by the Court, or resolv'd by the Judges before, or such necessary Inferences from them as were impossible to be deny'd.

It could not be deny'd, but a general Impeachment of High-Treason, by the Custom of Parliament, was good; it could not be deny'd, but, by the Resolution of the Judges in the Case of the Lords in the *Tower*, a general Impeachment of High-Treason stop't Proceedings upon an Indictment for the same Matter. It did not differ the Case, that the Indictments in the *King's-Bench* against the Lords were remov'd into the House of Lords; for every one knows new Indictments might have been preferred against them for the same Crimes. And if that had been the Reason of the Judges Resolution, why did not the Judges then in Court, all, or most part of whom were Judges at the giving that Opinion, deny the Opinion, or the Reason alledg'd, which they did not? It was not a Reason to disallow the Plea, because particular Articles use to follow general Impeachments, and the Impeach'd are not bound to answer till the particular Articles were exhibited, which is true; for by the same Reason, a Defendant cannot plead an Action depending against him for the same Matter in a superior Court, unless the Plaintiff hath declar'd against him in the superior Court, which is not true. It was not a Reason that all Records in inferior Courts must be pleaded particularly, as Indictments, and the like; because such Records must be certain and particular, or else they are erroneous, and cannot be pleaded; but an Impeachment may be general.

Where the Matter of a Plea is naught, no Form can make it good; though where the Matter of a Plea is good, an ill Form may spoil it. If therefore a general Indictment or Record is naught, as in all the Cases cited against the Plea, it was no special Averment to reduce it to a certainty, or any Form can make it a good Plea: But a general Impeachment is good, and therefore it may and must be pleaded generally; and pleading it specially, would make it false, if there were no subsequent Articles, as in this Case there were not, to ascertain it.

It is to no purpose to run through all the Ramble of the Counsel or Court against the Plea, when they all said the Matter of the Plea was not in question, but the Form; and yet when so often ask'd in what of the Form it was defective? they were not able to answer. If it be agreed that the

Matter of a Plea is good, but it is defective in Form, they always shew how it ought or might have been mended, which in this Case was never done. And as this Case was new in several Particulars, so it is in this, that in reading all the Arguments of this Plea, no Man knows, by what was discours'd, what was the Point in question.

After the Arguments, the Chief Justice, in shew at least, very favourably offers the Prisoner's Counsel liberty to amend the Plea, if they could; which they (apprehending as they had Reason, for I think none can shew how it might have been mended, rather a Catch than a Favour) refus'd to do; whereupon the Court took time to consider of it, and on the 11th of *May*, there being a great Auditory, rather to hear how the Judges would bring themselves off, than to know what the Law of the Plea was, the Chief Justice, without any Reasons, deliver'd the Opinion of the Court, upon Conference had with other Judges, that his Brothers, *Jones*, *Raymond*, and himself, were of Opinion that the Plea was insufficient; his Brother *Dolben* not resolv'd, but doubting concerning it, and therefore awarded the Prisoner should plead to the Indictment, which he did, *Not Guilty*; and his Trial order'd to be the next Term.

I think it would puzzle any Person to shew, if ever a Court of *Westminster-Hall* thought a Matter to be of such difficulty as fit to be argu'd, that they gave their Judgments afterwards without the Reasons: 'Tis true, that the Courts of Civil Law allow Debates amongst the Judges to be private among themselves; but the Proceedings at Common Law always were, and ought to be, in *aperta curia* *. Had this Practice taken place heretofore, † as it hath of late (but all since this Precedent) no Man could have known what the Law of *England* was, for the Year-Books and Reports are nothing but a Relation of what is said by the Counsel and Judges in giving Judgment, and contain the Reasons of the Judgment, which are rarely express'd in the Record of the Judgment; and it is as much the Duty of a Judge to give the Reasons why he doubts, as it is of him who is satisfied in the Judgment. Men sometimes will be asham'd to offer those Reasons in publick, which they may pretend, satisfy them, if conceal'd; besides, we have a Maxim in Law undeniable, and of great use, that any Person whatever may rectify or inform a Court or Judge publickly or privately, as *Amicus Curia*, a Friend to the Court, or a Friend to Justice: But can that be done, if the Standers-by know not the Reason upon which the Court pronounce their Judgment? Had the three Judges, who were clear in their Opinion, given their Reasons of that Opinion, perhaps some of the Standers-by might have shew'd Reasons unthought of by them, to have made them stagger in, if not alter that Opinion; or if Justice *Dolben* had given the Reason of his Doubt, perhaps a Stander-by might have shewn him a Reason unthought of by him, which would have made him positive that the Plea was or was not a good Plea.

If a Man swears what is true, not knowing it to be true, though it be logically a Truth as it is distinguish'd, yet it is morally a Lye; and if a Judge give Judgment according to Law, not knowing it to be so, as if he did not know the Reason of it at that time, but bethought himself of a Reason for

* 2 Co. Inst. 103.

† Of old Time before Edw. III. the Reasons us'd to be entered on record in cases of difficulty; but even afterwards were constantly pronounc'd by the Court, that they might be publish'd in the Books of Cases and Reports. 4 Co. Inst. 4.

for it afterwards, though the Judgment be legal, yet the pronouncing of it is unjust.

Judges ought to be bound up by the Reasons given in publick, and not satisfy or make good their Judgment by after-thought of Reasons. How very ill did it become the Chief Justice *Popham*, a Person of Learning and Parts, in the attainting Sir *Walter Raleigh*, of which Trial all since that time have complain'd? when he gave his Opinion, that the *Affidavit* of the Lord *Cobham*, taken in the absence of Sir *Walter*, might be given in Evidence against him, without producing the Lord *Cobham* Face to Face to Sir *Walter* (which was desir'd by him, altho' the Lord *Cobham* was then forthcoming). When he summ'd up the Evidence, he said, * *Just then it came into his Mind, why the Accuser should not come Face to Face to the Prisoner, because he might retract his Evidence; and when he should see himself must die, he would think it best that his Fellow should live to commit the like Treason, and so in some sort seek Revenge.* Which besides that it is against the common Law, and Reason, it is against the express Statute of *Edw. VI.* which takes care, that in Treason the Witness shall be brought Face to Face of the Person accus'd.

Did it become a just Man to give his Opinion, and bethink himself of a Reason afterwards? And I am mistaken if it will not herein appear, that many Persons complained of, have not been guilty of the same Weakness or Injustice, call it which you will; so foolish are the best Lawyers and plausible Speakers, when they resolve to carry a Point, whether just or not: However they may deceive the Ignorant, yet they talk and argue very absurdly to the Apprehension of the majority of Mankind. And they had been sooner discover'd, but that the Discoverers were quickly suppress'd and crushed, as Scandalizers of the Justice of the Nation. And I think this may be justly called the first mute Judgment given in *Westminster-Hall*.

But to return to *Fitzharris's* Trial, which came on the 9th of *June*; and then the King's Counsel made use of their Arts in managing the Jury. And first, there were a great many Persons for Jurors to whom Mr. Attorney had no stomach; some challenged for Cause, for that they were no Freeholders, as *John Kent*, *Giles Shute*, *Nathaniel Grantham*, and several others; and the Challenge allow'd to be a good Challenge by all the Court; for though the Chief Justice only spoke, yet all the Court assent to what one Judge says, if they do not shew their dissent. I do not take notice of this, as complaining of it, for I think it is a good Cause of Challenge in Treason; but then I cannot but wonder at the Assurance of the same King's Counsel, who denied it to be a good Cause of Challenge in the Lord *Ruffel's* Trial. It is true, that was a Trial in the City, but that Matter had no Consideration in the Judgment; for after the Lord *Ruffel's* Counsel had been heard, all the Judges deliver'd their Opinions, That at common Law, *No Freehold* was no Challenge in Treason; and that the 1 and 2 *Phil. & Mar.* had restor'd the Trial in Treason to be what it was at common Law: Of which Number of Judges, Sir *Francis Pemberton* and Sir *Thomas Jones* were two; nay, Sir *Francis Pemberton* ask'd Mr. *Polluxen*, *Whether he found any Resolution at common Law, that no Freehold was a Challenge in Treason.* And that Judgment is afterwards cited in Colonel *Sidney's* Trial, as the

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Opinion of all the Judges of *England*, That *no Freehold* was no Challenge to a Juror in Treason at common Law; and Colonel *Sidney's* Trial was in a County at large.

But if it was not a Challenge at common Law, I would know how it came to be a Challenge in *Fitzharris's* Case? There was no intervening Act of Parliament to alter the Law between the two Trials, that I know of.

Another Art us'd, was to challenge for the King without Cause, where no Cause could be shewn, such Jurors as they did not like.

The Prisoner was troubled at this, and appeals to the Court, whether the Attorney-General was not oblig'd to shew his Cause of Challenge; but is answer'd by the Court, that he need not till all the Pannel was gone through, or the rest of the Jurors challeng'd, which is true; but had the Prisoner been advis'd to challenge the rest of the Jury, as he would have been if he had had Counsel, the Attorney must have wav'd his Challenge, or put off the Trial. And since he was not allowed Counsel, why should not the Court, according to their Duty, as they have said it is, advis'd him so to do? I am sure, in Count *Coningmark's* Trial, when Sir *Francis Winnington* challenged a Juror without Cause, for the King, the Court presently ask'd the Cause; and such Answer was made by the Prosecutor's Counsel as was made to *Fitzharris*: Whereupon the Court told the Count, that the way to make them shew their Cause of Challenge, was to challenge all the rest of the Jury; and thereupon the Challenge was waved. They were different Practices, tending to different Ends; and accordingly it succeeded, *Fitzharris* was convicted, and the Count acquitted.

Upon the Trial the Evidence was this; *Fitzharris* was, the 21st Day of *February*, 1681, with *Everard*, and gave him Heads by word of Mouth, to write the Pamphlet in the Indictment mentioned, to scandalize the King, raise Rebellion, alienate the Hearts of the People, and set them together by the ears; the Libel was to be presented to the *French* Ambassador's Confessor, and he was to present it to the *French* Ambassador; and it was to set these People together by the ears, and keep them clashing and mistrusting one another, whilst the *French* should gain *Flanders*, and then they would make no bones of *England*: For which Libel *Everard* was to have forty Guineas, and a monthly Pension, which should be some thousands of Pounds. *Everard* was to be brought into the Cabal, where several Protestants and Parliament-Men came, to give an account to the Ambassador how things were transacted. *Everard* asked what would be the use of the Libels? *Fitzharris* said, we shall disperse them we know how; they were to be drawn in the Name of the *Nonconformists*, and to be put and fathered upon them. This was the Sum of *Everard's* Evidence.

Mr. *Smith* prov'd *Fitzharris's* giving Instructions to *Everard*; and Sir *William Waller* and others prov'd the Libel, and the Discourse about gaining *Flanders* and *England*: Other Witnesses were examin'd to prove *Fitzharris's* Hand. For the Prisoner, Dr. *Oates* said, *Everard* told him the Libel was to be printed, and to be sent about by the Penny-Post to the protesting Lords, and leading Men of the House of *Commons*, who were to be taken up as soon as they had it, and searched, and

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to have it found about them. He said the Court had an hand in it, and the King had given *Fitzharris* Money for it already, and would give him more if it had success.

Mr. *Cornish* said, when he came from *Newgate* to the King, to give him an account in what Disposition he found the Prisoner to make a Discovery; the King said he had had him often before him and his Secretaries, and could make nothing of what he did discover; that he had for near three Months acquainted the King he was in pursuit of a Plot, of a Matter that related much to his Person and Government, and that in as much as he made Protestations of Zeal for his Service, he did countenance and give him some Money; that the King said he came to him three Months before he appeared at the Council-Table.

Colonel *Mansel* said, that Sir *William Waller* gave him an account of the Business in the presence of Mr. *Hunt*, and several others; and said, that when he had acquainted the King with it, the King said he had done him the greatest piece of service that ever he had done him in his Life, and gave him a great many thanks: But he was no sooner gone, but two Gentlemen told him, the King said he had broken all his Measures, and the King would have him taken off one way or other; and said, that the Design was against the Protestant Lords, and Protestant Party. Mr. *Hunt* confirm'd the same thing, and added, that he said the Design was to contrive those Papers into the hands of the People, and make them Evidences of Rebellion; and appealed to Sir *William Waller* who was present, whether what he said was not true. Mr. *Bethel* said, *Everard* before he had seen *Bethel*, or heard him speak a Word, put in an Information of Treason against him, at the Instigation of *Bethel's* mortal Enemy; which Information was so groundless, that tho' it was three Years before, yet he never heard a word of it till the *Friday* before.

Mrs. *Wall* said, *Fitzharris* had 250*l.* 200*l.* or 150*l.* for bringing in the Lord *Howard* of *Esrick*; she added, that *Fitzharris* was looked upon to be a *Roman* Catholick, and upon that account it was said to be dangerous to let him go near the King, that he never was admitted to the King.

The Lord *Conway* said, that the King had declared in Council, that *Fitzharris* had been employed by him in some trifling Businesses, and that he had got Money of him; but added, as of his own Knowledge, that the King never spoke with him till after he was taken, which was the 28th of *February* last.

All the Evidence being over, it was summ'd up by the Counsel, That upon all the Circumstances of it, *Fitzharris* was the Contriver and Director of the Libel; that it was a treasonable Libel, and a Jesuitical Design; that the Excuse he made, as if *Everard* drew him into it, or trepanned him into it, was vain, nothing of that being prov'd. That *Everard* could do nothing alone, and therefore Sir *William Waller* must be in the Contrivance; but that was unlikely: That the Prisoner would insinuate that the King hir'd him to do it, because the King gave him Money, but that was out of Charity; and therefore concluded, with a great many Words, that an *English* Protestant Jury of twelve substantial Men, could not but find the Prisoner Guilty.

The Court added, that though Dr. *Oates* said, *Everard* said it was a Design of the Court, and was to be put on some Lords, and into some Par-

liament-Men's Pockets; yet *Everard* was there upon Oath, and testified no such thing in the World; and for the Impeachment in the Lords House, they were not to take notice of it.

After which the Jury inform'd the Court, that they heard there was a Vote in the House of Commons, that the Prisoner should not be try'd in any inferior Court: To which the Chief Justice said, That that Vote could not alter the Law, and that the Judges of that Court had Conference with all the other Judges, concerning that matter; and it was the Opinion of all the Judges of *England*, that that Court had a Jurisdiction to try that Man. After which, Justice *Jones* was of Opinion, that if he were acquitted on that Indictment, it might be pleaded in bar to the Impeachment; and Justice *Raymond* deliver'd his Opinion to the same purpose. It is strange that all the Judges should be of that Opinion; yet before it was said, Justice *Dolben* doubted. It is more strange, that if Justice *Dolben* was not of that Opinion, he would hear it said he was, and not contradict it. It is most strange, that if the Judges of that Court were of that Opinion, they had not declar'd so, in the arguing or giving Judgment on the Plea; for that was the Matter of it, being pleaded to the Jurisdiction of the Court, that they had not power to try the Prisoner for that Crime, so circumstanced.

If the Plea had been over-rul'd as to the Matter, none would have been so impertinent, as to go about to maintain the Form of it.

Now to say truth in behalf of the Publick, and not on behalf of *Fitzharris*, the Evidence was unfairly summed up, for *Fitzharris* never pretended *Everard* drew him in, or was to trepan him: It is true, he ask'd *Everard* what the Design of the Pamphlet was, and whether he was not put upon it to trepan others? who answer'd, he was not. But afterwards being too nearly prest by the Attorney-General, he said, *Fitzharris* told him the Use of the Libels was to disperse them he knew how; that they were to be drawn in the Name of the *Nonconformists*, and put upon them. And *Oates* said, *Everard* said the Libels were to be printed, and sent abroad by the Penny-Post to the protesting Lords, and leading Men of the House of Commons, and the Persons seiz'd with them in their Pockets; which is all strong Evidence that the Libel was design'd to trepan others, and that was all along the Import of *Fitzharris's* Questions, tho' cunningly not answer'd by some of the Witnesses, and as cunningly omitted in summing up the Evidence.

It is true, the Chief Justice said, *Everard* said no such thing as *Oates* had said; but why was not *Everard*, who was then present, ask'd, Whether he said what *Oates* had given in Evidence?

There cannot be shewn any Precedent where a Witness contradicts, or says more or less than a Witness that went before him, by the hear-say of that Witness; but the first Witness is ask'd, what he says to it. Why was not Sir *William Waller*, who was also present, ask'd what he said to the Evidence of Mr. *Mansel* and Mr. *Hunt*? And who it was that inform'd Sir *William* what the King said? It was no way in proof, nor pretended by *Fitzharris*, that any Person was concern'd in that matter, but *Everard* and *Fitzharris*, though it was shrewdly suspected by the House of Commons; and no Man that reads the Trial, but believes there were many more concern'd, not yet discover'd: But the

the Counsel might have brought in any Judge of the Court by the Head and Shoulders to be a Confederate, as well as Sir *William Waller*, who was a *Jack-a-lent* of their own setting up, in order to knock him down again.

It was not pretended by *Fitzbarris* that the King gave him any Money to frame that, or any other Libel; there was Evidence, that he had got Money of the King for some little matter he was employed in, perhaps, for bringing in Libels dispersed abroad, or discovering Plots.

Upon the whole Evidence, it was plain that *Fitzbarris* was an *Irish* Papist; it was plain he was the only visible Contriver of the Libel; who were behind the Curtain is not plain, and to know them, was the Design of the Impeachment.

It was plain it was a devilish Jesuitical Design, as the Court and Counsel, in summing up the Evidence, agreed it to be; it was plain, that the Libel was such, that if dispers'd with intention to stir up the King's Subjects against him, it had been High-Treason within the Statute of the 13th of the King: But what the Intention of the contriving of the Libel was, was not very certain; and therefore, consequently what the Crime of it was, was uncertain.

To take the Evidence all the ways, as to the Design of the contriving of the Libel, it is capable of being interpreted; the easiest Construction is to say, he fram'd a Libel with intention to pretend to the King, that he had intercepted a Libel privately dispersed; and to make it more likely, it should be framed in the Nonconformists Names, to make his Report the more credible (for of Papists or Church-men it could not be believed) to get more Money of the King; and that matter, by all his Questions to the Witnesses, he most drove at: and that would at most be but a Cheat.

A more criminal, but less credible Construction, is to believe he design'd to disperse them, to excite and prevail upon the Discontented to take up Arms.

For what Effect had that Pamphlet, when it was (for it was afterwards) dispersed, upon the Minds of the People? Or what Effect could any Man of Sense think it could have? For though it was a virulent, yet it was as foolish a contriv'd Libel as ever was writ; yet I own, if it had been writ and dispersed with that Design, it had been High-Treason within the Statute of *Ed. III.*

But the most natural Construction of the worst Design of it, was to trepan the Parliament-Men, and make the Libels Evidences of a rebellious Conspiracy: This *Everard* confesses *Fitzbarris* told him was the Use to be made of them; and *Everard* could not know the Design of them, but by what *Fitzbarris* told him. And *Oates* well explains what *Everard* meant by the Words, in his Evidence, *put the Libel on the Nonconformists*, by what *Everard* told him.

But yet even that, though in itself the highest Crime a Man can be guilty of, next to putting it in execution, is but a Conspiracy; which was mildly punish'd in *Lane* and *Knox* their Case, though this exceeded that; that being a Design only against one Person, this against many.

Yet though this was of no higher Crime by the Law, as now establish'd, than a Misdemeanor, it was fit for the Legislative Power to have punish'd it in the manner it was punish'd; which yet the Legislative Power ought to resent as an Injury, for an inferior Court's snatching the Exercise of that Power out of their Hands, which only belongs to

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the supreme Authority. That this Crime, upon construction of the Evidence taken in the best Sense, is no Treason; though the Libel should in all probability incite the Subject to levy War, which it was not likely to do, or if in Fact it had been the cause of a Rebellion, yet if it was not designed by the Contriver to that purpose, it was not Treason by the Statute of *Edward the Third*, or *Charles the Second*; for in the last Statute, it is designing to levy War, and in the Statute of *Edward the Third*, it is a strained Construction, to make designing to levy War, Treason; yet none ever pretended to strain the Sense of that Statute farther than designing to do it.

If the ill Effects the Libel did, or might produce, made it Treason, then Sir *Samuel Astrey*, who read it in Court at the Trial, and the Printer, that afterwards printed and publish'd it, and Sir *William Waller*, who read it to Mr. *Hunt*, and others, were guilty of Treason; for the Libel carried no Venom or Charm with it the more, for being fram'd by *Fitzbarris* or *Everard*, or for being publish'd by either of them, than if publish'd by another Person.

The difference is, *Astrey* read it aloud, as his Duty; the Printer printed and published it for Gain; Sir *William Waller* publish'd it as a Novelty; and if *Fitzbarris* contriv'd it, to put it upon the Nonconformists, or Parliament-Men, and not to stir up a Rebellion, though it tended to all the ill Consequences mention'd in his Indictment, yet it was not Treason.

But it will be urged, how shall *Fitzbarris's* Intention be proved? It was a Question which made a mighty sputter in arguing the Plea. How shall it be proved, that the Impeachment was for the same Treason for which the Indictment was? But in the Trial of *Fitzbarris*, that Question was sully cleared; for it was proved there, that the very Libel then produced in Court, was the same Libel read in the House of Commons, upon which the Impeachment was voted.

And to say truth, nothing can be put in Issue, but is capable of Trial: *Quo animo* a thing is done in all Overt-Acts of a Design, is one of the main Questions; * or to speak in Law Phrase, whether done *proditoriè* or not, an Adverb of great Use and Sense, though heretofore slighted; and under which, I believe, a great many Persons will be enforc'd to shelter themselves from being punished by the Law establish'd.

No Man will pretend that Libel did any Man mischief but the Contriver; nor in probability could have done, if not used to the purpose *Everard* said to *Oates*. Yet other Persons have been guilty of as illegal Acts, of worse Consequences in prospect, and much worse in effect, and it did not amount to Treason. I dare say, the Allegation, that they disturb'd the Kingdom by their Acts, and War caus'd to be mov'd against the King, is true of them, and they are guilty of all the Aggravations us'd in Indictments of Treason.

To instance in some of many; Did it not make a mighty heart-burning in the City against the Government, and rais'd great Jealousies between the King and People, when the Sheriffs, *North* and *Ritch*, were impos'd on the City? Did not the taking away the City's Right of electing Sheriffs, and the suspicions for what end it was done, besides the Illegalities that followed? If what Sir *Edward*

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Herbert

* See Trial of Woodburne, State Trials Vol. VI. p. 222.

Herbert says in his late Vindication, *Fol.* 16. be Law, as it hath an aspect as if it were, that Grand-Juries return'd by such as are Sheriffs in fact, but not in right, are illegal, and Convictions on their Presentments are illegal and void, give great disturbance: and that Opinion seems to be countenanc'd by my Lord *Coke's* third *Instit.* *Fol.* 32. in his Comment on the 11th of *Henry* the IVth, and consequently my Lord *Ruffel's*, and other Attainers void? Did it not add to the heart-burning, the punishing those Citizens as Rioters, who were at *Guildhall*, innocently contesting their Right of electing? Was it not an increase of the Mischief, the bringing the *Quo Warranto* against the City, whereby the Credit of the City was lost, and many Orphans starved, and more impoverished, beyond the possibility of recovery? And it was yet heighten'd by the Judgment given in the highest Case that ever came into *Westminster-Hall*, by two Judges only, and that without one Word of Reason given at the pronouncing, according to the Pattern of *Fitzharris's* Case, and was the second mute Judgment. Did it not fright all honest Men from being on Criminal Juries, when *Wilmer* was so illegally prosecuted for not giving a Verdict against his Conscience, by an *Homine Replegiando*, and Information? And did not that make all Merchants, who had Transactions beyond Sea, afraid to send their Servants thither, for fear they might be laid by the Heels till they fetch'd them back again? Did it not startle the Lords, and the leading Men of the House of Commons, mention'd so often in *Fitzharris's* Trial, when the Earl of *Essex*, Lord *Ruffel*, Colonel *Sidney*, Mr. *Hampden*, and several others, were clapp'd up close Prisoners in the *Tower*? Did it not deter an honest Man from appearing to witness the Truth, when Sir *Patience Ward* was convicted of Perjury? Did it not provoke two great and noble Families, when the Lord *Ruffel* and Colonel *Sidney* were so illegally and unhandfomly dealt withal, as shall be hereafter declar'd? Did it not provoke all the Nation, except the Clergy and Soldiery, when all the Charters of *England* were seiz'd, and not re-granted, but at excessive Rates, to the starving the Poor, who should have been fed with the Money which went to purchase the new Charters, and reserving the disposition of all the Places of Profit and Power, within the new Corporations, to the King, but which indeed the Confederates shar'd among themselves? Nay, the very Election of Burgeffes, the freeness of which is the great Fundamental of the Government, was monopoliz'd, and put into a few hands. Did not the unreasonable Fines, and cruel Punishments inflicted, oppress many, terrify all, and consequently made the Government odious to the Subject? Did not the Cruelties acted in the *West*, enrage above a third part of the Nation? Did not the turning out many of the Soldiery and Clergy, without any Reason; and for that purpose erecting arbitrary Courts, and granting Dispensations to Persons by Law disabled, to enable them to have and enjoy the Places and Offices of such as were illegally turn'd out, and of all who should be in like manner turn'd out? And was it not seen what the Consequences of those things would be, by all who did not wink their Eyes, or who were not blinded by the Profit they made of such illegal and cruel Acts? Was not the King at last sensible, that the Consequence of what is before recited would be what afterwards happen'd? And did he not in less than a Month's time, when too late, throw down all that *Babel* of

Confusion which had been so long a building? and did all in his power, and would have done more if he could, to have set things as right as they were before the Parliament of *Oxon*; for from thence the Extravagancies may be dated. But alas! more Mischief can be, and was done by weak Brains, than the best Wits can retrieve; those that were dead could not be brought to life; the restitution of the Cities Charters was but in shew a Relief. How shall all those defend themselves who have acted under all the illegal Sheriffs constituted, and not elected? How shall those defend themselves, who have acted under Officers appointed by the new Charters, which by the restitution are gone as if they never had been? How shall Sheriffs, Goalers, and other Officers, who have had, or now have Custody of Prisoners, and having not taken the Test, trust to the Validity of a Dispense, behave themselves? Shall they continue to keep their Prisoners in custody, or let them go? If the last, they are subject to Actions of Escape; if the first, they are liable to false Imprisonment. These, and a great many more Mischiefs, not yet seen, are the natural results of these illegal Actions.

I never reflect on these things, but I remember *Tully*, in his Offices, lays down as a Rule, that nothing is profitable but what is honest, and gives many Reasons for it; but nothing so convincing, as the Examples he brings in publick and private Matters. And tho' the Empire was vast, and he bore a great Figure in it, and was very knowing, and was well read in the *Greek* and *Roman* Histories, yet he was not able to bring a hundredth part of Examples, to prove his Position, as have been in this little Island in the space of eight Years. And the Persons, by whose Advice these things were transacted, are the more inexcusable, if it be true what a certain Nobleman (who bore a considerable Character in the two late Kings Council) once said to me was true. He was complaining that the King was misled by the Advice of his Lawyers. I ask'd him whether the King put his Judges and Counsel upon doing what was done, without considering whether it was legal, as the common Vogue was he did; or that his Lawyers first advis'd what to be done, was Law? He answer'd me, on his Honour, the King's Counsel at Law first advis'd, the King might do by Law what he would have done, before he commanded them to do it.

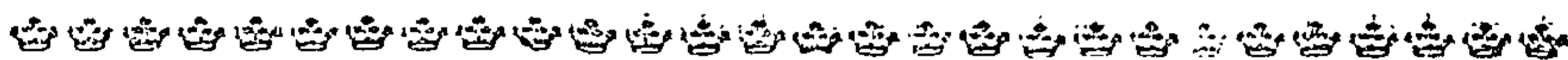
Yet I agree, none of those matters, though so inconvenient and grievous, are Treason by the Statutes of *Ed. III.* or *Car. II.*

For Profit in some Cases, Revenge in others, the endeavouring means to escape Punishment, and a natural propensity to Cruelty in many, were the true ends driven at; and not the bringing their Prince into the hatred of his Subjects, though that was a necessary consequent of all recited, and of many more matters omitted. And let *Fitzharris's* Crime, and those recited, be but examin'd, his was but a *Peccadillo* to the least of those; though this was acted by an *Irish* Papist, and these by *English* Protestants, Sons of the Church of *England* as by Law establish'd, as they call themselves; though I doubt, not sincere Protestants, as my Lord *Ruffel* said; Words which were matter of Laughter to those who brought him to the Block.

But, though neither *Fitzharris's* Crime, taken in the last Sense, nor the above Crimes, were High-Treason by any Statute; and the Judges have not power to punish any other Treasons: yet in all times the Parliaments have practis'd, and it is necessarily

cessarily incident to all supreme Powers, in all Governments, to enact or declare extravagant Crimes to be greater than by the established Law they are declared to be, not by virtue of the Clause in the Statute of *Edward* the Third, whereby some have, by mistake, thought that a Power was reserved to the *Parliament* to declare other matters Treason, than what is therein express'd: For admit that Clause had been admitted, there are none can doubt, but in Point of Power, the *Parliament* could (how far in Justice they might, is another Question) have declar'd any other matter to be Treason; and the Words of that Clause are very improper Expressions, either to vest or serve a Power in the *Parliament*; for the Words are only prohibitory to the Judges to adjudge any other matters Treason than those express'd in the Act, though they were somewhat like those express'd; and therefore might be suppos'd Treasons; and it is a sort of monition to Offenders, that they should not presume to be guilty of enormous Crimes, upon presumption that they were not Treasons within that Act. For in the Preamble 'tis said, because many other like Cases of Treason (which in Sense are Cases like Treason declared in that Act) may happen in time to come, which could not be thought of or declared at that present; therefore if any such should happen before any Justice, the Justice should tarry, and not

proceed to give judgment of Treason on it, till it should be judg'd in Parliament, Treason or Felony. How well the Judges, in late days, have observed this prohibitory Law, let the World judge; and most certainly the Parliament might have declar'd in *Fitzbarris's* Case, as they may in those other, that the Crimes were Treason, Felony, Misprision of Treason, Trespass, or what other Crime known in the Law, and inflict what Punishment they thought fit: and it is no injustice for the supreme Power to punish a Fact in a higher manner than by Law established, if the Fact in its nature is a Crime, and the Circumstances make it much more heinous than ordinarily such Crimes are. It was not injustice in the Parliament of the second and third of *Philip* and *Mary* to enact, that *Smith*, and others, who were suppos'd to be guilty, as Accessaries, to a barbarous Murder, and were equally, if not more guilty than the Principal, to enact, as they did, that if they should be found guilty as Accessaries, they should not have their Clergies, which at the time of committing the Fact Accessaries to Murder were allowed to have. It is true, to declare or enact a Fact, after it is committed, to be a Crime, which when committed was in it self none, such as transporting Wool beyond Sea, and the like, would be high Injustice.



Remarks on Colledge's Trial.

BUT to return whence I have digress'd, *Fitzbarris* being executed according to his Sentence, though there was great grumbling amongst the Protestants, that those who set him on work were conceal'd, and never like to be discover'd now he was dead; yet all was quiet, and the Conspirators, who resolv'd, though *Fitzbarris* miscarried in his Design, yet the *Plot* should go on; but what it should be, or where the Scene of it should be laid, or who the *Plotters* should be, they were not well resolv'd.

Great Noise of Warrants being issu'd out there was, but at last all center'd in an inconsiderable Fellow, one *Stephen Colledge*, a Joyner by Trade, who for his Honour, as a Prisoner of State, was committed to the Tower for High-Treason. At first it was design'd to lay the Scene in *London*, and accordingly a Bill of Indictment of High-Treason was exhibited to the Grand Jury (whereof *Wilmer* was Foreman) at the Sessions-House: But the Business of *Fitzbarris* was so new, and smelt so rank, that the Bill could not be digested, but was spew'd out with an *Ignoramus*; for which *Wilmer* was afterwards forc'd to fly his Country.

Then it was resolv'd the Scene should be at *Oxford*, and accordingly the King's Counsel, with *Irish* Witnesses, at the Assizes, post thither, and prevail with the Grand-Jury to find the Bill; but by what Arts is not known, for he was privately shut up by them: and I should wonder, if he, who frequently, in the hearing of those who understood better than himself, had Assurance enough to impose upon the Courts, should scruple in private to impose any thing on an ignorant Jury.

I know not how long the Practice in that Matter of admitting Counsel to a Grand-Jury hath

been; I am sure it is a very unjustifiable and unsufferable one. If the Grand-Jury have a Doubt in point of Law, they ought to have recourse to the Court, and that publickly, and not privately, and not rely upon the private Opinion of Counsel, especially of the King's Counsel, who are, or at least behave themselves as if they were Parties.

It is true, it is said they are upon their Oaths; and though it be not express'd in their Oaths, that they should do Right between the King and Subjects, yet that is imply'd in the Oath, I agree. But have they behav'd themselves as if they were under an Oath? Besides, all Men are not capable of giving Advice to be rely'd on in so great a Matter as Life; but the Manner of doing it being in private, can never be justify'd. I know, in *Fitzbarris's* Case, the King's Counsel were cajoling the Grand Jury in private for some Hours: but I did not think fit to take notice of it in that Trial, because I think both the Grand and Petty-Jury did very well; they acted according to the best of their Understanding, which is all that God or Man requir'd of them; they ask'd pertinent Questions, they were over-ru'd in some, not sully answer'd in others; not that I think either of them gave a Verdict according to Law upon the Fact, as it appear'd upon the Evidence; but that was not the Fault of the Jury, but of the King's Counsel, and of the Court, who misled the Jury. I thought it more proper to take notice of it in this Trial, wherein the first Bill was rejected by an understanding Jury, and all Men wonder'd how the second came to be found *Billa Vera*; and for that Reason, one of the King's Council boasted at Court, of his Service and cunning Management in the matter.

The Bill being found, the next matter was to bring the Prisoner to his Trial: and as he had more Honour than what usually is bestow'd on so mean a Man to be committed to the *Tower*, tho' in truth it was to keep him from all means of Defence; so to carry the matter on, he was allow'd to have, by order of the King and Council, a Counsel and Solicitor to come to him, and advise him for his Defence at all Events; a Favour deny'd to *Fitzbarris*, for his Counsel was to advise to the matter of the Plea only: but that Favour in shew was only to betray him, as shall be shewn. And a third Favour he had, which no Man of his Quality ever had; there were then three of the King's Counsel sent from *London*, and all the Counsel that could be pick'd up upon the Spot, which were three more, and no less than four Judges to prosecute and try him; but that was to make sure work of him.

The 17th of *August*, 1681, he came to his Trial: his Indictment, as to part, was in common Form for Treason, but particularly for designing to seize the King's Person at *Oxford*, mixt with Words he should say, as, That there was no good to be expected from the King, he minded nothing but Beastliness, and that he endeavour'd to establish Arbitrary Power and Popery. To which being requir'd to plead, he desir'd a Copy of the Indictment, a Copy of the Jury, to know upon what Statute he was indicted, and Counsel to advise him whether he had any thing pleadable in Bar; all which were deny'd him. Then he desir'd he might have his Papers, which were taken from him after he was brought from the Prison, and before he came into Court, at an House over-against the Court; for so it seems the King's Counsel had order'd the matter, that the Goaler *Murrel*, and the Messenger *Saxel*, after they had him out of the Prison, should run him into an House, and take away all his Papers, which they believ'd were the Instructions, as in truth they were, of the Counsel assign'd him when in the *Tower*, and bring the Papers to them; whereby they would not only disable him of his Defence, but they could be better instructed how to proceed in a way for which he had not provided himself of any Defence.

Murrel and *Saxel* did as the King's Counsel directed them. Much wrangle there was whether he should have his Papers or not; all the Court agreed he should not have them till he had pleaded *Guilty*, or *Not Guilty*; and afterwards he should have the Use of some, and not of others, because they did not appear to be written by himself, but by some Counsel or Solicitor; and as they said, none is allowed in Treason, unless assigned by the Court. The Chief Justice *North* said, they were not taken away by him; but, says *Colledge*, they were taken away by the Keeper, under pretence of bringing them to his Lordship. The Court said they knew not what Papers he meant, and knew nothing of it: he said, the Indictment mention'd something of Misdemeanor, as well as Treason, but he knew not how to make his Exceptions without his Papers. I have thought fit to mention all these things, because this Trial was the Inlet to all that followed, and gave Encouragement to spill nobler Blood. The Injustice of the Violence us'd to the Prisoner, must be measur'd from the Reasons given for it, that the Papers were Instructions from Counsel and Solicitors, and none in Law was allow'd in Treason. 'Tis true, no

Counsel are allow'd for the Prisoner in a Trial upon an Indictment of any Capital Matter; but in an Appeal for Capital Matters, Counsel are allow'd even on the Trial. The Reason given, that the Indictment is the Suit of the King, and no Counsel or Witness is allowable in a Capital Matter against the King, is foolish, as shall be hereafter shown; and as vain is the Reason that the Judges are Counsel for the Prisoner, which they ought to be: † but I doubt it will be suspected, that in this Case, and many others, they did not make the best of their Client's Case; nay, generally have betray'd their poor Client, to please, as they apprehended, their better Client, the King: for so they say they are to be Counsel likewise for the King in Indictments, that is to say, they are to be indifferent and upright between both, so certainly they are to be in Appeals; therefore that is not the Reason why no Counsel is allowed the Prisoner in the Indictment: but the true Reason in probability is, that the Prisoners in Indictments are generally so very poor that they could not be at the charge of having Counsel, and so Non-usage gave colour of a Law.

The other Reason my Lord *Coke* gives for it, viz. that much of the Truth may be discern'd by the Prisoner's Behaviour, or Answers, which would be conceal'd if he spoke by another, is not satisfactory; for the same is to be said in an Appeal. As to the Publick, 'tis not material whether a Man is prosecuted and punish'd by an Indictment, or an Appeal; and that Appeals are less frequent than Indictments, is only that the first is more chargeable than the last; for though we hear not of late of any Appeals but in Murder, yet they lie in Robbery, Burglary, Felony, and in all Crimes at Common Law punishable by loss of Life or Member: but though the Rule in Indictments is, That no Counsel is allow'd, yet it is confin'd to the Trial. No Law, Common or Statute, nor any Usage, says, a Prisoner shall not have Counsel to advise him before or after the Trial; and in Murder, and all other Crimes, it is always admitted; and why not in Treason?

In Treason, say some, 'tis criminal for one to advise or sollicite for the Prisoner; and the King's Counsel said, he had known one indicted for being a Solicitor for one in High-Treason; and says the Court, it is criminal for one to be Solicitor or Counsel in Cases of High-Treason, unless assign'd by the Court: and whether it be so or no, is worth Inquiry.

First, No Law-Book as to this Matter makes any difference between Treason, and other Crimes; and Advising and Solliciting is spoken of in general Terms; which being reduc'd to Particulars, will shew the Absurdity of it.

Suppose I, observing the Indictment on which the Prisoner was arraign'd, was erroneous, and should therefore advise him to move and quash it for that Error: for, say I, if you should be try'd on this Indictment, and found guilty, unless you move in Arrest of Judgment, you will be attainted, and then you can take no advantage of that Error; and if you be acquitted, you may be indicted again, and try'd again, because the first Indictment was erroneous.

If this be Law, as none can deny it, is it not lawful to advise him; and it is not fit for the Court to quash the Indictment faulty, notwithstanding all the Cant of Dilatories, Subterfuges, and defending himself by plain Matter of Fact? Or suppose I advise in Fact, that I hear that such

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a Witness is come against him, I know he is hired to do the Jobb, and I will prove it on him, if call'd: Or suppose I tell him, I know such a Witness is convict of Perjury, and if he will call me, I will produce the Records of his Conviction; can any Lawyer say these things are criminal? But if I should advise a Prisoner to escape out of Prison, shewing him the Way of doing it, it is criminal.

In all Cases comforting a Traitor is Treason*; but it is meant where you do it to keep him from Justice†; for else feeding a Traitor in Prison is Treason, which none will affirm‡. So that reducing general Words to particular Facts, clears the Sophistry of them: nor is it criminal to be a Solicitor in Treason, for where there is no positive Law, as in this Case there is not, natural Reason must take place; and better Reason cannot be given than what the Prisoner in this Case gave: If a Man be coop'd up and not suffer'd to go about his Business himself, and no Friend must be employed to do it for him, how is it possible for him to make his Defence? I know it is said his Innocency must defend him; but the Folly of that Saying shall be shewn in another place. But say they, The Court shall assign him a Counsel and Solicitor; but when, and for what? only for a Point of Law. May not a Prisoner want a Solicitor for a Matter of Fact? Suppose he had occasion for a Witness which he could not readily find, or occasion for a Copy of a Record, for want of which Mr. *Cornish* suffer'd; was it not reasonable for him to have a Solicitor? And when shall the Court assign him a Solicitor? only when the Prisoner comes upon his Trial, and then it is too late to have any use of him; as *Colledge* was arraign'd at twelve, and try'd at two a-clock the same Day; and as was Mr. *Cornish's* Case. But, say the King's Counsel, they had known one indicted for High-Treason for being a Solicitor in such a Case, though I do not believe it, yet that Authority goes no farther to prove the Matter, than an Indictment I knew against a Person once, for stealing an Acre of Land; and against another for wickedly and devilishly breaking an Award, whereby two unjust Arbitrators directed the Prisoner to convey his Land to a certain Lord, without any Satisfaction or Recompence, prov'd those Matters to be Felonies.

But though a Prisoner may be advis'd, yet that Advice must not be reduc'd to writing. Then suppose one Man's Memory be good, and can bear all the Advice given him, and another's Man's Memory bad, and cannot do it: Is not the last hang'd for having a bad Memory, rather than for his Crime? But though it may be reduc'd to writing, yet it must be his own Hand writing, and not another's; how ridiculous is the Distinction? Suppose the Prisoner cannot write, then he is hang'd for his Parents Fault or Misfortune, for not educating him, or for not being able to educate him better.

Which is somewhat of kin to the late Practice in the West, where many Men were hang'd for having old *Jewish* Names, as *Obadiab*, or the like, with a Jest, that their Godfathers hang'd them. But, suppose it is not lawful in general to be a Counsel or Solicitor, with, or to a Prisoner committed for High-Treason; yet the Prosecution being the King's he may give a Privilege which the Law of Courts, doth not allow, and in this Case it was so done: for, to the Confusion of those who did this Injury, and of those Judges who would not do the Prisoner Right, they have printed the Orders of the

King and Council, which appointed Mr. *West* and *Aaron Smith* to be his Counsel and Solicitor.

If it was lawful for the Prisoner to have Counsel, and to have Advice in writing; it was very unlawful, and as high a Misdemeanour in the King's Counsel to order his Papers to be taken away, as they were capable of being guilty of; both the Prisoner and the Matters of his Defence being under the Protection of the Court.

It is not an ancient Practice the seizing of Papers, though of late us'd; it began, I believe, upon my Lord *Coke*, whose Papers were seiz'd and carried to the Secretaries Office, upon the like Pretences as of late, and when return'd, were gelt of many Bonds and other Securities, to a great many thousand Pounds value, which never came to light. It was afterwards practis'd upon some Members of Parliament, and, as I remember, voted Illegal, as undoubtedly it is: for though, sometimes you may meet with Papers which may be Evidence against the Prisoner; yet it is possible that other Papers than the Prisoner's may be mix'd with his to make good an Accusation; nay, which is worse, some of the Papers may be withdrawn, which may be the only Matter of his Defence, and that hath been often practis'd. And I cannot but remember a Story about this Matter: When Sir *William Jones* died, it was said, that one from *Whitehall* offer'd Sir *William Jones's* Servant a great Sum of Money but to let him search his Master's Study, to find a Paper which would discover great Matters. A certain Person discoursing with a Privy-Counsellor about it, the Privy-Counsellor said, It was not true; for, says he, if we had had a mind to have done it, could we not send a Messenger on pretence of searching for treasonable Papers, and bring all the Study to *Whitehall*, and keep what we would of them?

But though that hath been often practis'd, yet this was the first time that ever a Prisoner had the Instructions for his Defence taken away from him; and the Manner was worse than the thing, it being done just as he was coming to his Trial, relying upon his Writing, not his Memory, for his Defence; besides the Agony so great an Injury put him in, when he had so great a Concern upon him, as the Trial for his Life, and he could not but know by all that Preparation, that it was more than ten to one against him: all which is well seen in his Trial, where he so pathetically and sensibly press'd the Court for Justice in this Matter, which they excus'd with such mean Answers, that all Mankind must see they were satisfy'd of the Injustice, and were resolv'd not to do him Right: They knew not which way he came by the Papers, they knew not but he may be criminal who brought them him; they knew nothing of his Papers, they knew not what Papers he meant; that his Lordship did not take them away, and such like stuff: as if it was not the Duty of the Court to relieve the Prisoner against the Oppression of any such Persons but themselves; else why did they not ask *Murrel* and *Sawel* who stood by, and were charged with taking them, for the Papers, and have satisfy'd themselves of them? But in truth they knew before what they were. And *Colledge* was a true Prophet, when finding his Life so beset, he said, This was a horrid Conspiracy to take his Life: but it would not stop there, for it was against all the Protestants of *England*. And the Rule the Court made at last was as unjust, That he should have the use of some of his Papers after he had pleaded not Guilty, but not

* 3. Co. Inst. 138. † 2. Co. Inst. 183. 3. Co. Inst. 134. § H. P. C. 218.

not before ; for suppose there was Matter in them which could not be made use of after such Plea, as a Plea to the Jurisdiction of the Court, a Pardon, otherwise acquitted, and the like, could not be pleaded, or advantage taken of them after not Guilty pleaded ; although there was not such, yet there might have been such Pleas for ought the Court knew. How unjust then was it for him to plead not Guilty before he should have the use of his Papers ? But there was Matter in them for quashing the Indictment ; and he hinted so much to the Court, as that the Indictment contain'd Crimes of different Nature, as Treason and Misdemeanour, and I think it was good Cause to quash the Indictment.

In all Civil Matters, two Matters of different Natures cannot be put into one Action, as Debt and Trespass ; two Capital Crimes of different Natures cannot be join'd in one Indictment, as Murder and Robbery : and for the same, and another Reason, Treason and Misdemeanour cannot be join'd in one Indictment ; for the Jury may observe that one part of the Indictment, which in it self is but Misdemeanour, as that he said, The King minded nothing but Beastliness, &c. though charg'd in the Indictment as Treason, was prov'd, and not the material Parts of the Indictment, as designing to seize the King's Person, &c. and finding some part of the Indictment prov'd, might find him Guilty generally, which extends to every Article of the Indictment, and so the Jury deceiv'd, and the Prisoner in danger ; or suppose he was acquitted of such an Indictment, if it ought to have been quash'd, whether the Prisoner shew the Error or not, he may be try'd again upon another good Indictment for the same Treason. If therefore what he offer'd was an Error, or but like an Error in the Indictment, by the Law which favours Life, and the jeopardy on Life, the Court ought not to have try'd him on that Indictment, but have directed another Indictment to have been found. It is a vain Objection to have said, That that would have been troublesome. Is the Mischief of that comparable to that of putting a Man twice in jeopardy of his Life for the same thing ? But it would have been a delay. I say none ; for there was a Grand Jury in Court, and within the two Hours time the Court adjourn'd (to give the King's Counsel Opportunity of viewing the Prisoner's Papers which were taken from him, and to consider of the Method of his Prosecution by them, which they did, and alter'd it from what they at first design'd it) the King's Counsel might have had a new Bill found ; but peradventure they could not prevail with that Grand Jury to have found a new Bill ; they remembered they had ill luck with the first Bill at London, which I believe was the true Reason : but I'll do the Court no Injury, in supposing that to be the Cause of the Adjournment which was not ; 'tis true, in the printed Trial, 'tis pretended they adjourn'd in order to Dine ; yet those that knew the Adjournment was by the Direction of the King's Counsel, and overheard their whispering with the Chief Justice (which is both an indecent and an unjust thing, and is neither better nor worse than a Plaintiff or Defendant's whispering a Judge while his Case is before him trying) and I know that the Judges had breakfasted but a little before, and had no great Stomach to their Dinners, and therefore believe, that that before assign'd, and not what was pretended, was

the true Cause : They might better have put off their Dinner to their Supper, than their Supper to their Breakfast, as they did, the Trial lasting till early next Morning.

But because all Irregularities of Court and Counsel, in all these Matters, are shifted off and excus'd by two Sayings not understood generally ; the first whereof is, That the Court is to act for the King, and the Counsel are for the King, and no Person must come near the Prisoner, to the Prejudice of the King, as in *Fitzbarris's* Case was often said ; a Witness was permitted to go on in an impertinent Story, of a Transaction between him and my Lord *Shaftesbury*, in my Lord *Ruffel's* Trial, of which the Prisoner complain'd that it was design'd to incense the Jury ; and though the Chief Justice declar'd it was not Evidence, yet a great while afterward he went on in a like manner : nay, the Counsel in summing up the Evidence, repeated the same Matter, which was permitted because it was *for the King* ; and yet, when the Earl of *Anglesea* began to say what the Lady *Chaworth* told him, he was snubb'd, and cut short ; and Mr. *Edward Howard* was serv'd the same Sauce, because it was *against the King* : It is fit therefore to know what is meant in Law by those Words. No body doubts what the Courts or King's Counsel of late Days meant, but in Law they are not so meant : for though many things are said to be the King's, as the Protector of his People, and more concern'd in their Welfare than any private Persons ; yet they are so in Preservation, and not in Property or Interest. The Highways are the King's, in preservation for the passage of his Subjects ; and whoever obstructs them wrongs the King, as he is hurt when his Subjects are hurt ; but in Property, the Soil generally belongs to private Persons. The King is hurt when his Subjects are oppress'd by Force, because he has engag'd to defend them ; and therefore the Offender is punish'd by the King, to deter the Offenders, and others, from committing the same Offences ; which is for the benefit of the Publick. But as a Man may be oppress'd by open Force, so he may be oppress'd by private Insinuations, and false Accusations, and the King has engag'd to defend his Subjects from such ; not that it is possible to prevent them, but by consequence, that is, by punishing such as shall be found guilty of those Crimes, which heretofore were punish'd with the highest arbitrary Punishments we read of. The Consequence is, That it is for the King to punish Offenders, to acquit the false accus'd, and to punish the false Accusers ; that is to say, in all Cases to do right according to Law and Truth.

Surely Queen *Elizabeth* gave the best Explanation of the * Words, when the Lord *Burleigh*, seeing Sir *Edward Coke*, the then Attorney-General, coming towards her, he said, *Madam*, here is your Attorney-General, *Qui pro Domina Regina sequitur*. Nay (*says she*) I'll have the Words alter'd, for it should be, *Qui pro Domina Veritate sequitur*.

For the King, and *for Truth* ; they are synonymous Words ; *for the King against the Truth* is a Contradiction. And the Judges and King's Counsel having taken an Oath to advise the King according to the best of their cunning, which is according to Law and Truth ; if therefore the King's Counsel use means, and the Court permit them so to do, to suppress Truth, or to disable the Prisoner from making his Innocence appear, as in *Colledge's*

* 3 Cok. Inst. 79.

ledge's Case was done, if they urge things as Evidence of the Crime whereof the Prisoner is accus'd, which by Law are not Evidence, as in this Case, in the Lord *Ruffel's* Case, Colonel *Sidney's* Case, Mr. *Hampden's*, and Mr. *Cornish's* Case, and in many more they did, and as in some of them shall be hereafter shewn. If they insinuate any Fact as Evidence, which is not prov'd, as in my Lord *Ruffel's* Trial, that my Lord of *Essex* kill'd himself; if they wrest as Evidence of the Fact, what in Sense is not so, as in Colonel *Sidney's* Case, the writing his Book, (nay, for any thing appear'd, it was writ before King *Charles* the Second came to the Crown) they are Counsel against the King, being against Truth, as well as against the Prisoner.

I think no Man will deny the Truth of this Proposition, That it is as much the King's interest to have an Innocent accus'd of Treason, acquitted, as it is to have a Nocent accus'd of Treason, convicted. If that be true, then let any one shew me a Reason if he can; for there is no Law against it, why he may not have the same Liberty of clearing his Innocence, as the Prosecutor hath of convicting him; I mean by free and private Access of all Persons to the Prisoner, as is us'd in all other capital Matters. If it be said he may get some to corrupt the Witnesses against him, or suborn others for him, the same may be said in all other Matters; but in Treason that is not a likely Matter, for generally the Prisoner never knows what he is accus'd of, and consequently cannot know his Accuser, nor how to provide a Counter-Evidence, till he comes to be arraign'd, and then it is too late: for generally he is presently tried after his Arraignment, as was the Case of *Colledge*, and my Lord *Ruffel*, and Mr. *Cornish*; and Persons committed for Treason are so much the less able to corrupt or suborn Witnesses, than any other Criminals, that they generally, according to the late Practice, have no Accuser brought Face to Face to them on their Commitment as all other Criminals have, who always are committed upon an Accusation made upon Oath in their hearing, and their Defence heard before their *Mittimus* made; and whatever the Pretence may be, yet in Experience, it is found that more Perjuries are committed in Prosecutions for Treason by the Accusers, than by the Witnesses for the Prisoner.

One reason is, A Witness in Treason is more difficultly convicted than in any other Crime: For Treason is an *Ignis fatuus*, 'tis here and there, as *Colledge* was first in *London*, then in *Oxford*; it is not confin'd to place or time, as all other Crimes are; in all other Crimes, as Murder, Robbery, or the like, it must be proved to be within the County where laid; it must be of the Person named in the Indictment, which are Evidences of Fact, which in some sort prove themselves. And there was but one that I remember (for *Oates* I do not count one) was ever justly convicted of Perjury in Treason, and that too was for want of Cunning, for he foolishly swore to Time as well as Place, which a Witness in Mr. *Hampden's* Trial would never be brought to do: Besides Malice and Revenge, which in Prosecutors and Accusers in Treason are generally the Motives, go farther than Money or Kindness, which if us'd in any Case, are the Motives of false Witnesses for the Prisoner.

Now as for the King and for the Truth are the same, so for the King and for the Law are the

same. The Laws are the King's, as he is to see the Execution and Preservation of them; so for the King against the Law is a Contradiction.

Therefore to try a Prisoner upon a vicious Indictment, as was done in *Colledge's* and Colonel *Sidney's* Cases, is against the King as it is against Law, for by that means he is in danger to be hang'd if convicted; or tried twice, if acquitted, which is against Law.

It is no Salvo of the Matter what the Judges said in *Colledge's* Case, that the Evidence of Misdemeanour is no Evidence of Treason; for the same may be said in an Indictment of Murder and Robbery; nor that the Judges would take care to inform the Jury which was Evidence of Treason, which of Misdemeanour, which they promis'd to do, but were not as good as their Words, as shall be shewn: for the Court may forget so to do, and the Jury may forget what the Court said to them of that Matter.

But notwithstanding all this, if the Prisoner was innocent, there could be no harm done to him, for his Innocence would defend him: This was a saying, and as mortal it was to *Fitzbarris*, to *Colledge*, to Colonel *Sidney*, to Mr. *Cornish*, and several others, as was the Letter \odot amongst the *Greeks*. It is true, my Lord *Coke* us'd the Expression, but in another Sense than that of late practis'd. I would fain know what they meant by the Expression; Is it, that no Man will or ever did swear falsely against a Prisoner in Treason? If that be true, how came the same Persons to be so violent against *Oates* for what he swore against *Ireland*? or do they mean, that, let an Accuser swear never so violently and Circumstantially against a Prisoner, yet if he be innocent it will do him no harm? If that be true, I would fain know how the Prisoner shall escape; is it that his Innocence shall appear in his Forehead, or an Angel come from Heaven and disprove the Accuser? Neither of which we have observed, tho' all have said, and I believe, that some Persons have been very innocently executed. Or shall the Accuser be detected by the bare Questions of the Prisoner, that I think will not be neither; and therefore to instance in the only Person who hath of late escap'd in a Trial of Treason, where there was a Design against his Life, which was my Lord *Delamere*, if he had not had Witnesses to have prov'd the Persons mention'd to have been with him at the Place and Time sworn against him to be in other places, it was not his Denial had serv'd his turn, but he would have run the same Fate with my Lord *Brandon*. Nay, I am apt to think had he been tried by a Jury of Commoners pack'd, as at that time they usually were, he had not escap'd.

The truth is, when I consider the Practice of late Times, and the manner of Usage of the Prisoners, it is so very much like or rather worse than the Practice of the Inquisition, as I have read it, that I sometimes think it was in order to introduce Popery, and make the Inquisition, which is the most terrible thing in that Religion, and which all Nations dread, seem easy in respect of it. I will therefore recount some undeniable Circumstances of the late Practice: A Man is by a Messenger, without any Indictment precedent, which by the common Law ought to precede, or any Accuser or Accusation that he knows of, clapt up in close Prison, and neither Friend or Relation must come to him; he must have nei-

ther Pen, Ink or Paper, or know of what, or by whom he is accus'd; he must divine all, and provide himself a Counter-Evidence, without knowing what the Evidence is against him. If any Person advise or sollicite for him, unless assign'd by the Court by which he is try'd, they are punishable: He is try'd as soon as he comes into the Court, and therefore of a Solicitor there is no occasion or use; if the Prisoner desires Counsel upon a point of Law, as was done in my Lord *Ruffel's* Trial, the Council nam'd must be ready to argue presently, and the Court deliver their Judgment presently, without any Consideration. The Prisoner indeed hath Liberty to except to thirty-five of the Jury peremptorily, and as many more as he hath cause to except to, but he must not know beforehand who the Jury are; but the King's Counsel must have a Copy of them: He must hear all the Witnesses produc'd to prove him guilty together, without answering each as he comes, for that is breaking in upon the King's Evidence, as it is call'd; tho' it hold many Hours, as it happen'd in most of the Trials: he must not have any Person to mind him what hath been sworn against him, and forgotten by him to answer; for if that were allow'd, the Prisoner perhaps may escape hanging, and that is against the King: There is a Proclamation to call in all Persons to swear against him, none is permitted to swear for him; all the impertinent Evidence that can be given is permitted against him, none for him; as many Counsel as can be hir'd are allow'd to be against him; none for him. Let any Person consider truly these Circumstances, and it is a wonder how any Person escapes? it is downright tying a Man's Hands behind him, and baiting him to death, as in truth was practis'd in all these Cases. The Trial of *Ordeal*, of walking between hot Iron Bars blindfold, which was abolish'd for the Unreasonableness of it, tho' it had its Saying for it too, that God would lead the Blind so as not to be burnt if he were innocent, was a much more advantageous Trial for the Suspected than what of late was practis'd, where it was ten to one that the Accus'd did not escape. If any of these things have been legally practis'd, I have nothing to say against it, but I have never read any thing of Common or Statute-Law for it. And I can with better Assurance say than any Person who hath practis'd these things, that no Law in *England* warrants them; and if not, then consider the Unreasonableness of these Methods.

There is yet one Objection to be answer'd, which being a very great Hardship upon the Prisoner, gives some colour of imposing other Hardships upon him, to wit, that a Witness cannot be examin'd for the Prisoner on his Oath in a Trial upon an Indictment of a capital Matter. It is not because the Matter is Capital, for then no Witnesses ought to be examin'd upon Oath for the Appellee in a capital Matter: Neither is it because it is against the King, for then no Witness ought to be examin'd on Oath for the Defendant in a Trial upon an Indictment of any criminal Matter; yet in Indictments of all criminal Matters, not capital, 'tis permitted to the Prisoner.

To say truth, never any Reason was yet given for it, or I think can be, if you believe my Lord

Coke, 3d Instit. fol. 79. of which Opinion my Lord *Hale* is, in his Pleas of the Crown*, that that Practice is not warranted by any *Act of Parliament*, Book-Case, or antient Record, and that there is not so much as *scintilla Juris* for it; for he says, when the Fault is deny'd, Truth cannot appear without Witnesses. As for what is pretended, that it is swearing against the King, and therefore it is not allow'd of; 'tis a canting Reason, which put into sensible *English*, a Man will be asham'd to own. And as slight is the Reason, that it being a matter of so high a moment as a Man's Life, the Prisoner will be the more violent and eager, and the Witnesses may be more prevail'd upon to swear falsely, more than they would be in a matter of less moment: The Weakness of that Reason hath been in part, and shall be further shewn. I think none will deny, but the End of Trials in any matters Capital, Criminal, or Civil, is the Discovery of Truth: Next, 'tis as necessary for the Prisoner to have Witnesses to prove his Innocence, as it is for the King to have Witnesses to convict him of the Crime? which Proposition is agreed by the Practice, it being always permitted, that the Prisoner shall produce what Witnesses he can, but they are not to be upon Oath. In the last place, since Truth cannot appear but by the Confession of the Party, or Testimony of Witnesses of both sides, it is necessary to put all the engagement as well on the Witnesses of part of the Prisoner, as of part of the King, to say the Truth, the whole Truth, and nothing but the Truth, as the nature of the Matter will bear: and as yet no better means has been found out than an Oath; which if deny'd to the *Prisoner's Witnesses*, either he is allow'd too great an advantage to acquit himself, or he is not allow'd enough.

If all that his Witnesses say without Oath, shall have equal credit as if they swore it, then he hath too much advantage; for Men may be found who will say falsely, what they will not swear, as is plain enough. How often doth a Defendant say, in a *Plea* at Law, that a Deed is not his, which yet in an Answer in *Chancery*, he will confess to be his? If his Witnesses shall not have Credit because not sworn, to what Purpose then is it permitted him to produce them? If they shall have Credit, but not so much as if sworn, I ask how much Credit shall be given? Is it two, three, or ten Witnesses without Oath shall be equivalent to one upon Oath? And besides, that Question never was or can be answered, what Credit shall be given them? There is an unreasonable Disadvantage put on the Prisoner, that a Witness produc'd on his part, of equal Credit with the Witness against him, shall not have equal Credit given him, because he is not on his Oath; whereas he is ready to deliver the same things on his Oath, if the Court would administer it to him: and yet that Difference was taken in *Fitzbarris's* Case, as to the Credibility of *Everard* and *Oates*, the first being upon his Oath, the last not.

I do not offer this as any Reflection upon the late Proceedings, but as a Reason why Matters in capital Proceedings ought not to have been carried further than heretofore they were, against the Prisoner by Example of so unreasonable a Practice.

But to return to the Trial of *Colledge*, which came on in the Afternoon, when the Attorney insisted

stated that the King's Witnesses ought not to be examin'd out of the hearing of each other; in which he was over-ruled, but the Rule not observ'd, nor was it material: for the King's Counsel having the Prisoner's Writings, and by them observ'd how he intended to make the Witnesses against him contradict themselves, they did not produce such Witnesses as were not instructed to concur in the Evidence of the same matter, but produc'd only such as were instructed to give Evidence of distinct matters. And therefore *Dugdale* was first produc'd, who gave Evidence of villifying Words spoke of the King at several times, at *Oxford* and *London*, by the Prisoner, to himself alone; that he shew'd the Witness several scandalous Libels and Pictures, and said he was the Author of them; and that he had a silk Armour, a brace of Horse-Pistols, and a Pocket-Pistol and Sword; that he said, *he had several stout Men to stand by him, and that he would make use of them for the defence of the Protestant Religion*; he said, *the King's Party was but an Hand-full to his Party*. *Stevens* swore the finding of the Original of the *Rarce-Show* in the Prisoner's Chambers. *John Smith* swore his speaking scandalous Words of the King, and of his having his Armour; and that when he shew'd it the Witness, he said, *These are things that will destroy the pitiful Guards of Rowley*; that he said, *he expected the King would seize some of the Members of Parliament at Oxford*; which, if done, he would be one should seize the King; that he said, *Fitzgerald, at Oxon, had made his Nose bleed; but before long, he hoped to see a great deal more Blood shed for the Cause*; that if any, nay, if *Rowley himself, came to disarm the City, he would be the death of him*. *Haynes* swore he said, *Unless the King would let the Parliament sit at Oxon, they would seize him, and bring him to the Block*; and that he said, *the City had One Thousand five hundred Barrels of Powder, and One hundred thousand Men ready at an Hour's warning*. *Turberville* swore, he said at *Oxford*, that *he wissh'd the King would begin; if he did not, they would begin with him, and seize him*; and said, *he came to Oxford for that purpose*.

Mr. Masters swore, that in discourse between him and the Prisoner, he justified the Proceedings of the Parliament in 1640, at which the Witness wondred; and said, How could he justify that Parliament that rais'd the Rebellion, and cut off the King's Head? To which the Prisoner reply'd, That that Parliament had done nothing but what they had just cause for, and that the Parliament which sat last at *Westminster* was of the same Opinion; that he call'd the Prisoner Colonel in mockery, who reply'd, Mock not, I may be one in a little time.

Sir William Jennings swore as to the fighting with *Fitzgerald*, and the Words about his bleeding.

For the Prisoner.

Hickman said he heard *Haynes* swear, *God damn him*, he car'd not what he swore, nor whom he swore against, for it was his Trade to get Money by swearing. *Mrs. Oliver* said, *Haynes* writ a Letter in her Father's Name, unknown to her Father. *Mrs. Hall* said, she heard *Haynes* own that he was employed to put a Plot on the Dissenting-Protestants. *Mrs. Richards* said, she heard him say the same thing. *Whaley* said, *Haynes* stole a Silver Tankard from him. *Lun* said, *Haynes* said the Parliament were a Company of Rogues for not giving the King Money, but he would help the King to Money enough out of the Fanaticks Estates. *Gates* said, *Turberville* said, a little before the Witnesses were sworn at the *Old-Bailey*, that he was not a

Witness against the Prisoner, nor could give any Evidence against him: And after he came from *Oxford*, he said, he had been sworn before the Grand-Jury against the Prisoner, and said, the Protestant Citizens had deserted him, and *God damn him*, he would not starve. That *John Smith* said, *God damn him*, he would have Colledge's Blood. That he heard *Dugdale* say, that he knew nothing against any Protestant in *England*; and being tax'd, that he had gone against his Conscience in his Evidence, he said, it was long of Colonel *Warcup*, for he could get no Money else; that he had given out that he had been poison'd, whereas in truth it was a Clap. *Blake* said, that *Smith* told him *Haynes's* Discovery was a Sham-Plot, a Meal-Tub Plot.

Bolton said, *Smith* would have had him given Evidence against *Sir John Brooks*, that *Sir John* should say there would be cutting of Throats at *Oxford*, and that the Parliament-Men went provided with four, five, six, or ten Men a-piece; and that there was a Consult at *Grantham*, wherein it was resolv'd, that it was better to seize the King than to let him go, whereas he knew of no such thing: that he would have *Bolton* to be a Witness against *Colledge*, and told him what he should say, lest they should disagree in their Evidence; that he heard *Haynes* say, he knew nothing of a Popish or Presbyterian Plot, but if he were to be an Evidence, he car'd not what he swore, but would swear any thing to get Money. *Mowbray* said, *Smith* tempted him to be a Witness against *Colledge*, and was inquisitive to know what Discourse pass'd betwixt him and my Lord *Fairfax*, *Sir John Hewly*, and *Mr. Stern*, on the Road; and said, that if the Parliament would not give the King Money, and stood on the Bill of Exclusion, that was Pretence enough to swear a Design to seize the King at *Oxford*.

Everard said, *Smith* told him he knew of no Presbyterian or Protestant Plot, and said, Justice *Warcup* would have persuaded him to swear against some Lords, a Presbyterian Plot, but he knew of none; he said, *Haynes* told him it was Necessity and hard Pay drove him to speak any thing against the Protestants; and being question'd how his Testimony agreed with what he formerly said, answer'd, he would not say much to excuse himself; his Wife was reduc'd to that necessity, that she begg'd at *Rouse's* Door, and mere Necessity drove him to it, and Self-preservation, for he was brought in guilty when he was taken up, and was oblig'd to do something to save his Life, and that it was a Judgment upon the King or People; the Irishmens swearing against them was justly fallen on them, for outing the Irish of their Estates.

Parkhurst and *Symons* said, they had seen at *Colledge's* House his Arms, about the latter end of *November*. *Yates* said, *Dugdale* bespoke a Pistol of him for *Colledge*, which he promis'd to give *Colledge*. And upon Discourse some time after the *Oxford* Parliament, *Yates* said, *Colledge* was a very honest Man, and stood up for the good of the King and Government. Yes, said *Dugdale*, I believe he does, and I know nothing to the contrary. *Deacon* and *Whitaker* said they knew *Colledge* was bred a Protestant, and went to Church, and never to a Conventicle that they knew of, and thought him an honest Man. *Neal*, *Rimington*, *Januer*, and *Norris* to the same purpose; and *Norris*, that *Smith* (in company where was Discourse of the Parliament-Mens being agreed to go to *Oxford*) said, he hoped they would be well provided to go, if they did go. *El. Hunt* said, a Porter, in her Master's absence,

brought the Prints taken in *Colledge's* House eight Weeks before; and said, *Dugdale* told her, after her Master was in Prison, he did not believe *Colledge* had any more hand in any Conspiracy against his Majesty, than the Child unborn: and he had as lieve have given an hundred Pounds he had never spoke what he had; and that he had nothing to say against her Master, which would touch his Life.

Having summed up all the material part of the Evidence in the order it was given, for or against the Prisoner; let us see whether, upon the whole, an honest understanding Jury could, with a good Conscience, have given the Verdict the then Jury did; or whether an upright Court could, with a good Conscience, have declar'd they were well satisfied in the Verdict given, as all the four Judges in that Case did, though the Chief Justice *North* only spoke the Words. And though it is too late to advantage the deceased, yet it will do right to the Memory of the Man, to whose dextrous Management on his Trial, many now alive owe the continuance of their Lives to this day. It was not their Innocence protected the Lord *Fairfax*, Sir *John Brooks*, and many others before-mention'd, and many not named in the Trial, but *Colledge's* baffling that Crew of Witnesses, and so plainly detecting their Falshood, that the King's Counsel never durst play them at any other Person but the Earl of *Shaftesbury*, as shall be shewn; and failing there, they were paid off, and vanish'd, and never did more harm visibly: what under-hand Practices they might be afterwards guilty of, I know not.

Who could believe any one of those four Witnesses, *Dugdale*, *Haynes*, *Turberville*, and *Smith*, if it were for no other Reason than the improbability of the thing; for (as *Colledge* said) was it probable he should trust things of that nature with Papists, who had broke their Faith with their own Party, who could lay greater Obligations of Secrecy upon them than he was able to do? That he, a Protestant, should trust People who had been employed to cut Protestants Throats? And neither of them ever discovered any of the things they swore, till after the *Oxford* Parliament, tho' most of them were pretended to be transacted and spoken before.

Who could believe *Dugdale* in any of his Evidence against the Prisoner, when *Oates* testified against him, that he said he knew nothing against any Protestants in *England*? And being tax'd by *Oates*, that he had gone against his Conscience in his Evidence against *Colledge* to the Grand-Jury at *London*, he said, *It was long of Colonel Warcup, for he could get no Money else*; which is a plain Confession he had sworn wrong, and of the Cause for which he did it, and of the Person who induced him to do it. That he had given out that he was poison'd, whereas his Disease was a Clap: which was an ill thing in him, as it imply'd a Charge of poisoning him on other Persons. And when *Elizabeth Hunt* testified against him, that he said, after *Colledge* was in Prison, that he did not believe *Colledge* had any more hand in any Conspiracy against the King, than the Child unborn; and that he had as lieve have given an hundred Pound he had never spoken what he had; and that he had nothing to say against *Colledge* which could touch his Life: And when *Oates* testify'd against him, that when *Oates* said *Colledge* was an honest Man, and stood up for the good of the King and Go-

vernment; *Yes*, said *Dugdale*, *I believe he does, and I know nothing to the contrary*.

Who could believe *Haynes* in any part of his Evidence against the Prisoner, when Mrs. *Hall* and Mrs. *Richards* said, he own'd he was employ'd to put a Plot upon the Dissenting Protestants? when *Whaley* testified against him that he was a Thief, and had stole *Whaley's* Tankard? when *Lum* testify'd that *Haynes* said the Parliament were a Company of Rogues, for not giving the King Money; but he would help the King to Money enough out of the *Fanatics* Estates? when *Hickman* testified against him he heard him say, *God damn him*, he car'd not what he swore, nor against whom he swore, for 'twas his Trade to get Money by swearing? when Mrs. *Oliver* said, that he had writ a Letter in her Father's Name, without her Father's knowledge? when *Belron* testify'd against him, that he said he knew nothing of a *Popish* or a *Presbyterian* Plot, but if he were to be an Evidence, he cared not what he swore, but would swear any thing to get Money? when *Everard* testified against him, that he said, Necessity and hard Pay drove him to say any thing against the *Protestants*; and being tax'd that his Evidence against *Colledge* agreed not with what he had formerly said, he said, *he could not excuse it, but his Poverty and Self-preservation drove him to it*? which was a plain Confession of the falshood of his Evidence, and of the reason of it; and added, it was a judgment upon the King or People, the *Irishmens* swearing against them, for outing the *Irish* of their Estates: which can have no other Sense, than the *Irishmens* forswearing themselves against the *English* was a Judgment, &c.

How could *Turberville* be believed in any part of his Evidence against *Colledge*, when *Oates* testified against him, that he said, a little before the Witnesses were sworn against *Colledge* at the *Old-Bailey*, that he was not a Witness against him, nor could give any Evidence against him; and yet afterwards, at *Oxon*, *Turberville* told him he had sworn against *Colledge* to the Grand-Jury, and said, the Protestant Citizens had deserted him, and *God damn him he would not starve*: which Words, I think, need no Explanation.

And lastly, How could *Smith* be believed in any part of his Evidence against the Prisoner, when it was testified against him by *Blake*, that he said *Haynes's* Discovery was a Sham-Plot, a Meal-Tub-Plot? The meaning of the Words, I think, are well known: That he would have had *Belron* swear against Sir *John Brooks*, the Lord *Shaftesbury*, and *Colledge*, Things of which he knew nothing, and told him what he should swear, lest they should disagree in their Evidence. When it was testified against him by *Oates*, that he said, *God damn him*, he would have *Colledge's* Blood? when it was testified against him by *Mowbray*, that he tempted *Mowbray* to be a Witness against *Colledge* and Sir *John Brooks*, and was very inquisitive to know what Discourse he had with the Lord *Fairfax*, Sir *John Hervey*, and Mr. *Stern*, on the Road to *Oxon*; and said, if the Parliament did not give the King Money, but stood on the Bill of Exclusion, that was pretence enough to swear a Design to secure the King at *Oxon*? when *Everard*, and many others testified he said he knew of no *Presbyterian* or *Protestant* Plot. Now if *Colledge's* Witnesses were credited, it was impossible the King's Witnesses could be credited; that was agreed by the Court

to be true upon the Trial. The Answer on the Trial was, that the King's Witnesses were on their Oaths, the Prisoner's were not; which was a Reason in Words, but not in Sense.

And surely what *Colledge* said on that Matter, without any Knowledge in the Law, cannot be answer'd. *It is not fair dealing*, said he, *with a Man for his Life, because the Witnesses against him, upon their Oaths, deny the things the Witnesses for him prove; therefore the Witnesses against him must be believed, and the Witnesses for him disbelieved, when yet the Witnesses for him were ready, on their Oaths, to maintain what they said for him.*

Nor is the Law so: for taking the Law to be, that a Witness for the Prisoner shall not be sworn, which is only made good by Practice; the same Law, that is to say Practice, is, that a Witness without Oath, for the Prisoner, is of equal Credit with the Witness against him upon Oath, and none can shew the contrary till of late Days.

To give one Example of many, where it was necessary for the Prisoner to produce a Witness to prove his Innocency, and where the Witness for him was as much believed as the Witness against him: There was a Person, whose Name I do not remember, arraign'd (at the same time that an Indictment of High-Treason was endeavour'd to be found against the Lord *Shaftesbury*) for robbing another of Money, and of a hired Horse, of which likewise the Person was robb'd. The robbing of the Money and a Horse was prov'd by himself, and several others; but that the Prisoner was the Person that committed the Robbery, none positively swore but the Person robb'd; who likewise swore, that the Horse on which the Prisoner was taken, was the Horse taken from him; against which the Prisoner prov'd, by the Person of whom the Horse was agreed to be hired, that the Horse the Prisoner was taken upon, was not the Horse he let to hire to the Person robb'd; whereupon the Prisoner was acquitted; and yet the Prisoner's Witness was not on his Oath, and the Person robbed was on his Oath: which, besides that it proves the Matter for which it is brought, shews the Folly, as well as Injustice of the Practice of imprisoning Men, without letting them know for what, and without confronting them with the Witnesses against them, upon the Commitment. For how could this Man have known what Witnesses to produce, unless he had known what in particular he was indicted for? and how could he have sent to such Witnesses, unless he had had the liberty of sending to the Persons who were to be Witnesses for him? And it shews the Folly of those Sayings, that a Man's Innocence must defend him, and that the Evidence against the Prisoner must be as clear as the Sun at Noon-day. All will agree that the Prisoner in this Case was innocent, and yet that alone, without producing a Witness to prove his Innocence, would have flood him but in little stead; and how could he have known what sort of Evidence to have ready, unless he knew what he was accus'd of?

I do not mean what Crime he was accus'd of, as Treason, Murder, Robbery, Theft, or any other Crime; but unless he knew the Person robbed, when, where, and other Circumstances; which, say some, is not to be permitted in Prosecutions of High-Treason; for if so, then no Man shall be hang'd for High-Treason; unless there was as strong Proof against him, as is requir'd in any Indictment of any capital Matter: and that, they say, is not to be expected in Treason; for no Man

will call two Witnesses to be Evidences of his Words or Actions, being Overt-Acts of his Design of High-Treason. The Objection is too foolish to be answer'd; for it is neither better nor worse, than that if a Man shall not be hang'd for Treason without Evidence, he shall never be hang'd for Treason; for no Evidence, and Evidence which the Law rejects, is the same in Sense, though different in Words: and as the Intent of the Mind is difficult to prove on the Part of the King, so is the Prisoner's Part of producing Counter-Evidence much more difficult; and therefore the Law hath taken care, by the Statute of *Edward* the Third, that the Intent shall be proved by an Overt-Act; and by the Statute of *Edward* the Sixth, that that Overt-Act shall be proved by two Witnesses. And therefore, since the Law hath taken care that there shall be a stricter Proof in High-Treason than in any other Crime, for the Judges to say a less Proof may be admitted to convict one of High-Treason than of any other Crime, is very ridiculous; unless they will at the same time say, that the Parliament, who made those Statutes, were Men of little Understanding, and not to be regarded. And certainly, it was a good Counter-Evidence which was given in behalf of the Prisoner, by some Witnesses, though slighted by the Court, and not permitted by the Court to be given by others, that there were great Endeavours to set up Sham-plots, and charge the *Protestants* with them: For let any one shew me a Reason, why the Evidence of Sham-plots, though they do not immediately concern the Prisoner, is not as good Evidence for him, as the Evidence of a real Plot, in which he was not concern'd, is against him. The last was permitted to be given in Evidence against my Lord *Ruffel*, Col. *Sidney*, and others; though the first was not permitted to many Witnesses in this Trial, and it was a material Objection which *Colledge* made, *That there was no proof of any Persons being concern'd with him in the Design of seizing the King.*

It was an unadvised Answer the Court gave, that he alone might be so vain as to design it alone: For if from thence an Inference is made, as was insinuated by the Court to the Jury, that therefore he did alone design it, it was an Evidence of his being a Mad-man, not a Traitor. Had the Evidence been of the mischiefing the King by means which a single Person is capable of using, as Stabbing, Shooting, and the like, the Matter is not impossible; but it being by means which it is impossible for a single Person to execute, it carries such disbelief with it, that it is impossible to find a Man in his Senses at the same time guilty of it. And a Man that is *non compos Mentis*, if my Lords *Coke* * and *Hale* † are to be believ'd, cannot be guilty of High-Treason within that Branch of the Statute, *compassing and imagining*, &c.

It is true, a Mad-man may be guilty of Treason, in attempting the King's Person; but for that he is no more said to be punish'd, than Beasts of Prey are when kill'd; which are more properly said to be destroy'd than punish'd for the publick good. But if so good a Counter-proof in *Colledge's* Case was not made, as ought to have been, some Allowances ought to be made for the Prisoner's ignorance of what he was accus'd of, his usage and strict Imprisonment before his Trial, the ruffling him just before his Trial in the Manner before declar'd, the depriving him of his Notes, the giving an Evidence of many Hours long against him, before he was permitted to answer any part of it. And
the

* 3. Inst. 4. 6. 4. Co. Rep. 124. b.

† H. P. C. p. 10. 43. Hist. of P. C. Vol. I. p. 37.

the use of Pen, Ink, and Paper, was but of little advantage to him; for a Man that hath not been used to do it, cannot take Notes of any use. And in truth, he complain'd he had not taken Notes of half-said, but relied on the Court to do him justice in summing up the Evidences; which they promised to do, but broke their Words.

It must likewise be consider'd, that the concern a Man hath upon him, when he is upon Trial for his Life, is so far from fortifying, that it weakens his Memory: Besides, the foul Practice, without any Remorse, put upon him and his Witnesses; some of them imprison'd, that he could not have them at the Trial; others so threaten'd, that they durst not appear for him, and the Cry of the Auditory against him and his Witnesses, were mighty Discouragements. All these things being consider'd, how could any understanding Jury take it on their Oaths, *That the Evidence against the Prisoner, of a Design to seize the King, &c. was as clear as the Sun at Noon-Day?*

As for the Evidence which Mr. Masters gave, if it were true, it was no Evidence of Treason; an erroneous Opinion may make an *Heretick*, but not a Traitor: it is a very distant Consequence, that because he affirm'd that the Parliament in Forty had done nothing but what was just in respect of King Charles the First, therefore the Prisoner was guilty of a Design against King Charles the Second: Besides, that in all Probability, tho' Mr. Masters might inveigh against the Parliament, Colledge might only justify them, by throwing the ill things done in that time upon the *Papists*, as Colledge in his Defence says; and Mr. Masters, after much pumping, recollected himself, and said he thought the Prisoner said, the *Papists* had a hand in those things; which prov'd the Truth of Colledge's Assertion.

As for the Evidence of Colledge's saying he might be a Colonel in time; if he hoped for what he said, it was no Crime, or Proof of a Crime, 'tis no more than what every Soldier hopes for, and he himself had been one.

As for the Evidence of *Aiterbury*, *Saxel*, and *Stevens*, of their seizing the Pictures; admit they swore true, it did not amount to the Proof of the Treason in the Indictment, or of any sort of Treason: And yet if Colledge's Maid said true, it looks as if the Finders or some other Person sent them to Colledge's House, in order to find them there.

Of all Sorts of Evidence, the finding Papers in a Person's Possession is the weakest, because no Person can secure himself against Designs upon him in that kind. And after *Dangerfield's* Design upon Colonel *Mansel*, and the Evidence in *Fitzbarris's* Trial, that the Design of that Pamphlet was to convey Copies of it into some Members of Parliament's Pockets, and then seize them, that piece of Evidence ought to have been spar'd, till those and other Practices of like kind had been forgotten.

The last Witness was Sir *William Jennings*, of Colledge's saying he had lost the first Blood in the Cause, but it would not be long before more would be lost; what was that more, than that he thought more would be lost in the Cause, which he interpreted the Protestant Cause? Suppose he thought so without Reason, and was mistaken, where was the Crime? But if he thought so upon good Reason, and good Reason he had to think so, there was no pretence of a Crime in

it. I believe most Men thought as Colledge did, from the time of the Business of *Fitzbarris*; and what Imputation was it to him? Why were not all the Expressions he us'd in his Trial as good Evidence against him as that Saying? For he then said, *it was an horrid Conspiracy to take away his Life, and would not stop at him, for it was against all the Protestants of England, and the like*; which was his Opinion, and After-times shewed him a true Prophet.

One thing was very dishonestly insinuated, that the Prisoner was a *Papist*, which was only to incense the Jury against him, and it had its Effect; whereas it was very plain that he was a *Protestant*, tho' perhaps a Dissenter, and therefore had not lately come to the publick Church; and under that Notion the *Papists* and some *Protestants* were contented that Dissenters should be punished as *Papists*; yet if they could have proved him a *Papist*, no doubt they would have done it, for the Destruction of the Man was the Design of the Prosecution, and it matter'd not for what Treason he was convicted, so he was convicted. And he himself gave a pretty sort of Evidence against himself, if they could have prov'd him a *Papist*: he prov'd, and confessed, he was educated a *Protestant*; and if they could have proved him reconciled to the *Papish* Religion, which was Treason, he help'd them a great deal in their Proofs: It was therefore very disingenuous in the Chief Justice to reproach him at his Condemnation, that he had not made that Proof of his Religion as it was expected, when his Religion was not the Matter of which he was indicted; that was sily insinuated to exasperate, and no Proof pretended to be made of his being a *Papist*. But he had more Reason to complain of the Injustice of the Court in summing up the Evidence, who did it in such a Manner, that if they had been Counsel for the Prisoner, as they pretended, they would have been justly suspected to have taken a Fee of the other side to betray their Client.

For, as Colledge readily said, if the Chief Justice had looked on his Notes, he would have found more Evidence against *Turberville*, and *Dugdale*, than he had repeated. And it was a lame Excuse for the Chief Justice to say, he referr'd it to the Memory of the Jury, for he could not remember more; when, as I dare say, after about thirteen Hours Evidence, the Jury remember'd no more, than that they were to find him Guilty.

The Truth is, upon the whole, what Colledge said was true; they took away all Helps from him for defending himself, and therefore they had as good have condemned him without a Trial. Notwithstanding all which, the Courage of the Man never faints, but after he was condemn'd, boldly asked, *when he was to be executed?* To which the Lord Chief Justice reply'd, it depended on the King's Pleasure; but smoothly said, in those Cases of High Treason they did not use to precipitate the Execution, it should not be so sudden but that he should have Notice to prepare himself. And in truth he had from the eighteenth, on which he was condemned, to prepare himself, to the one and thirtieth of *August* 1681, on which he was executed; a much longer time than was allow'd my Lord *Russel*, or Mr. *Cornish*, and many others. And the true Reason of so long a Reprieve, was to see how the Nation would digest the Matter, and whether the Man by the Terror

of Death could be prevail'd upon to become a Tool to destroy other Innocents: But when it was found that the People were quiet, and that the Prisoner could not be prevail'd upon to do an ill thing to save his Life; his Execution was order'd; yet as a shew of Mercy, his Quarters were permitted to be bury'd; a Favour he slighted, with saying that he car'd not whether he was eaten up with Flies or Worms. The same Favour was likewise shewed *Fitzbarris*, but the true

Reason of both was, That they had a mind that the Trials and pretended Crimes, for which *Fitzbarris* and *Colledge* were condemned, should be forgotten; which would not be so soon done, if their Quarters were always expos'd to view. But though all People were quiet, yet there was great grumbling, and most honest Men were afraid; and the Constancy of *Colledge* at his Execution was such, that it made the most violent against him relent.



Remarks on the Earl of Shaftesbury's Grand Jury.

THE next Person question'd was the Earl of Shaftesbury, against whom a Bill of High-Treason was preferr'd to the Grand Jury, at the Sessions-House, on the 24th Day of November 1681. The Evidence was publickly given in Court, and was this; Mr. *Blathwaite* swore he found the Papers then produc'd in a Velvet Bag in the great Trunk, which was taken by Mr. *Gwynne* in the Lord Shaftesbury's House. Mr. *Gwynne* swore all the Papers in the Velvet Bag, when he deliver'd them to Mr. *Blathwaite*, were taken by him in the Lord Shaftesbury's House: Sir *Leoline Jenkins* swore, the Paper produc'd was the Paper deliver'd him by Mr. *Blathwaite*, and it was unalter'd. Then the Paper was read, the Effect of which was a Project of an Association signed by no Person, and whose Hand-writing it was, none knew. *John Booth* swore, that he was engag'd to Captain *Wilkinson*, who pretended to have a Commission from the Lord Shaftesbury and several others to go for *Carolina*; he was about that time introduced into the Earl's Acquaintance by the Captain, where was a Discourse about *Carolina* Business; he was four or five times between *Christmas* and *March*, with the Earl and the Captain: that the Captain told him he was to command fifty Men to be the Earl's Guard at *Oxon*, and would have had him to be one: That if the King did not consent to several Acts of Parliament and other Things, they were to purge the Guards and Court of several Persons; and though the Captain told him that first, afterwards he heard the Earl say the same things, particularly about a Week or ten Days before the Parliament sat at *Oxon*, he gave some Intimation of this to *Walter Banes*, and then writ it down, and sent it to the Council sealed in a Cover. *Turberville* swore, that the Lord Shaftesbury said about *February*, there was but little good to be done with the King as long as his Guards were about him. *Smith* testify'd a great deal of Discourse between him and the Lord Shaftesbury of something said reflecting on the King; and that he should say, that if the King should offer any Violence to the Parliament at *Oxford*, he would meet with a strong Opposition, for that the Gentlemen, who came out of the Country, came well provided with Horse and Arms to oppose, and that they might lawfully do it, if he offer'd any Violence to them whilst they sat. *Haynes* swore, that the Earl said if the King did not give *Haynes* his Pardon, he and others would raise the Kingdom against him; that *Haynes* gave the Earl an

exact Account of Transactions since King *Charles* the First's coming to the Crown, and that the Earl said the Duke of *Buckingham* had as much Right to the Crown as any *Stuart* in *England*. *John Macnamarra* said, the Earl said, the King was *Popishly affected*, and took the same Methods his Father did, which brought his Father's Head to the Block, and they would bring his thither; and this was said in the Presence of *Ivey*, and he thought of his Brother; and said, the King deserv'd to be depos'd as much as King *Richard* the Second. *Dennis Macnamarra* likewise testify'd the last Words, and that it was the latter end of *March*, or beginning of *April*. *Ivey* said, the Earl said, if the King deny'd *Haynes* a Pardon, they would rise upon him and force him to give one, and that they design'd to depose him and set up another in his stead. *Bernard Dennis* said, he had a great deal of Discourse with the Earl, who bid him speak to his Friends in *Ireland* to be in a readiness to assist the Commonwealth of *England*, for they intended to have *England* under a Commonwealth, and extirpate the King and his Family.

Then the Court told the Jury the Indictment was grounded on the Statute of King *Charles* the Second, but they ought to consider both of that Statute, as also the 25th of *Edward* III.

The Question is, whether the Grand Jury ought to have found the Bill on this Evidence. First it ought to be consider'd, what the Duty of a Grand Jury is; and I think it is not what the Chief Justice * said, to consider only whether there be probable ground for the King to call the Person accused to an account, much less do I think that the reason of finding a Bill by the Grand Jury was for the Honour of the King, or Decency of the Matter, lest Persons accused should be called to an Account by the King, where there is no kind of Suspicion of the Crime committed by them, as the Court said, (which last Matter was never assigned as a Reason of finding a Bill by the Grand Jury before) but I take the Reason of a Grand Jury to be this, that no Man for a capital Matter shall ever be questioned by the King, unless a Grand Jury take it on their Oaths that they believe the Matter of the Accusation true; I put an Emphasis on the Words questioned by the King.

It is true, it is generally said, that the Business of a Grand Jury, in capital Matters, is *in favorem vite*; but that taken simply is not true, for then what

* Sir Francis Pemberton.

what Reason can be assign'd, why a Man shall be arraign'd on an Appeal of Murder, Robbery, or the like, which touches his Life, as much as an Indictment of those Crimes, without having the Matter of the Appeal first found to be true by a *Grand Jury*? But the true Reason of a *Grand Jury* is the vast Inequality of the *Plaintiff* and *Defendant*, which in an Indictment is always between the King and his Subjects; and that doth not hold in an Appeal, which is always between *Subject* and *Subject*: and therefore the Law in an Indictment hath given a Privilege to the Defendant, which it hath done in no other Prosecution, on purpose, if it were possible, to make them equal in the Prosecutions and Defence, that equal Justice may be done between both. It considers the *Judges*, *Witnesses* and *Jury* are more likely to be influenced by the King than the Defendant; the *Judges* as having been made by him, and as it is in his Power to turn them out, punish, to prefer or reward them higher; and though there are no just Causes for them to strain the Law, yet there are such Causes, which in all Ages have taken place, and probably always will. This was the Reason of running *Prerogative* so high in their Judgment of *High-Treason* before the *Stat. of Ed. III.* that no Man, as that Statute says, knew what was not *High-Treason*: This was the Reason of expounding that Statute oftentimes between the making of it, and the making of the Statute of *Queen Mary*, that People were at as great a loss, till the last Statute, as they were before the making of the first; and even since the Statute of *Queen Mary*, the Exposition on the Statute of *Ed. III.* has been so extravagant and various, that People are at this day as much at a loss to know what is not *High-Treason*, as they were before the Statute of *Ed. III.* Nor was it, nor is it, possible, but that the great Power of enriching, honouring, rewarding and punishing lodg'd in the King, always had, and yet must have an Influence on the *Witnesses* and *Jury*; and therefore it is that the Law has ordered, that at the King's Prosecution, no Man shall be criminally questioned, unless a *Grand Jury*, upon their own Knowledge, or upon the Evidence given them, shall give a Verdict, that they really believe the Accusation is true.

I own, of late Days, they have said the Duty of the *Grand Jury* is to find, whether the Accusation be probable or no. But that Saying is warranted by no positive Law, or antient Authority; and therefore the Duty of the *Grand Jury* must be founded in the *Oath* administred to them, which is as strict as the *Oath* administred to the *Petit Jury*: and to say truth, the Verdict of the *Petit Jury* takes credit from the Verdict of the *Grand Jury*; which is not only the Reason of the Difference in the Names of the two Juries, but is likewise the Reason why an Attaint for a false Verdict doth not lie against a *Petit Jury*.

The Oath of the *Grand-Jury*, is, *To present the Truth, the whole Truth, and nothing but the Truth*: The Oath of the *Petit Jury* is, *well and truly to try, and true Deliverance make, between the King and the Prisoner at the Bar, &c.* which signifies the same thing as to present the Truth, &c. It is true, some Reasons have been offer'd, which, if consider'd, are Words without Sense; as that the Presentment of the *Grand Jury* is but in order to bring the Prisoner to his Trial, and he not before the *Grand Jury* to make his Defence himself: but that can be no Reason why Probabilities should satisfy the Jury,

because it doth not answer the Design of the Law, which will have a Man convicted by the positive Oaths of *two Juries*, consisting of more than twenty-four, in all Indictments.

Next, why is a *Grand Jury* composed of more substantial and understanding Men than a *Petit Jury*, if their Business be mere Formality, or a Matter of less Weight than the Business of a *Petit Jury*? In the last place, why is less Evidence required to convict a Man in his absence, than is required to convict him if present? It is far from an Argument, that less Evidence is requir'd to convict one if absent, than if present, that it seems to me that more Evidence should be requir'd to do it. Men may, and often do make very fair Stories in the absence of a Person accused, that when present, he easily answers; and there being no positive Law for the Direction of a *Grand Jury* in that matter, a *Grand Jury-man* is excusable, nay, it is his Duty to give a Verdict according to the plain understanding of the Words of his Oath, which is to present the Truth, as far as he is convinced of it; and that Truth must be found according to his Knowledge, or as it is represented to him by Witnesses.

And as for the Witnesses, they must be Persons of Credit; and all Persons are supposed to be so, unless the *Grand Jury* know the contrary, or have been so credibly informed. 'Tis true, a *Grand Jury* ought not to believe *Coffee-house* Stories, or light Stories; but common Fame by credible Persons, which is *Vox Populi*, ought to prejudice them against a Witness, so as to disbelieve him: and it is no Answer to say, as the *Chief Justice* in this Case said, that the Credibility of the Witness is not to be considered by the *Grand Jury*, because the King is not present to defend the Credit of his Witnesses: tho' the Fact in that Case was not true, for the King's Attorney, Solicitor and Counsel were present, and I think the King is no otherwise present at any Criminal Prosecution; and the Jury knew by *Colledge's* Trial, and by *Wilkinson's* Depositions before the King, that the Evidence of all the Witnesses produced, except what were to the Paper, was questioned, but even that was afterwards quitted by the Court, when it would not be swallowed by the *Grand Jury*: for afterwards the Court told them, that if they of their own Knowledge knew any thing against the Witnesses, they might consider of it, but not of what they were credibly inform'd by others. And, besides the Credibility of the Witnesses, the Possibility or Probability of the thing sworn is to be consider'd by the *Grand Jury*; an impossible thing they ought not to believe, though sworn by never so many credible Witnesses, and a very improbable thing they cannot positively on their Oaths swear they believe.

And not only the Fact, but what the Crime of the Fact alledged in the Bill of Indictment, the *Grand Jury*, as far as they are capable of judging Matter of Law, ought to consider; so they were told in the Charge given them. 'Tis true, if they were ignorant in the Law, and the Court in their Directions misled them, as if the Court should tell them stealing a Horse is High-Treason, and the *Grand Jury* find it accordingly, it is excusable in the *Grand Jury*, though punishable in the Court. But wrong Directions by the Court, in finding a Fact where there is no Evidence, do not excuse the *Jury*.

Now, to examine the Matter in hand by these Rules, could any Person who knew my Lord *Shaftesbury*, or that had heard of, or believed his Character

racter to be what it was, believe that it was possible for him to discourse with the Witnesses at the rate they swore, to some of them at the first, to others of them the second time he saw them; to discourse of Matters of Policy, with *Booth* at one time, and afterwards with *Haynes*, and afterwards with *Macnamarra*, Fellows of so little Sense, that he would have been asham'd to have entertain'd them in the meanest Office about him; and yet as they pretended, he makes them his Privadoes in the Secret, of not so much what he would have had them, but of what he intended himself to do?

Who could believe any thing, *Truberville*, *Smith* or *Haynes* should say, where there was so much of their Falshood, and of their Designs to swear falsely, prov'd against them in *Colledge's* Trial? Or of *Ivey*, and the three *Macnamarra's* after that Trial, who, though they were not produc'd at it, because the King's Counsel by *Colledge's* Notes saw he was able to falsify them, yet some Witnesses in that Trial prov'd their Design of swearing falsely?

Who could believe *Booth's* Story of lifting so many Men under *Wilkinson*, to be at my Lord *Shaftesbury's* dispose at *Oxon*, after *Colledge's* Trial, and after what *Wilkinson* had testify'd to the King and Council, though not then prov'd to the *Grand-Jury*?

A Judge indeed cannot take notice of any thing not prov'd (though he may and ought to be a Witness, if he knew any thing material of the Matter try'd before him and others) but a *Grand-Jury* may take notice of any thing they know or believe. The Passages at *Colledge's* Trial were pretty notorious, being authentically publish'd by *Fra. North*, and the Examination of *Wilkinson* by as authentick a Paper.

It was unaccountable, that the Witnesses conceal'd what they heard the Earl speak so long, of which none of them pretended to give any Reason; nor was it any Excuse to those who sign'd a Petition to the City, in which they suggested they were tempted to swear against their Consciences, to say they knew not what was in the Petition: He that sets his Hand to a thing as if he assented to it, but doth not, is a Man of Falshood. Suppose one sets his Hand to a Bond, said to be seal'd and deliver'd, not having seen it seal'd and deliver'd, is not he guilty of little less than *Forgery*? But admitting those Witnesses had sworn Truth, yet the Jury ought not to have found the Bill; for they ought to find the Bill true according to all the material Circumstances of it, as well as the Substance of it, which was *High-Treason*. One material Circumstance of it was, that it was said to be *High-Treason* within the Statute of *Charles II.* And that made another Circumstance of the Indictment material, which was the time when that Treason was committed; because by that Statute the Prosecutions of Treason on that Statute ought to be within six Months after it is committed, and the Indictment ought to be within three Months after the Prosecution: and he being imprison'd in *July*, and the Bill suggesting that the suppos'd Treason was committed the 18th of *March* before, and divers other times, both before and after, which might be interpreted to have been after the Prisoner's Commitment; had the Jury found the Bill as laid, they had found the Treason

to have been committed, not only within the time the Prosecution by that Statute ought to be, but also within the time the Indictment ought to have been preferr'd, whereas in truth the Earl had been imprison'd above three Months before the Indictment preferr'd, and there was no Evidence of any Treason committed by him after his Imprisonment: and therefore the finding the Bill as laid had been injurious, to bring a Man in question for his Life on that Statute, whereas by Law he ought not to have been.

For it was resolv'd in *Colledge's* Case, that the Prosecution for Treason on that Statute ought to be within six Months, and the Indictment within three Months, though the Court was of another Opinion in the *Lord Ruffel's* Trial.


And that this Indictment was on that Statute, was expressly said to the *Grand-Jury*, and upon good Reason; for the Court in their Charge said, that the Intention of levying War, or designing to imprison the King, was not Treason, till the Statute of *Charles the Second*; though in the *Lord Ruffel's* Trial it was held to be Treason by the Statute of *Edw. III.* and therefore the time of the Treason committed was material to be found by the *Jury*.

As for the Writing found in the Earl's Study, it was no manner of Evidence of Treason, admitting what the Witnesses swore as to the finding it to be true; because it was not prov'd that it was prosecuted or compos'd by the Earl of *Shaftesbury*, or by his Order, and that piece of Evidence was in that particular a meer Original.

In *Fitzbarris's* Case, it was prov'd the Libel was compos'd by his Direction; Colonel *Sidney's* Book was prov'd to be like his Hand; it was pretended that *Colledge* said he was the Author of the *Raree-Show*, and no Example of this Evidence was ever made use of before.

Neither was it Evidence of Treason as to the Matter, for there was not one Word against the present King, but his Successor, if he should be such a Person.

It is true, one of the King's Counsel said that one Passage in it was, that they would join to destroy the Mercenary Forces about *London*, and thence infer'd it was downright levying War against the King and his Guards; whereas there is not any such word or thing in the Paper as he pretended to cite: and if it had been in the Paper, it would have been but Evidence of a Treason within the Statute of the late King. And then the time of Writing it, ought to have appear'd; and if that had been clear'd, yet for the above Reasons it was no Evidence: and the *Grand-Jury*, tho' some of them afterwards smarted for it upon other Pretences, did like honest understanding Gentlemen; and had they done otherwise, to avoid the Ignominy of being call'd, though in truth it was an honour to be, an *Ignoramus Jury*, they had justly deserv'd the Reproach which since have lighted on other Juries, such as *Mr. Cornish's*, and the like. And having spoken of this *Ignoramus Jury*, for which, two of them, if not more, were afterwards upon other Pretences severely handled; I think fit to say something of the Sufferings of one, for being in a preceding *Ignoramus Jury*, because it was a meer Novelty, and that was *Mr. Wilmer*.



 Remarks on Mr. Wilmer's *Homine Replegiando*.

THIS Prosecution, though it was but Criminal and not Capital, did as much Mischief, as it struck a Terror into all *Grand Juries*, as any the before mentioned Matters; and it was by the *Homine Replegiando* issued out against him. As for the Information against him, I shall say nothing, because the Justice of both will appear in the Discourse of the first. Mr. *Wilmer* had sent a Boy beyond Sea by Agreement, as Mr. *Wilmer* said, whether true or not, as to this matter is not material; a *Homine Replegiando* is granted against Mr. *Wilmer* for this, at whose Prosecution is not material: for any Person upon Suggestion, back'd by an *Affidavit*, may have it granted. The Sheriff would have return'd on the Writ, that the Boy was sent by his own Agreement and Consent with Mr. *Wilmer*; which Return was not allow'd, and the Sheriffs were told that they must either return they had replevied the Boy, and they must have him in Court, or else they would be laid by the heels; or else they must return that Mr. *Wilmer* had *Esquied* him, which is carrying him away, where the Sheriff could not find him; and then a *Writ* would issue against Mr. *Wilmer*, upon which he would be taken and kept in Prison till he produced the Boy: and no other Return should be allowed than one of those two, and if they did not make one of those two Returns, they should be committed. Now if the Law be so, the Court must be innocent, but the Law ought then to be reformed in that Particular; but if the Law was not, as I think it is not, I think Mr. *Wilmer* and the Nation had great Injustice done them; for it was quickly seen what the Mischief of that Judgment was, and therefore it was endeavour'd to be reformed by an Act of King and Council afterwards. First, I say, it is lawful for a Master to covenant with a Servant to serve him beyond Sea; in the next place it is lawful for a Master to send his Servant beyond Sea according to such Agreement. And if both these Propositions be true, as I think no Man will say they are not, it is a natural Consequence to say, that the Law hath provided a Return upon a Writ of *Homine Replegiando*, if it should be sued out against such Master for a Servant so sent beyond Sea, which may indemnify the Master in so doing; and that Return can be no other than the special Matter which in this Case was refused to be accepted. 'Tis no Argument that no such Return is ever read of in any Book: For the Law hath determin'd, that some Returns are good, and others bad; yet it hath not said, what are all the good Returns, which may be made on an *Homine Replegiando*, and the Sheriff is no more confin'd to Returns, than a Man in the pleading of his Case, which my Lord *Coke* says may vary according to the Nature of his Case; and yet the Law hath said what is a good Plea, and what a bad one, but hath not express'd all the good or bad Pleas. And therefore it is no Argument against such a Return, that no Precedent of it can be found, 'tis enough that no Judgment can be produced against it; and the Reason of both may be, that the Case never happened before, that is to say, that never

any Person was so malicious before, as to sue out an *Homine Replegiando* against a Master for a Servant sent by Agreement beyond Sea: and Returns must be varied according to the Case. Perhaps no Precedent can be found of a Return on that Writ, that the Person sought for is dead; yet all Persons will agree it is a good Return, it is so in Replevin of Cattle, and even that Example falsifies the Doctrine of the Court, that there are but two Returns on that Writ allowable by Law. It is not an Argument for disallowing the Return, that the Person sent beyond Sea was a Child, not capable of making such a Contract (though I believe, if the matter were look'd into, he was of age so to do) for nothing of that doth, or can appear in the Writ or Return: It stands therefore simply upon this, whether the Sheriff may on an *Homine Replegiando* return, that the Person supposed to be in custody, being of full Age, was by mutual Agreement sent beyond Sea by the Person in whose custody by the Writ he is supposed to be, which I think is far from a Doubt. But notwithstanding all these Hardships on *Juries*, it was seen to be plainly impossible to procure any Bills of Indictment for *High-Treason*, much less any Persons to be convicted on the like Evidence, except in *London*, were are some of the best, as well as the worst of Men in the Nation; and even there it was not to be done, as long as the *Juries* were sensible and honest Men, which would be as long as the Election of Sheriffs was in the Citizens; and, to the Honour of the City, it was seen that they chose only honest Men to be their Sheriffs; and that when they saw the publick Safety depend on honest Officers, though at other times they had rather pay a Fine, than undergo the Trouble and Charges of that Office, yet at that time no Man, legally chosen, refused to stand, though they were reproached and punished for it: and if Mr. *Bow* refused, it was because he would not join with *North*, who was impos'd on the City; for which reason it was resolv'd to take from the City the Right of chusing Sheriffs, but by what means was not presently resolv'd on.

That the City might forfeit their Right of electing, there was no great doubt; as if the Sheriffs were dead, and new ones were not chosen in a convenient time, so that there was a defect of Justice, or the like: but nothing of that kind could be laid to their Charge, and therefore a new unheard-of matter was thought on, and set a-foot, which was, to make the City forfeit their being a Corporation; and being annihilated, the Grants made to them by the Crown, as the Right of electing Sheriffs was, would revert to the Crown again.

A *Quo Warranto* was therefore brought against the City in *Hilary Term*, 1681, to shew by what Warrant they pretended to be a Corporation, and to have their Privileges mentioned in the Writ; to which the City pleaded, and set forth their Right; and the King reply'd, and set forth several Matters done by them, contrary to the Duty of a Corporation: upon which there was a *Demurer*, of which Judgment was not given till *Trinity Term*, 1683.

1683. I will say nothing of the Right of the Proceeding, it having been largely and learnedly argu'd for the City; but if the Matter were so clear a Case, as the King's Counsel and Court would have it to be, how came it to pass that in *Henry the Eighth's* time, when the King was so earnestly bent to dissolve the Religious Corporations, in which the publick Inclination join'd with him, the doing it by *Quo Warranto* was not thought of? It was very plain, that those pretended Religious did not observe the Rules, nor perform the Ends for which they were incorporated; and certainly their Misdemeanours, against the Intent of their being incorporated, were better Causes of Forfeiture, than was the City's petitioning for a Parliament, &c. Yet that King took other Methods, he had formal Conveyances of their Lands from most of those Corporations, and formal Surrenders of their Corporations, sign'd by every Individual of the Corporations, and those afterwards confirm'd by Act of Parliament. And sure the late King had as much Right to bring a *Quo Warranto* against *Magdalen College*, for refusing, contrary to their Duty to admit the President the King nominated, if the King had a Right to nominate the President (as some Judges asserted he had) as King *Charles the Second* had against the City: and it was once in Debate, whether the Proceeding against that College should be by *Quo Warranto*, or before the *Ecclesiastical Commissioners*; the last was resolv'd on, not as more legal or effectual, but as more expeditious; in the one, the Proceedings being *de Die in Diem*, in the other from Term to Term. This only I will observe, that when the Judgment against the City was given, which was of the greatest Concern to the Nation ever contested in any Court of *Westminster-Hall*, it was done by two Judges only, and no Reason of that Judgment rendred: whereof *Withins*, who was one, I think, heard but one Argument in the Case. It is true, they said *Raymond*, when alive, was of the same Opinion; and said *Saunders*, who was then past his Senses, was of the same Opinion; though I was told by one who was present, when the two Justices came to ask his Opi-

nion in the matter, he had only Sense enough to reproach them for troubling him about the matter, when they were sensible he had lost his Memory. And to say truth, the delivering the Sense of an absent Judge, though it hath been sometimes practis'd, is not allowable; for sometimes they deliver another Opinion than what the absent Judge is of. Judge *Withins* did so in several Cases, when he delivered the Opinion of *Sir Edward Herbert*, which *Sir Edward Herbert* afterwards in open Court, disown'd: Judge *Holloway* serv'd Judge *Powel* the same Trick, if the last said true. The long depending of the *Quo Warranto* had alarm'd all the Nation, who were yet quiet, hoping that Judgment would be given for the City, as some of the Judges and of the King's Counsel, had given out it would; but the contrary was resolv'd on, and therefore the Nation, at the time of the giving the Judgment, must be amus'd with somewhat else and nothing so proper as a Plot: but there was difficulty in that also; for if the pretended Plotters should be acquitted, it would make the Matter worse; and nothing would secure that, but imposing what Sheriffs they pleas'd on the City, and accordingly *North* and *Rich* being pitch'd on, the one by a shameless Trick, and the other by open Force, were impos'd on the City.

Having gain'd that Point, the Proceedings in the *Quo Warranto* were much quicker than before, and two Arguments were only permitted in it of each side, the one in *Hilary Term*, the other in *Easter Term*; and so the Case was ripe for Judgment in *Trinity Term* following, but must be, and was usher'd in, with the Discovery of a pretended Plot: Which so amaz'd the Nation, that though Judgment in the *Quo Warranto* was given two Days after the pretended Discovery, no body took any notice of it for several Months after it was given. The truth was, no body durst mutter against it, or question the Legality of it; it was enough to have brought any Person into the Plot to have done it, it would have been call'd *flying in the Face of the Government*, questioning the Justice of the Nation, and such like *Cant*.



Remarks on the Lord Ruffel's Trial.

THE Plot being nois'd abroad, the Persons before-hand resolv'd on were seiz'd on, and the Lord *Ruffel*, and others were clapp'd up close Prisoners.

The Lord *Ruffel* having been for some few Weeks a close Prisoner in the *Tower*, was, the 13th of *July*, 1683. brought to the *Old-Bailey*, and arraign'd for High-Treason, in designing to raise a Rebellion, &c. and the same Morning was try'd. He desir'd he might not be try'd that Day, for he had some Witnesses which would not be in Town till Night: Which being deny'd, then he desir'd that the Trial might be put off till the Afternoon; which was likewise deny'd. He ask'd whether he might not make use of any Papers he had; which was allow'd. He desir'd he might have a Copy of the Pannel of the Jury that was to pass on him; he was told he had a Copy deliver'd to his Servant some Days before.

The Jury being call'd, he challeng'd the Foreman for being no Freeholder in *London*. To argue which, Counsel were assign'd him; who presently came into the Court, and having excus'd their not speaking more to the Matter, for want of time to consider of it, argu'd, That it was a good Challenge, because at common Law every Juryman ought to be a Freeholder; that the Statute of 2 *Hen. V.* provides none shall be a Juryman in capital Matters, but a Freeholder of Forty Shillings yearly: That there is no Difference between a City and County, and a County at large, at common Law; not by that Statute 7 *Hen. VII.* which takes away the Challenge of no Freeholder in the Ward in *London*, and shews it was a good Challenge in *London* before that time: The 4th of *Hen. VIII.* which likewise takes away the Challenge of no Freehold in *London*, shews it was a good Challenge before that time; and the same was inferr'd from the 23d of *Henry VIII.*: But though none of those Sta-

tutes extended to Treason, yet if it was a good Challenge in Treason in *London* before those Statutes, it was so still.

The King's Counsel said, at common Law it was not necessary that a Juryman in Treason, should be a Freeholder; and though Treason is within the 2d of *Henry the V*, yet by the Statute of *Queen Mary*, the Statute of the 2d of *Henry the Vth*, as to Treason, was repeal'd; that it was a Point they would not have lost to the City of *London*; that if the Prisoner should peremptorily challenge Thirty-five, as by Law he might, there would scarce be found Thirty-five more Freeholders in the City, the Inheritance of the City being mostly in the Nobility and Corporations, and consequently Treasons may be committed in the City, and there would not be enough to try it; and in the Case of the City of *Worcester*, in *Quo Warranto* brought against them, that Challenge was taken and over-ruled by the *King's-Bench*, by Advice of the Judges of the *Common-Pleas*; that the *Venire* mentions no Freehold, but only *Probes & Legales Homines de Vicincto*.

Then the^a Chief Justice ask'd Mr. *Pollaxfen*, Whether he did find any Judgment in Treason at common Law, that *no Freehold* was a Challenge? Who answer'd, he did not. Whereupon the Chief Justice reply'd, That then he did not speak *ad idem*; for he took it, in case of Treason and Felony, at common Law it was no Challenge; and the Statute of *Henry the Fifth*, in that Point, was introductive of a new Law, and that Statute, as to Treason, was repeal'd by that of *Queen Mary*; and that a Case cannot be found of such a Challenge in Treason since the Statute of *Queen Mary*, but it was a Business of great Importance.

The^b Chief Baron was of the same Opinion; for the same Reason, Justice *Windham* and Justice *Jones* were of the same Opinion; the last added, the rather because the Prisoner is allow'd to challenge Thirty-five peremptorily: and Justice *Carlton* was of the same Opinion, and the rather, because no Precedent had been offer'd of such a Challenge before: Justice *Levinz* was of the same Opinion, for the same Reason: Justice *Street* was of the same Opinion, for the same Reasons; and thought they had been very nice, when the Life of the King lay at stake, and all the Customs and Privileges of the City of *London* seem'd to be levell'd at in that point: Justice *Wilkins* was of the same Opinion.

Then the Chief Justice told the Prisoner, the Court over-ruled his Challenge; but that he had no Hardship put upon him, for the Reason of Law for Freeholders was, that no slight Persons should be put upon the Jury; but in his Case there were Persons of Quality and Substance put upon the Jury, which was the same in substance with a Jury of Freeholders.

These being the Reasons of over-ruling that Challenge, they may be ranked under these Heads: There was no such Challenge at common Law; if there were, yet not in Treason. And if it were a Challenge in Treason, where a Trial is in a County at large, yet not where it is in a City and County; and if in a City and County, yet not in *London*.

The assigning many Reasons for one and the same thing, makes the Judgment justly suspected: for if when two Witnesses to one Fact, varying in

the Circumstances of it, are justly suspected in point of truth several Reasons for the same Judgment make the Knowledge or Integrity of the Judges justly suspected; every Case in Law, as my Lords *Coke* and *Hale* say, standing upon its own particular Reason: and therefore when many Reasons are given, it looks as if the Judges were hunting about for Reasons to make good what beforehand they are resolv'd to vent for Law, rather than that their Judgment is the Result of those Reasons.

But to consider them singly, I do indeed think there is no express Resolution, that at common Law in any Case of any capital Matter, it was a good Challenge (except the Case of *Fitzbarris*, already taken notice of) but in civil Matters my Lord *Coke* is express, that at common Law it was a good Challenge; and with him Sir *John Fortescue* seems to concur, who, in his Exposition on that Statute of *Henry the Vth*, says, if the Debts or Damages be under Forty Marks, the Juryman shall have Land to a competent Value, according to the Discretion of the Justices. My Lord *Coke* saith, in such Case any Freehold sufficeth; now how can that be true, if it were not necessary at common Law to have some Freehold? For the Statute makes no Provision for Debt or Damages under Forty Marks. It must therefore be by common Law that some Freehold was necessary, and that any Freehold shall suffice. And surely, if in civil Matters it was necessary for a Juror to have a Freehold, much more in capital Matters, and mostly in Treason. It is very plain, that at common Law no Man was thought to be a sufficient Man, but a Freeholder; and tho' now, and for some time past, the Value of Trade is equal to that of Land, yet heretofore it was not so, and by what was heretofore, the common Law is to be known.

The matter of Trade was heretofore so inconsiderable, and the Traders themselves for that Reason so vile, that it was a Disparagement for a Freeholder to marry with a Tradesman, as is to be seen by the Statute † *Merton*: and therefore mere Tradesmen, and not Freeholders, were not to be trusted with the Concern of a Trial in a civil Matter, and much less in a Capital, and least of all in a Trial of High-Treason.

The Chief Justice *Pemberton* says, that the Reason of Freeholders was, that no slight Persons should be put upon a Jury where the Life of a Man, or his Estate, is in question; it is plain therefore, the Concern of the thing to be tried, is the measure of the Substance of the Juryman. If that be true, the Trial in Treason is of the highest Concern: How then is it true, as some of the Judges concluded, that tho' Freehold might be requisite in some Cases at common Law, yet in Treason certainly not? It is indeed a Paradox to me.

And the peremptory Challenge of Thirty-five allowed the Prisoner, is no Reason against the Challenge of no Freeholder; for that is only a Privilege allowed the Prisoner *in favorem Vitæ*; and it might as well be argued, that no Challenge at all to the Petty-Jury shall be allow'd the Prisoner, because he had a Grand-Jury past upon him before, which is also *in favorem Vitæ*; that no Man, at the King's Suit, shall be so much as question'd for his Life, till above the Number of Twelve substantial Men have on their Oaths said they think the Accusation true; and after that, he is allow'd to challenge

† See Stat. of Merton, cap. 7. 2 Inst. 92. Cok Lit. 80.

peremptorily Thirty-five, and with Cause without number. To affirm therefore that no Freehold is not a Cause of Challenge, because he may challenge peremptorily Thirty-five, is a *non sequitur*: and though Non-usage, that is to say, that this Challenge was never taken in Treason, was then us'd as an Argument, yet it is the weakest of Arguments which is to be found in *Littleton*; tho' even that Fact was not true, for the Challenge was taken and allow'd before; unless you will distinguish and say, that in that Case it was taken by the King, and therefore good, and in this by the Prisoner, and therefore bad. I'm sure that difference cannot be warranted, either by Authority or Reason; and what though *Cook*, and the other Regicides, and other Persons, did not take that Challenge, is it an Argument that they could not, or that they thought they could not? perhaps they had forgotten to do it, as much as the Judges in this Case had forgotten their Resolution in *Fitzbarris's* Case; or perhaps they could not take it, their Jury being Freeholders; or perhaps it was to no purpose, they being tried in *Middlesex*, where a Jury of Freeholders would quickly be found. Nor is it an Argument that no Case of this Challenge at common Law is to be found in the Books; for since the Statute of *Henry the Fifth*, to the time of *Queen Mary*, it could never be a Case; and from that time to this it could never be a Case in Felony: and the Law being so very plain, that if the Fact were with the Prisoner, it was always allowed; if against the Prisoner, it was disallowed, not as not good in point of Law, but as not true in point of Fact; therefore the Challenge perhaps was not taken notice of in the Books, which only report Difficulties.

It is true of late, and it is but of late Practice, the whole Transactions of a Trial are published for the Benefit of the Publisher, rather than for the common Good; and that indeed was the Motive of publishing *Fitzbarris's* Trial signed by *Fra. Pemberton*, and of *Colledge's* Trial signed by *Fra. North*, and of my Lord *Ruffel's* signed by *William Pritchard*, Mayor, and *Col. Sidney's* Trial signed by *George Jefferies*, and *Mr. Cornish's* Trial signed by *Thomas Jones*. And that is the Reason why, since that Statute, we find no Case of such a Challenge in capital Matters, and before that Statute the Year-Books go but a little way.

It is enough there was no Resolution that it was not a good Challenge, for it will be of the King's side to shew why that should not be a good Challenge in Treason, which was in most, if not in all other Cases.

It is pretty to observe what Steps were made in over-ruling this Challenge: some were of Opinion that it was no Challenge in any Case at common Law; so said the Attorney and Solicitor-General, the Chief Baron, Justice *Windham*, and Baron *Street*. The Chief Justice thought it no Challenge at common Law in Treason or Felony only, but that the Statute of *Henry the Fifth* made it a Challenge in Treason and Felony; but whether the Statute of *Henry the Fifth* made it a Challenge in Treason, the Chief Baron and Justice *Windham* doubted. Justice *Jones* thought it no Challenge at common Law in Treason; Justice *Levinz* would not determine whether it was a good Challenge in any Case at common Law, but he and Baron *Street* were clearly of Opinion it was not a good Challenge in *London*. The Chief Justice thought it a Business of great Consequence, not only for the Prisoner,

but for all other Persons: Baron *Street* thought the Judges had been very nice in the matter, which, in the Phrase of the Law, is giving themselves a great deal of trouble in a matter very clear, or of no moment.

But though they differ'd in their Reasons, yet all agreed in this, and in this only, that tried he should be, and that presently.

Then as for the Custom of the City of *London*, to try without Freeholders, how did it appear to the Judges that there was any such Custom? Did they ever read of any such Custom in the City of *London*? Nay, were not the Statutes which were cited, where *no Freehold* was made no Challenge in *London* in particular Cases, as so many express Resolutions, that there was no such Custom in the City? for if there had been such Custom, what need those Statutes? To which the Judges never vouchsafed any Answer, because in truth they could make none.

But it was objected, there was the Resolution in the City of *Worcester's* Case, which I agree was of as good Authority, and of no better, than the Judgment in the principal Matter of the *Quo Warranto*. And it was likewise objected, there would be a failure of Justice in Cities, if the Challenge were good for want of Freeholders.

I ask, Would it have been a failure of Justice at common Law, or by reason of somewhat which hath happened of late Times? There is none who pretends to know any thing of the History of *England*, that will say, that heretofore the Cities were not inhabited mostly by the Gentry, and especially the City of *London*; partly for Luxury, partly for their Security, and then there was no want of Freeholders in the Cities; but when matters became more quiet, and Trade increased, and made Houses in the Cities more valuable, then were Houses of equal Convenience, and less Price, situate in the Suburbs, or in the Country; the Gentry by degrees parted with their Houses in the Cities to Tradesmen for Profit, and remov'd themselves to other Places. And I believe it may be remembered, that even the *Strand*, in the Memory of Man, could have furnish'd the County of *Middlesex* with a sufficient Number of Freeholders; and yet now, for the above Reasons, you can hardly find a Jury of Freeholders there.

Besides, it must be remembered, that *London* heretofore had many of the King's Palaces in it; and the Country Gentlemen did not then, as now, take up with Lodgings, but were Inhabitants of Houses: and if the failure of Justice happen by the above means, I am sure it is against the Oath of the Judges to supply that Defect with their Resolution; but it ought to have been supplied by an Act of the Legislative Power.

If the Necessity of the Thing warrants the Judgment, how unlearned were the Judges in *Henry the Seventh* and *Henry the Eighth's* Times, that they did not supply the Defect in Law in the City of *London*, and other Cities, by their Resolutions? How vain were the Parliaments in those Times, who supplied those Defects in Law, mentioned in the Acts cited by those Statutes, which were Works of time and trouble, if they had thought the Judges, by their Resolutions, had power to do it? for if they had power to do it, they could have done it *extempore*, as in this Case.

For the last Objection, that the Writ mentions only *Probos & Legales Homines*, and speaks nothing of Freeholders; *Legales* may be very well interpreted,

puted, to imply Men qualify'd by Law; but I take it, that *Homines* implies it: for by *Homines de Comitatu* are meant Freeholders of that County; and all others, in point of Trust, are not consider'd in Law. My Lord *Coke*, in his Comment upon the 28th of *Eliz. 1. cap. 8.* which gives the Election of Sheriffs to the People of the County where the Sheriffwick is not in Fee, says, People there, means Freeholders of the County; and the same is understood by Writs to the Counties to choose *Coroners, Verdurers,* and the like, though the Writ says, *per communitatem Comitatus, & de assensu Comitatus.*

And tho' the Writs of *Venire* in civil Matters, of late Days, mention what Freehold each Juror shall have, yet that is by the Statute of the 35th of *Hen. VIII. cap. 6.* which expressly commands the Writ shall so express it, in all Issues join'd in *Westminster*, to be tried between Party and Party; before which time it is plain, the *Venire*, even in civil Matters, did not express any Freehold, and that Statute doth not extend to Issues join'd on Indictments.

Now if upon all which hath been said, it is not plain, that the Challenge ought to have been allow'd, yet sure it was doubtful; and if so, and a matter of great Consequence, as the Chief Justice said it was, why might not the Counsel for the Prisoner have had a little more time to have consider'd of the Challenge before they had argu'd it, or the Judges have taken a little time to consider the Matter before they had given their Judgment? I dare say, none of them could remember any positive Resolutions one way or other, nor upon a sudden was it expected they should; and therefore, for their own sakes, if not for the Prisoner's, they might have taken the Morning, if not the Day. The Prisoner desir'd his Trial to be put off, for to have consider'd of it; in that time, perhaps, some of them might have remembred, or others might have put them in mind of their Resolutions in *Fitzbarris's* Case; they might have consider'd how to distinguish between that Case and this, and not run away with it, that that Challenge was never made in Treason, as all the Judges affirm'd. But my Lord *Ruffel* was told by the Court, that they always tried the Prisoner, in Treason, the Day he was arraign'd, and could not put off the Trial for a Morning, without the Attorney-General's Consent; but surely that is not true, *Plunket* and *Fitzbarris* were try'd the Term after they were arraign'd, though the Attorney-General oppos'd it. It is true, he submitted to the Rule, as it was as much his Duty to do, as the Prisoner's; but if there be a difference between an Arraignment at *Westminster* and the *Old-Bailey*, as to the speeding the Trial, the Place will not vary the Reason of the thing, if there be not any Law for it, as there is not; but even at the *Old-Bailey*, the Trial in Treason hath been put off to another Sessions, it was done in *Whitebread's* Case, and in many other Cases. If it be said that was by the Attorney-General's Consent, I say that makes no difference; for the Judge is to be indifferent between the Attorney-General and the Prisoner. If the Court must order nothing but what the Attorney assents to, why is not the Prisoner try'd and judg'd by the Attorney alone? or what needs all the Formality of a Trial? If it be said, that that Trial was put off, because the King's Witnesses were not ready; I say, there is the same Reason to put off a Trial, because the Prisoner's Witnesses are not ready, and

that was the pretended, though not the true Reason of putting off *Fitzbarris's* Trial to another Term; and there is no Law to the contrary.

It is totally in the Discretion of the Judges to put off a Trial; which Discretion ought to be govern'd by Reason.

But indeed this was extraordinary, and without any Precedent: it can never be shewn in the Case of the greatest or meanest Persons, being accus'd of the greatest or least Crime, that ever the delay of a Day, much less of a Morning, for his Trial, was deny'd, where he shew'd but any colour for what he said, when the Sessions were to continue after the time he desir'd, as in this Case it did. *Fitzbarris* said his Witnesses were in *Holland*, and though he nam'd no Persons, yet his Trial was put off to the next Term; my Lord *Ruffel* said his Witnesses could not be in Town till that Night, yet the respite till next Day was deny'd: all Persons agreed, that there was some extraordinary Reason for it, and before the Trial was over, the Riddle was out.

My Lord of *Essex* was kill'd, or to be kill'd that Morning; as to this Matter, it is not material whether by his own or another's Hand: they were sensible the Evidence against my Lord *Ruffel* was very defective, and that Accident was to help it out; but that would not avail, unless it were a surprizing Matter upon the Jury: should the Jury have had a Day's, or but a Morning's time to consider of it, People might have been talking with the Jury. It was very material to ask, what Influence that Accident would have on my Lord *Ruffel's* Trial, whether it was any Evidence against him: they might have been told what was true, that no Person kill'd, was in Law suppos'd to have kill'd himself, till a Coroner's Inquest had sat upon the View of his Body, and found it so; and if it had been so found, yet even that had been no Evidence against another, because the Coroner's Inquest never found the Reason why a Man kill'd himself; and if they should find the Reason, yet even that was no Evidence against another, because that other was never call'd before the Coroner's Inquest to make his Defence. They might have been told a great many Circumstances of the Improbability of the killing himself; they might have observ'd that the King's Counsel were so far sensible, that it was no Evidence against my Lord *Ruffel*, that they never attempted to prove the Earl of *Essex* was dead, or kill'd himself: it was only silyly insinuated, together with the Reason of it, which had its Effect, if the Report be true of some of the Jurymen's saying *it went farther with them, than all the Evidence of the Witnesses produc'd*; and if that be true, there was a reason, tho' not a just one, for speeding that Trial beyond the ordinary Methods of Trials at the *Old-Bailey*.

But tho' my Lord *Ruffel* had seemingly less favour in that Matter than any other Person, even than *Colledge*, who had the respite of two or three Hours between his Arraignment and Trial, (tho' that was not in favour to *Colledge*, but only to examine his Papers which they took from him, and instruct their Witnesses accordingly) yet in other things he had more Favour or Justice done him: his Papers were not taken from him; it was agreed to be his Right to use them without questioning from whom he had them, what they were, or the like, as in *Colledge's* Case was done; he had a Copy of the Pannel of the Jury, even before his Arraignment, given him; and the Chief Justice said it never was denied in Case

of Life that he knew of, which was denied *Colledge* before he pleaded; because then 'twas pretended there was no Issue join'd, till *Plea pleaded*, after which the *Venire* is awarded; tho' all Men know, that the Sheriff summon'd the Jury before the Arraignment, and even after Issue join'd. *Colledge* was denied a Copy of the Pannel, only he was told, he should look every Jurymen in the Face before he was sworn; and as far as the Looks of a Man betray him, he should be satisfi'd whether he was honest or not, which is

an ill way of judging; for I think the Person * that gave that Rule, would have deceiv'd any Man by his Countenance, who had not known his Practices.

But says the Attorney General †, in my Lord *Ruffel's* Case it was matter of Favour, and not of Right, therefore no Injustice to *Colledge*. I confess of all Men who ever came to the Bar, he hath laid down the most Rules, which depend totally upon the Authority of his own saying: in *Colledge's* Case he affirm'd, that the King's Witnesses ought not to be kept out of the hearing of each other, when they gave their Evidence (a Method us'd in civil Matters, the Reason of which is well known, and none can show any Law or Reason why it should not be us'd in capital Matters) with as much Reason and Authority, as what is now said.

First, I do affirm there is no Authority in Law, which says a Prisoner shall not have a Copy of the Pannel; in the next Place I affirm, that after a Jury struck in a civil Matter, each Party ought to have a Copy of the Pannel, in order to provide himself of a Challenge, if there be any Cause. In the last place, I affirm, that by Law, more Favour is allow'd a Defendant in a Capital Matter, to defend himself, than in a Civil. And if these Propositions be true, let any Person, if he can, make out the Law or Reason of the above Assertions.

Of a like Stamp was the Saying of the Attorney, when my Lord desir'd a Copy of the Matter of Fact laid against him, that he had Notice of it; for Questions were put to him about it, and he was with his Lordship himself, and examin'd him upon those Questions, which was a Favour to him, that he might know what the Matter was he was accus'd of.

I do not affirm that ever it was practis'd, to give the Prisoner a Note of the Fact, to be given in Evidence against him, proving Treason, or that it was ever denied till then, nor do I know of any Law *pro* or *con* in the Case; but if one would judge by Reason or Practice in parallel Cases, I think it ought not to be deny'd.

I know not at present of more than two Sorts of general Indictments, and those are of Treason and Barrettry; the last is a general Indictment, for stirring up Suits without Reason, and without mentioning any Suit in particular; and therefore if by the Rule of the Court the Defendant was not help'd, which obliges the Prosecutor to give the Defendant, some reasonable time before the Trial, a Note of what Suits he intends to give in Evidence against him, it was impossible for the Defendant to escape, if it had been his Misfortune to have had five or six Suits.

For I never yet saw a Witness produc'd against the Indicted, but he would swear the Indicted brought an Action against him without Reason; and yet I have often seen, that the Indicted having had notice, that that was one of the Suits he

was intended to be charg'd with, hath been able to prove that he had good, or at least probable Cause of Suit, which he could not have done if he had not notice. And in Treason, for designing to kill the King, there have been so many Interpretations of Facts tending that way that it is almost impossible for an Innocent to defend himself, unless he had notice of the Fact intended to be insisted on at the Trial.

There are yet some Expressions which mightily puzzle me: the King's Counsel said in the Argument of the Challenge, that they would not have the Point of being a *Jurymen*, tho' not a Freeholder, lost to the City of *London*; and one of the Judges said, 'twas the Privileges of the City were struck at in that Point. If by those Expressions be meant, that it is for the benefit of the Publick that there should be no failure of Justice, I agree to it; but if it be meant that it is for the Benefit of the Citizens to be *Jurymen*, I deny it: and I think nothing shews it plainer, than that it is a Privilege that a Citizen shall not be drawn out of the City to be a *Jurymen*; that a Nobleman shall not be on a *Jury*; that it is a Matter of Prerogative in the King, and Favour to a particular Person, to grant a Charter of Exemption from being on a *Jury*. So that, if I consider the Law, I know what is meant by those Expressions; if I consider allow'd Practice, it is true, a *Jurymen* may earn his Eightpence for a Trial; but that is too inconsiderable Pay for Persons of Substance, as the *Jurymen* in this Case were said to be, to be fond of the Employ, or to account it a Privilege. Yet even that was but in civil Matters; in criminal Matters not Capital, the *Jury* were heretofore paid if they acquitted the Defendant, but not if they found him guilty, tho' of late it hath been practis'd to give them more, and treat them higher if they convicted the Defendant, than if they acquitted him: But in capital Matters, as the Case in question was, it was never allow'd, or at least own'd, to pay the *Jury*, be the Verdict which way it would.

Having spoken to the *Preliminaries*, I proceed to the Trial, wherein Colonel *Rumsley* was first produc'd: he said, he was sent by my Lord *Shaftesbury* about the end of *October*, or beginning of *November*; who told him, he should meet at one *Sheppard's* the Duke of *Monmouth*, Lord *Ruffel*, Lord *Gray*, Sir *Thomas Armstrong*, and Mr. *Ferguson*, to know of them what Resolution they were come to about the Rising of *Taunton*. *Sheppard* carry'd him where they were, and answer was made, Mr. *Trenchard* had fail'd them, and there would be no more done in the matter at that time; thereupon the Lord *Shaftesbury* took a Resolution to be gone. Mr. *Ferguson* spoke most of the Message, and he thought the Lord *Gray* spoke something to the same Purpose; he did not know how often he had been at that House, he was there more than once, or else he heard Mr. *Ferguson* make a Report of another Meeting to the Lord *Shaftesbury*, my Lord *Ruffel* was in the Room, and that was all they said at that time that he remembered, he was not there above a Quarter of an Hour. There was some Discourse about seeing in what posture the Guards at the *Mews* and *Savoy* were in by all the Company, to know how to surprize them if the Rising had gone on; Sir *Thomas Armstrong* and Mr. *Ferguson* began, all debated it; he thought the Duke of *Monmouth*, the Lord *Gray*, and Sir *Thomas Armstrong* were sent to view them; the

the Rising was appointed to be the 19th of *November*; he was spoke to by the Lord *Shaftesbury* to go to *Bristol* if the Rising had gone on, but in was Quality was not determin'd. The Lord *Ruffel* agreed to the Debate. Being ask'd if my Lord *Ruffel* said any thing there, and what; he answer'd, My Lord *Ruffel* spoke about the Rising at *Taunton*. Being ask'd what my Lord *Ruffel* said, he answer'd, My Lord *Ruffel* discourst of the Rising. Being ask'd if my Lord gave his Consent to the Rising, he said he did.

The next Witness was Mr. *Sheppard*, who said, In *October* last, Mr. *Ferguson* came to him in the Duke of *Monmouth's* Name, and desir'd the Conveniency of his House for himself and some Persons of Quality, which he granted. In the Evening the Duke of *Monmouth*, Lord *Gray*, Lord *Ruffel*, Sir *Thomas Armstrong*, Colonel *Rumsey*, and Mr. *Ferguson* came, not all together, but the one after the other. Sir *Thomas Armstrong* desir'd, that none of his Servants might come up, and that they might be private; so what they wanted he went down for, a Bottle of Wine, or so: the Substance of the Discourse was, to surprize the King's Guards; and in order to it, the Duke of *Monmouth*, the Lord *Gray*, and Sir *Thomas Armstrong*, went one Night, as he remembered, to the *Mews*, or thereabouts, to see the Guards; and the next time they came to his House, he heard Sir *Thomas Armstrong* say, the Guards were very remiss in their places, and not like Soldiers, and the thing was feasible if they had but strength to do it. He remembered but two Meetings there; they came in the Evening; he neither heard nor saw any Coaches at his Door: When they came in, as he remembered, the Lord *Ruffel* was both times there; he had no Business with the Lord *Ruffel*, nor the Lord *Ruffel* with him at that time, but since he had. He did not remember Colonel *Rumsey* discourst the Lord *Ruffel* about any private Business, nor remember'd any farther Discourse; he remember'd no Writings nor Papers read at that time: upon recollection, he remember'd one Paper read by Mr. *Ferguson*, in the Nature of a Declaration, setting forth the Grievances of the Nation, the Particulars he could not tell; it was a pretty large Paper, it was shew'd for Approbation, as he suppos'd, when to be set out was not discourst; 'twas shew'd to Sir *Thomas Armstrong*, and, as he remember'd, the Duke of *Monmouth* was present, and he thought Colonel *Rumsey* was present. Colonel *Rumsey* said, he was not present, it was done before he came. Mr. *Sheppard* went on and said, the Design of the Paper was in order to a Rising, as he suppos'd by the Purport of it; he would not say the Lord *Ruffel* was there when that Paper was read, but he was there when the talk was about seizing the Guards; he could not be positive as to the Times of those Meetings, but it was when the Lord *Shaftesbury* was absent from his House, he absented about *Michaelmas-Day*; he could not be positive that my Lord *Ruffel* was at both Meetings; he thought he was at both, he was sure he was at one.

The last Witness was the Lord *Howard*. He said he brought Captain *Walcot* acquainted with the Lord *Shaftesbury*; and upon his Account Captain *Walcot* soon gain'd a confidence with Lord *Shaftesbury*. *Walcot* told him, the People were sensible all their Interests were going to be lost by the Violence offer'd to the City in the Election of Sheriffs, and that they were resolv'd to take some Course to put a Stop to it: that there were several Meetings about it, and some Persons began to prepare to act; that

some had good Horses, and kept them in private Stables, and he resolv'd to be one in it: He having an Estate in *Ireland*, he dispatch'd his Son thither, and order'd his Son to turn his Stock into Money; the Son went about *August*: That the 30th of *September*, *Walcot* din'd with him; told him, that the Lord *Shaftesbury* was secreted, and desir'd to speak with him: *Walcot* brought him to the Lord *Shaftesbury*; who complain'd of the Duke of *Monmouth* and the Lord *Ruffel* for deserting him; but there was such preparation made in *London*, that now he was able to do it of himself, and intended to do it suddenly; he had above 10000 brisk Boys ready to follow him when he held up his Finger, they would possess themselves of the Gates, and in twenty-four Hours they would multiply to five times the Number, and would be able to possess *Whitehall* by beating the Guards. The Lord *Howard* went to the Duke of *Monmouth*, told him the Lord *Shaftesbury's* Complaint, who said, the Lord *Ruffel* and he told the Lord *Shaftesbury* from the beginning, that there was nothing to be done by them in the Country at that time. The Matter of the Discourse between him and the Duke of *Monmouth*, him and the Lord *Shaftesbury*, and him and *Walcot*, is too tedious to relate, and as little to the purpose, if the Jury had understood Matter of Law, which they did not; in it he takes care to shew what Confidence my Lord *Shaftesbury* had in him, more than in the Duke of *Monmouth* or the Lord *Ruffel*; how very cautious he was, and how precipitate the Lord *Shaftesbury* was, and that what he told the Duke of *Monmouth*, the Duke told the Lord *Ruffel*; and he heard the Lord *Ruffel* had been with the Lord *Shaftesbury*, and put off the intended Rising. At which the Lord *Ruffel* interrupted him, and said, he thought he had very hard measure, there was a great deal of Evidence given by hear-say only. Whereupon the Chief Justice said, it was nothing against the Prisoner; he declar'd it to the Jury, but the Attorney-General bid the Lord *Howard* go on in the Method of Time, and that it was nothing against the Prisoner, but the Witnesses were coming to it, if his Lordship would have patience, he assur'd him so. The Lord *Howard* went on where he left off, with a Story between him and *Walcot* of an intended Rising, and of some dark Sayings let fall by *Walcot* and the Lord *Gray*, importing a Design upon the King's Person; but the Lord *Howard* was very careful to put all off, but at last it was resolv'd to rise on the 17th of *November*: But the Lord *Howard* fearing it had been discover'd, because he saw a Proclamation a little before, forbidding Bonfires without the Lord Mayor's leave, that of the 17th of *November* was also disappointed, and the Lord *Shaftesbury* went away and died. But considering they had gone so far that it was not safe to retreat, and likewise that so great an Affair as that, consisting of such infinite Particulars, was to be manag'd with so much *Finesse*, they erected a Cabal of six Persons, the Duke of *Monmouth*, Lord of *Essex*, Lord *Ruffel*, Mr. *Hampden*, *Algernon Sidney*, and himself, about the middle of *January* last; and about that time they met at Mr. *Hampden's* House, where it was consider'd whether the Insurrection should be in *London*, or in a Place distant; what Countries and Towns were fittest and most dispos'd to Action; what Arms necessary to be provided; how to raise twenty-five or thirty thousand Pounds, and how they might so order it as to draw *Scotland* into a Consent with them.

About ten days after they met at the Lord *Ruffel's* House, and resolv'd to send some Persons into *Scotland*

land to the Lord *Argyle*, to invite some Persons hither to give an Account of that Kingdom; the Persons to be invited were Sir *John Cockram*, Lord *Melvil*, Sir *Campbel*; that Matter was referred to Col. *Sidney*, who told him he had sent *Aaron Smith*; they agreed not to meet again till the return of the Messenger. The Messenger was gone about a Month, it was six Weeks or more before he returned, and then his Lordship was forced to go into *Essex*, where he had a small Concern; there he staid three Weeks, and when he returned, he was informed Sir *John Cockram* was come to Town, and afterwards he was forced to go to the *Bath*, where he spent five Weeks; and from that time to this was five Weeks, all which time was a Parenthesis to him; and that he and the five mentioned erected themselves by mutual Agreement into that Society.

Atterbury swore *Campbel* was in his Custody: then Colonel *Rumsey* was asked, whether my Lord *Ruffel* heard him when he delivered his Message to the Company, and in what place of the Room the Company were: who answered, that when he came in, they were standing by the Fire-side, but all came from thence to hear him; and when my Lord *Ruffel* said, Colonel *Rumsey* was there when he came in, *Rumsey* said, No, the Duke of *Monmouth* and Lord *Ruffel* went away together.

Then in behalf of my Lord *Ruffel*, the Earl of *Anglesey* was examined, who said, that visiting the Earl of *Bedford*, the Lord *Howard* came in, and told the Earl of *Bedford*, that his Son could not be in such a Plot, or suspected of it, and that he knew nothing against the Lord *Ruffel*, or any body else, of such a barbarous Design: And he was going on again with what the Lady *Chaworth* had told him, but was interrupted by the King's Counsel, telling him, as the Court would not permit them to give Hear-say in Evidence against the Prisoner, so they must not permit his Lordship to give Hear-say in Evidence for the Prisoner.

Mr. *Howard* said, that the Lord *Howard* took it upon his Honour, and his Faith, he knew nothing of any Person concerned in that Business, and not only thought my Lord *Ruffel* unjustly suffered, but he took God and Man to witness, he thought my Lord *Ruffel* the worthiest Man in the World.

Dr. *Burnet* said, the Lord *Howard* was with him, and he did then, as he had done before, with Hands and Eyes lift up to Heaven, declare, he knew nothing of any Plot, nor believed any, and treated it with great Scorn and Contempt.

The Lord *Cavendish* testified as to the Life and Conversation of the Lord *Ruffel*, and thence concluded, it was not likely he should be guilty of any such Matter, and heard the Lord *Ruffel* speak of *Rumsey*, as if he had an ill Opinion of him, and therefore it was not likely he should trust him. Dr. *Tillotson* spoke of his Conversation; Dr. *Burnet* and Dr. *Cox* spoke of his Conversation, and of his Averseness to all Risings. Dr. *Cox* testified, that my Lord *Ruffel* said the Lord *Howard* was a Man of luxuriant Parts, but he had the luck not to be trusted by any Party. The Duke of *Somerset* spoke of the Lord *Ruffel*'s Conversation. The Lord *Clifford*, Mr. *Leveson Gower*, Mr. *Spencer*, and Dr. *Fitzwilliams* spoke of the Lord *Ruffel*'s Conversation. The Lord *Howard* being asked by the Jury what he said to the Earl of *Anglesey*'s Evidence, owned what the Earl said, but he did it to outface the Matter; and if he said untrue, he ought not to be believed on his Oath, and insinuated, that he meant what he

said to be meant of a Design of murdering the King; which he did not believe the Duke of *Monmouth* or the Lord *Ruffel* guilty of.

This being the Sum of the Evidence given against, or for my Lord *Ruffel*, let us consider how far it will justify the Verdict given against him: first, consider the Improbability of *Rumsey*'s Evidence, if my Lord *Cavendish* said true, that he should trust *Rumsey* to hear the Debate about seizing the Guards, when the Lord *Ruffel* had an ill Opinion of *Rumsey*. As for *Rumsey*'s delivering the Message, there was no great Matter in that, it is impossible to hinder Peoples speaking, and it is not Treason to conceal what's said; besides it was well known, it was *Rumsey*'s way to talk extravagantly, in order to accuse those that heard him, if they did not discover it. But besides the Improbability of the Evidence in respect of the Person, the manner of delivering the Evidence, and the Evidence itself was such as carried no Colour of Truth with it: he said he delivered his Message, and had an Answer to it, and being asked what the Company said further, answered, that was all that was said at that time, that he remembered, and gives a very good Reason for it, for he staid not above a quarter of an Hour; and added, that he was not certain whether he then heard something of a Declaration there, or whether Mr. *Ferguson* reported it to my Lord *Shaftesbury*, that they had debated it: and yet when *Sheppard* said *Rumsey* was there when the Declaration was read, he denied it, and said it was read before he came in. Being asked to what the Declaration tended, he answered to another matter, viz. that there was some Discourse about seeing what posture the Guards were in, and said, that all the Company debated it; and being drawn on by Questions, said, it was in order to seize the Guards, if the Rising had gone on. Now how doth that part of the Evidence agree with what he said before, that there was nothing more said than the delivering his Message, and the Answer to it? And how doth it agree with the time he said he staid, which was not above a quarter of an Hour? Whereas that Debate, if all the Persons present (being six) debated it, as he said they did, would certainly have taken up a larger time. How does the first and last part of his Evidence agree, when he said, my Lord *Ruffel* agreed to the Answer of his Message? And being asked whether and what he spoke to it, said, he spoke about the Rising at *Taunton*, but doth not say what; and yet in the first part of his Evidence, he said, when asked who sent the Message back, Mr. *Ferguson* delivered the Answer, the Duke of *Monmouth* and the Lord *Ruffel* were present, and he thought the Lord *Grey* said something to the same purpose. But what Credit could be given to any part of a Man's Evidence, whose Memory was so shallow, that he could not remember whether he was at two Meetings, or whether Mr. *Ferguson* related one of them to the Lord *Shaftesbury*? Yet both were supposed to be within the Compass of a Year, whereas a Man of Sense is supposed to remember all his own Acts for seven Years past, which is the Reason why the Chancery obliges a Man to answer as to his own Acts positively for seven Years, without saying, *as he believeth*, or *as he remembereth*, or the like. What Credit is to be given to a Witness who testifieth what was said in Company, and by whom, when his Memory doth not serve to answer positively, whether he was in the Company, or whether another told him what was there said? He might as

well have said he was there, or dreamt he was there, or that he heard the Discourse or dreamt of it, which had carried equal Credit with it.

It was plain, the Man was not of sane Memory enough to make a Will, much less to be a Witness in the Trial of a Man's Life; and nothing can be said for him, but that he was a Witness for the King, that is to say, a mad Man may be a Witness to take away a Man's Life, which is as good Law as a great deal of other *Cant* vented as a part of the Prerogative.

It is true, one of the King's Counsel recommends *Rumsey* to the Jury, as a very credible Witness under the Notion of an unwilling Witness: but had the same Person been a Counsel for the Prisoner, he would have called *Rumsey* a dancing Witness, for he said backwards and forwards; and an amazed Witness, for being asked one thing, he answered another; being asked as to the *Declaration*, he answered to the seizing of the *Guards*; being asked whether my Lord *Ruffel* assented to the Answer of the Message, he replied, yes, because he talked of the Rising, &c. which might be as well against as for it.

Sheppard's Evidence was to the Design of seizing the *Guards*; and as to the *Declaration*, he remember'd but two Meetings, at both which he said, as he remembered, my Lord *Ruffel* was present, but he could not be positive in that, and the times of the Meetings he did not remember: he said, the Substance of the Discourse was, how to surprize the King's *Guards*; and that the Duke of *Monmouth*, the Lord *Grey*, and Sir *Thomas Armstrong* went to see the *Guards*, as he remembered; and the next time they came to the House, Sir *Thomas Armstrong* said the *Guards* were very remiss, &c. Taking this Evidence by itself, without tacking *Rumsey's* Evidence to it, it was so far from being Evidence of Treason, that it was no Crime; for he doth not say, it was intended to be put in practice, notwithstanding all said by him: both the Discourses and Persons viewing the *Guards*, (which last was not Evidence, nor ought to have been given in Evidence) might be a Matter to try each other's Judgments, as well as an Evidence of a thing designed: and if it be capable of two Interpretations, the Law hath said, it shall be taken in *mitiore sensu*, in favour of Life. That distinction was taken by the Chief Justice in *Blague's* Case, the Day after this Trial, where the Evidence against him was a Discourse about taking the Tower, as high a Crime as seizing the *Guards*; and upon that *Blague* was acquitted. It is true, *Rumsey* said it was in order to be put in practice, when the Rising should be in the Country, but that he did not say at first; but was afterwards led to it by Questions: nor did he speak it as a thing at that or any other time determined, but as his own surmise or guess, because he knew of an intended Rising; yet how foolishly did he contradict himself? For, says *Rumsey*, it was to have been put in practice, if the intended Rising had gone on; and yet at the same Meeting he had said before, the Rising was put off: how contradictory therefore is it to say they made Preparations for a thing they had laid aside before? And it is plain *Sheppard* speaks of the same time; for both agree *Rumsey* was at that Meeting, though they do not agree how soon he came: besides, how could *Sheppard* speak positively of the Discourse, or of the Design of it, when he owns he did not hear all their Discourse, and gives a very good Reason for

it? For he said he went several times down to fetch Wine, Sugar, and Nutmeg, and did not know what was said in his Absence: he said he heard nothing about a Rising, nor heard any further Discourse; but on recollection, he heard something about a Declaration of Grievances in order to a Rising, as he supposed; the Particulars he could not tell. Now what sort of Evidence was that? In all civil Matters, a Witness shall not be permitted to give Evidence of the Content of a Deed or Writing, with producing the Deed or Writing itself, or a true Copy of it, and upon very good Reason; for he may make an untrue Construction of it. I remember a Witness who swore to the Content of a Deed of Intail; and being asked, whether he knew a Deed of Intail, and by what he knew the Deed he spoke of to be a Deed of Intail, answered, he knew a tailed Deed very well, and he knew the Deed to be a tailed Deed, because it had a Tail half as long as his Arm, meaning the Label of the Deed. And if this be the Practice, and the Reason of the Practice, in civil Matters, shew me any Authority or Reason any thing should be permitted to be given in Evidence in Treason, which is not permitted to be given in Evidence in the Trial of any civil Matter.

If you say, as Justice *Levinz* said in a like Case in *Colledge's* Trial, that it would be the difficultest thing in the World to prove Treason against a Man, if the Law were not so, and the King would in no sort be safe; on the other Hand, I say as *Colledge* there said, if the Law should be so, no private Person is safe: and if there be Mischief of either Hand, the Law is and must be Judge, which hath taken care (though to no purpose, because it hath not been observed) that there should be a stricter Proof in Treason than in any civil Matter, or in any other Crime: and how the Judges came to permit that loose Evidence in Treason to be given, which of late Years they have done, no just or honest Account can be given.

The last material Witness against my Lord *Ruffel*, was my Lord *Howard*, (as for *Atterbury's* Evidence, it ought not to have been permitted to be given, as shall be shewn, nor was it material) to no part of whose Evidence any Credit ought to be given, even by his own Confession: he was surely in the right, when he said that the Religion of an Oath is not tied to a Place; and I'll add, not to a Form, but receives its Obligation from the Appeal therein made to God: and therefore if he said (though I own he was not bound to say it) to the Earl of *Bedford*, Mr. *Howard*, and Dr. *Burnet*, what was testified against him, he ought not to be believed in any part of his Evidence. Did he say true to my Lord *Bedford*, when unsent for and unasked, (for ought appears after my Lord *Ruffel* was clapt into the Tower) that sure his Son could never be in any such Plot as that, or suspected for it, and that he knew nothing against him, or any body else, of such a barbarous Design; and yet he knew, if he swore true, that my Lord *Ruffel* was guilty of such a barbarous Design, that nothing but the Lord *Howard's* Duty to God, the King, and the Country, could prevail with him to give it in Evidence against a Person for whom he had so great an Affection as he had for my Lord *Ruffel*. How was it consistent with the truth of his Evidence, what he said to Mr. *Howard*, that he knew nothing of any Man's being concerned in that business, and particularly of my Lord *Ruffel*, whom

whom he highly commended, and said, he thought the Lord *Ruffel* unjustly suffered; or with what he said to Dr. *Burnet* with Hands and Eyes lift up to Heaven, which is as much an Appeal to God as may be, that he knew nothing of any Plot, nor believed any? It was an idle Evasion to say, when he spoke of my Lord *Ruffel*, he meant my Lord *Ruffel* was not guilty of the Design of murdering the King, (for which that Man, as he said, was committed, meaning *Walcot*, the Lord *Ruffel*, or any other Person) for he is still at liberty to explain himself, and I am apt to think they were all committed by Warrants of the same Form. I know not how dextrous he is at paring an Apple, but he must be an excellent *Logician* that can reconcile the Truth of his Evidence and Sayings. The Truth is, a Man that has those Niceties in his Head ought to have no Credit; for no Man knows whether he understands what he says aright, and I am apt to think his Lordship could shew, that he did not intend what he said at my Lord *Ruffel's* Trial in the Sense it was understood by the Court or Jury. To say, that he was to out-face the thing for himself and his Party, was as vain; (for besides that I think he was of no Party, because, as my Lord *Ruffel* said, he had the Luck to be trusted by none) where was the Sense of making those Protestations to Persons who could do him no good, and would do him no harm, both which my Lord *Pemberton* could; and therefore 'twas not alike? It is true, the Attorney-General commends the Lord *Howard* as a Person of great Credit amongst the Party, and insinuates the Lord *Grey* was left out of the Cabal for his Immorality, and the Lord *Howard* was taken in his place. But to pass from the General of his Evidence to the Particulars of it, for about two Leaves in the Print of it; it is a Discourse between my Lord *Shaftesbury* and him, wherein he makes my Lord *Shaftesbury* have a wonderful Confidence in him, and discovers all the Design to him, and what number of Men he had at command; but who they were or what they were, was never yet discovered, and yet the Lord *Howard* had not at that time been concerned in the Matter, nor did then assent: he very prudently was resolved to see whether it was likely to take effect or not, before he would enter on it. It was indeed a Matter of great wonder to those who knew my Lord *Shaftesbury*, and knew what Opinion he had of the Lord *Howard*, from the time he discovered that the Lord *Howard* frequented the Dutchess of *Portsmouth*, which was before *Fitzbarris's* Trial, (though after that Trial the Matter was publickly owned, which was before suspected by most, known to the Lord *Shaftesbury*) that he should so readily trust the Lord *Howard* with the Secret, who was unconcern'd in the Management before, as he says himself, and yet secreted himself from the Duke of *Monmouth*, and my Lord *Ruffel*, who were equally guilty, if what was sworn was true. I cannot but observe, that in all the time of the Lord *Shaftesbury*, the Lord *Howard* was no otherwise concerned in the pretended Design, but in raising Difficulties, and being in great fear lest there should be a Rising or an Attempt upon the King's Person: and if he said true, he was the Man that put off the intended Risings, and likewise the intended Design on the King's Person; insomuch, that I think he was so far from standing in need of a Pardon for Treason, that he deserved a considerable Reward, if it were for nothing else than for his fearing the Design

was discovered by the the *Proclamation* against Bonfires, which, as he said, put off the Rising intended to be the 17th of *November*; and yet he and others being afraid, the middle of *January* they erected themselves into a Cabal of six Persons, of which there is but one Person in all his Narrative he pretends to have spoken to about that Matter before, which is the Duke of *Monmouth*, and but one more he pretends even by hearsay to be concerned in it before, which is my Lord *Ruffel*. How improbable therefore was it, that those six Persons should, as it were in sight, put themselves upon such a dangerous Design, especially considering the Reason he gives for it, which was their Fears, that what had been transacted was, or might be discover'd? This likewise is observable, that from the 30th of *September*, the time the Sheriffs entred upon their Office, to the 17th of *November* following, he is very exact as to the time of each Matter, when there was no Person could contradict him; for my Lord *Shaftesbury* was dead, *Walcot* was convicted, and the Duke of *Monmouth* was gone, who are all the Persons mentioned to be concerned in that time: yet when he comes to speak of the Matter in which my Lord *Ruffel* was concerned, then he says it was about the middle of *January*, about ten Days after, about six Weeks after, about three Weeks, and five Weeks; for had he been precise in the times, he might have been disproved in the Meetings he gave Evidence of: and it was much his Memory is so very good as to the former times, to be so very precise in them as he was, and so very defective in the latter times; and yet those times do not make up the space between the middle of *January*, and the time of the Trial, by many Weeks, unless you will give large Allowances to the Word *about*; an Exception which was taken to *Mowbray's* Evidence, though he rectify'd it by his Account in his *Almanack*; but it would not be admitted, though *Colledge* very sensibly desired of the Court, for Justice sake to look on the *Almanack*, to see whether it was newly writ, as if done for that purpose.

Besides the Improbability, if such a thing was in hand, as the Lord *Howard* pretended, for him to run into the Country, and then to the *Bath*, when the Matter was just come to a *Crisis*, as it were, shews him, if he swore true, rather a Madman than a Traitor.

But the Usage of the King's Counsel and the Court towards the Prisoner, was very unjust and unfair; they permitted my Lord *Howard* to go on with a long Story of him and my Lord *Shaftesbury*, at which, when my Lord *Ruffel* took Exceptions, the *Chief Justice*, it is true, said it was no Evidence; yet the *Attorney-General* bidding him go on in the Method of time, he went on where he left off, intermixing Stories of Designs, and of Attempts by other Persons upon the King's Person, to exasperate the Jury, as my Lord *Ruffel* said rightly, against him; a thing which no Counsel durst have done, and no Court would have suffered in any other Case, nor even in that would the Court or Counsel suffer it for the Prisoner. How was my Lord *Anglesey* check'd when he began to tell what my Lady *Chaworth* said, and Mr. *Edward Howard* when he did not speak of his own Knowledge! How unjust was it for the King's Counsel to repeat all the Evidence the Lord *Howard* gave, when they summ'd it up, even that which the Court told them before was not Evidence! How unjust was the insinuating of the

Death of my Lord of *Effex*, as Evidence against my Lord *Ruffel*! And why did not the Court in summing up the Evidence take notice of the Liberty the *Witnesses* and *Counsel* had taken, and have told them what was not *Evidence*? No

other Reason can be given than what *Colledge* said at his Trial, upon his Observation of *Fitzbarris's* business and his own, that the Matter was not to stop at him.



Remarks on Colonel Sidney's Trial.

THE Lord *Ruffel* being executed, and the same Day, what was called his Speech being published, than which, nothing in Print was so eagerly accepted or sought after, which shewed the Inclination of the People, there was some respite for quieting the Minds of the People; but it was not to stop there, as *Colledge* said, and therefore Colonel *Sidney* (who was talked to death under the Notion of a Commonwealth's-man) was the 7th of *November*, 1683, brought to *Westminster* to be arraigned on an Indictment of High-Treason. The Indictment at the time he came to the Hall, was so far from being found by the Grand Jury, that it was not so much as presented to them; but the King's Counsel, who had pack'd the Jury, knew well enough that it would be accepted, that is, found upon sight by the Jury, without any Consideration, which was accordingly done, and Colonel *Sidney* thereupon arraigned. The Indictment was for designing to depose the King, and to persuade the King's Subjects to rebel; and that he did write a certain Libel wherein it was contain'd, that he (meaning King *Charles* the Second) is subject to the Law of God, as he is a Man; to the People who made him such, as a King, &c. To which Indictment he would have put in some Exceptions, express in a Parchment in his Hand, but was told by the Court he must either plead or demur, and upon no other terms Exceptions could or ought to be admitted; after which he pleaded Not Guilty.

The 21st of *November* he was try'd, at which time he insisted to have a Copy of his Indictment, as he had done when he was arraigned; but was both times denied. The first Witness against the Prisoner was Mr. *West*, against whom Col. *Sidney* objected, because he was not pardoned; but it was answered by the Court, that he was a good Witness in my Lord *Ruffel's* Trial, and therefore should be in that. Then Colonel *Sidney* desired Mr. *West* might speak nothing but what he knew of Colonel *Sidney*; but was answered by the Court, he might give Evidence of a Plot in general, tho' Colonel *Sidney* was not concerned in it; and it was called Sir *William Jones's* Law. Then Mr. *West* went on, and gave Evidence of what Colonel *Rumsey*, Mr. *Nelthorpe*, and Mr. *Ferguson* told him of Colonel *Sidney*; but of his own Knowledge he could not say any thing of the Prisoner. *Rumsey* gave a like Evidence he had done in my Lord *Ruffel's* Trial, with an addition of what Mr. *West* and Mr. *Goodenough* told him. *Keeling* gave Evidence of what *Goodenough* told him, all which the Court agreed was no Evidence against the Prisoner. Then the Lord *Howard* gave the like Evidence, from the middle of *January* to that time, as he had done in the Lord *Ruffel's* Trial, saying that he said the Earl of *Salisbury* was brought into the Cabal, who was not mentioned before; and save that he said the meeting at my Lord *Ruffel's* was about a Fort-

night or three Weeks after the meeting at Mr. *Hampden's*; whereas in my Lord *Ruffel's* Trial, he says it was about ten Days after the meeting at Mr. *Hampden's* House: and here he makes two notable Speeches for Mr. *Hampden* at the opening of the Consult, both which he had forgotten at my Lord *Ruffel's* Trial, nor could remember at Mr. *Hampden's* Trial, tho' in the last he was led by a great many Questions to put him in mind of them. After his Evidence given, Colonel *Sidney* was ask'd whether he would ask the Witness any Questions, who answered, he had no Questions to ask him; whereupon the Attorney-General said, *Silence*—You know the Proverb.

The Record of the Lord *Ruffel's* Conviction and Attainder was given in Evidence. Sir *Andrew Foster* swore Sir *John Cockram*, and the two *Campbells* came to *London*. Sir *Philip Floyd* proved the seizing of some Papers in the Prisoner's House, and he did believe the Papers shewn in Court to be some of them. *Sheppard*, *Cary*, and *Cook* swore the Writing produced was like the Prisoner's Hand-writing. The Attorney-General desired some part of the Writing should be read; the Prisoner desired all of it might be read, but was answered by the Court, that the Attorney must have what part of it he would to be read, and afterwards the Prisoner should have what part of it he would to be read; but he persisted to desire all of it should be read. Then the Writing was read (which was plainly an Answer to a Book, but what Book, was not mentioned) in which the Right of the People was asserted. The Earl of *Anglesea* gave the same Evidence for the Prisoner, of the Lord *Howard's* speaking of my Lord *Ruffel*, and the Plot, as he had done in my Lord *Ruffel's* Trial. The Earl of *Clare* said that the Lord *Howard*, after Colonel *Sidney's* Imprisonment, said, if he was questioned again, he would never plead; the quickest dispatch was the best, he was sure they would have his Life; and speaking of the Primate of *Armagh's* Prophecy, he said, the Persecution was begun, and he believed it would be very sharp, but hoped it would be short; and said, he thought Colonel *Sidney* as innocent as any Man breathing, gave him great Encomiums, and bemoaned his Misfortunes; and as for Col. *Sidney's* Papers, he said, he was sure they could make nothing of them. Mr. *Philip Howard* said, the Lord *Howard* said it was a Sham-plot; Dr. *Burnet* gave the same Evidence as he did in my Lord *Ruffel's* Trial. Mr. *Lucas* gave Evidence, that the Lord *Howard* said he knew nothing of Col. *Sidney's* being in any Plot. The Lord *Paget* gave Evidence to the same purpose. Mr. *Edward Howard* gave Evidence to the same purpose. *Tracy* and *Penwick* gave Evidence to the same purpose. Mr. *Blake* testified, that the Lord *Howard* said he had not his Pardon, and could not ascribe it to any other Reason, than that he must not have it till the Drudgery of swearing was over. Now to review what

what hath been said, it is strange to see what a Progress was made in the Resolutions of Points of Law, to take away a Man's Life; so say it in Col. Sidney's Words, as if the Court and Counsel thought it their Duty to take away a Man's Life any how. Mr. West, and several others, are admitted to give Evidence by hear-say against the Prisoner, and their Evidence summed up, and urged as Evidence to the Jury; and the Reason given for it was, that he was admitted a good Witness of a like matter, in the Lord Ruffel's Trial; which, besides that it was not true, for it was rejected in that Trial, as it appears it was in the print, yet if he had been admitted, of no Authority, as Colonel Sidney said, because, perhaps, he was not excepted to. Of a like stamp is the Evidence of the Conviction of the Lord Ruffel; tho' I agree the Lord Ruffel's Conviction was as good Evidence against Colonel Sidney, as the Earl of Essex's Murder was against my Lord Ruffel, and no better. The same may be said of Rumsey, Keeling, Forster, and Atterbury's Evidence. Against the Lord Howard's Evidence there were the same Objections as in the Lord Ruffel's Trial, with the addition of several other Persons testifying he said he knew not, nor believed any thing of the Matter; and that he could not have his Pardon, till he swore others out of their Lives, which in truth was the Sense of his Expressions.

The King's Counsel indeed had thought of something since the Trial of my Lord Ruffel, to palliate the matter of the Lord Howard's Sayings. (for they lean'd hard upon his Reputation, and look'd as if he would perjure himself at the Expence of some Persons Lives, as his Words are in the Lord Ruffel's Trial) Would you, say they, have had him confess'd the matter to those Persons to whom he had deny'd it?

I think there is a difference between confessing and denying: Who ask'd him the Question? What did it avail him to deny it to the Persons testifying against him? and therefore when he voluntarily said a thing untrue, unasked, not provoked or compelled to do it, and which could do him no good, it was good Evidence of his untruth, and that no credit ought to be given to what he swore.

As for the last part of the Evidence, which was about the Writing, both the Indictment and the Evidence was defective.

As for the Evidence, if the Subject-Matter of the Writing had been Evidence of Treason, the Indictment ought to have express'd that he publish'd it, which the Indictment in this case did not; and upon good Reason, which was, that the Jury might be put in mind, that the publishing of it was necessary to make it known; whereas they very well knew that the Evidence would not, nor did come up to it. This was the first Indictment of High-Treason, upon which any Man lost his Life, for writing any thing without publishing it; * for in Fitzbarris's Indictment, he was charged with publishing his Libel; and so in all other Indictments for Writing, and upon good reason: for this being made an Overt-Act of Treason, it must be an Evidence of a Design to kill or depose the King, or the like; and as the Consequence of what the Writing contain'd, which was, that the Power was in the People, &c. being in its nature no other, nor urged by the King's Counsel to any other Intent than to corrupt the Subjects Minds, could not be Evidence of such matter, unless proved he had writ and published it, whereof the last was not pretended to be proved.

That it was necessary to be express'd in the Indictment, and proved at the Trial, appears by the Resolution of all the Judges of England in Hugh Pine's Case, reported in *Cro. Car.* fol. 117. at a time when Prerogative run pretty high; wherein, besides the Resolution that no Words charging the King with any personal Vice, was Treason, there is the Case of one Peacham, in the 33d of Henry the Eighth, cited, who was indicted for Treason, for treasonable Passages in a Sermon never preached, nor intended to be preached, but found in Writing in his Study; he was found guilty, but never executed; for many Judges at that time were of Opinion it was not Treason, as the Book says: which I think, according to the Evidence here given, was the express Case of Colonel Sidney, admitting he writ the Book produced, and that the Passages in it were treasonable.

And as this Indictment was an Original in the particular before-mentioned, so it was a second of an *Innuendo* Indictment of Treason; Fitzbarris was the first. The Prosecution against Car, as I remember, was an Information, and Judgment arrested after a Verdict, because it was by *Innuendo*, of which no Precedent could be produc'd; and although in Actions for Words it was permitted, yet in Criminal Matters, being penal, it was resolv'd it ought not to be permitted, and certainly much less in Treason: and as this Indictment was an Original in one part, and a second in another, the Evidence on it was an Original in another part, which was proving the Book produc'd to be Col. Sidney's Writing, because the Hand was like what some of the Witnesses had seen him write; an Evidence never permitted in a criminal Matter before. The Case of the Lady Carre was well cited by Colonel Sidney, against whom there was an Indictment or Information of Perjury; in which it was resolv'd, that comparison of Hands was no Evidence in any criminal Prosecution: And it must be own'd, that at that time, besides Keeling and Twisden, there then sat in that Court Sir Wadham Windham, whom all will own to have been the second best Judge which sat in *Westminster-Hall* since the King's Restoration: and if it be not Evidence in a Prosecution of Misdemeanor, much less in Treason, as Col. Sidney said; which Inference, besides the Reason of the thing, is back'd by the Authority of my Lord Coke.

But admitting Colonel Sidney wrote that Book, and published it; yet if it were not done with a Design to stir the Subjects up into a Rebellion, but was writ and published only *disputandi gratia*, as the Import of the Books shews plainly it was, it was no more Treason, than the Discourse between Blague and Mate Lee about taking the Tower was. And suppose it was wrote with that Design, yet it not appearing when it was writ, how could a Jury, upon their Oaths, say it was done with a Design to raise Rebellion against King Charles the Second, when, for ought appeared, it was writ before he was King, or thought of? It might, for ought appeared, be writ in King Charles the First's time, or Cromwell's time, and design'd against either of them, or any foreign Prince, and therefore could not be Treason against King Charles the Second.

The Evidence was an Original in this particular; also it was the first time that ever a particular Expression in a Writing was given in Evidence against a Man in Treason, without reading the whole Writing, and for a very good Reason given by the Jury in Fitzbarris's Case, which was, That there might be something