

Court. Mr. Hurly, you shall make the best Use of it you can; when the Man tells you on his Oath, that he cannot tell; and we can't make a Man swear more than he can swear: He says, it was in 99, and before the Robbery. Was it in Winter, or Summer?

Capt. Lynch. In the Winter, as I do really remember it.

Mr. Hurly. My Lord, I humbly offer this: This Gentleman says, he met me at *Harry Barger's* House in *Loughbrea*; and, that I open'd my Portmanteau for him to take out a Bag.

Court. No, he says you open'd the Portmanteau to take out some Linnen; and you took out a Bag, and you look'd into it.

Mr. Hurly. Was this half a Year before the Robbery?

Capt. Lynch. I do not know.

Mr. Hurly. My Lord, I will prove I was not there, at *Loughbrea*, the last time I went home. And, my Lord, my Father held some Land from him: There came some Difference, and he told his Brother, that if I did not give up the Land, he would give me a Lift.

Mr. Bernard. Was there any one in the Room then with you?

Capt. Lynch. No body but Mr. Hurly and I.

Mr. Hurly. Pray, Sir, what sort of Portmanteau was it?

Capt. Lynch. It was a Cloth Wallet, blue and red.

Mr. Attor. Gen. The next Evidence we produce, is one *Charles Cassidy*; he was thought a fit Man for the Service, and was solicited to be Commander in chief of this Robbery.

Charles Cassidy sworn.

Court. Give an Account what you know of any Robbery of Mr. Hurly.

Cassidy. My Lord, I was a Practitioner in Surgery; and Mr. Hurly's Father fell sick, and I was sent for to attend him three Weeks or a Month; and then one Dr. Brady, a Relation of Mr. Hurly's was sent for: And as we were going up to see other Patients, the said Dr. Brady and I, says the Doctor, If you will take upon you a Business, you shall have Twenty Guineas. What is it to do, says I? It is to head a Party, says he, to rob Hurly, and then he will raise Money on the County. And after this, when he came back, the Doctor told him what he had offer'd me. Hurly said, I will give him Forty Guineas; and said, he would get People himself: And he said, I have four Persons, that I will trust with you, &c. but I went away, and never came near him since.

Court. When was this?

Cassidy. It was thirteen or fourteen Months before he was robb'd.— I serv'd in the House from before *Christmas* to *Easter*.

Court. Mr. Hurly, he swears thus; That he was employ'd to attend your Father, that was sick at that time; and, that after some Attendance you took Occasion to send for Dr. Brady, a Relation of yours: And going with the Doctor abroad to visit other Patients, he told him, You get little Fees from Mr. Hurly; but, says he, if you will head a Party for a pretended Robbery on Mr. Hurly,

he will get Money of the County, and you shall have Twenty Guineas. He said, he did not care to meddle with it, for his Relations would suffer by it; but he said, It would be but little that every one would pay: Then, said he, I don't care if I do. And when he came home, the Doctor told before your Face what he had done. You said, What! give him Twenty Guineas! I'll give him Forty Guineas. And after, when he went home, he thought not fit to do it; for he told you, his Face was very remarkable, and known in the County, and, that he should be discover'd. Oh! Sir, said you, I'll help you to another Face. You told him, he should have one *Donogh O'Brien*, *Daniel Hicky*, and *Calaban Carty* to assist him.

Mr. Soll. Gen. Has not *Donogh O'Brien* another Name?

Cassidy. I know, my Lord, it is *Donogh O'Brien Andrews's* Son.

Court. You have been acquainted since *Christmas* was two Years; When was it that this was said to you by Dr. Brady?

Cassidy. It was the *February* after.

Mr. Robbins. How long after this Discourse of Dr. Brady and Mr. Hurly did you speak of it?

Cassidy. My Lord, I did not speak of it; and the Night it was to be transacted I ran away from my own House, for fear of being suspected.

Mr. Robbins. Did you go before a Justice of Peace voluntarily? or, Were you call'd to give that Examination?

Cassidy. I kept it to my self till last *Sunday*; being at Church, and after dining at Mr. *Hickman's*, they were talking of Hurly's Business. I said, There is a Man in this Country that can do Mr. Hurly more Mischiefe, in relation to this Robbery, than any other. Who is that? said he. I, being afraid to bring my self into Trouble, said no more. Says the Minister, You ought to be punish'd, if you don't do your best for to save your Country from Ruin. And, upon this, after I came home, I recollected my self, and I went to a Justice of Peace, and swore it; and after I had given my Testimony, he bound me over to prosecute.

Mr. Soll. Gen. He has done like an honest Man.

Mr. Foster. How came you to conceal it for Two Years past? Did you never tell it to any Man before?

Cassidy. But to one young Man, that I thought would joyn with me.

Court. What young Man is that?

Cassidy. 'Tis one *Comer*. When I was at Mr. Hurly's House, I often play'd a Game at Tables with him: When he had not then Money to send for a Bottle of Wine, he got me to send my Note for twelve Bottles of Wine at *Ennis*.

Mr. Attor. Gen. The Persons concern'd in the Robbery had Vizards: We shall shew you, that when Mr. Hurly was in *Dublin* last, what Shop he was at, and what sort of Commodities he bought. There was a Masque to be acted.

Daniel Kiefe sworn.

Mr. Attor. Gen. Pray, where do you live?

Kiefe.

Kiefe. In Town, my Lord, with Counsellor *Turner*.

Mr. Att. Gen. If your Lordships please to ask him, Whether he knows *Mr. Hurly*?

Kiefe. I knew *Mr. Hurly* these many Years.

Mr. Att. Gen. Pray give an Account what you observed when *Mr. Hurly* was going into the Country; what Shops you met him in, and what Commodities he was buying.

Kiefe. In *February*, 1699, he came into *Mr. Bently's* Shop, and asked for Masks to wear at a Masquerade: He told him he sold none, but there were some in *Christ's Church-Yard*; and he went in at the Gate towards the Yard; and when he was gone, I said, *Mr. Bently*, I wonder what he designs to do with them, I fear 'tis for no good Design.

Mr. Att. Gen. Pray where did he go when *Mr. Bently* told him they were to be had in *Christ's Church-Yard*?

Kiefe. He went streight into the Yard.

Mr. Att. Gen. What Time was it?

Kiefe. It was in *February*, 99, the latter End of the Term.

Joseph Bently sworn.

Mr. Att. Gen. Pray, my Lord, that *Mr. Bently* may give an Account whether he knows *Hurly*.

Bently. Yes, my Lord, I do—— And I remember he came into our Shop to ask for Masquerading Masks or Vizards.—— And I think it was about *January* or *February*—— I told him we had none. Pray, says he, can you tell me where I can get any?—— I said, I cannot tell, unless you get them in the Yard: And he went thro' the Shop into the Yard.

Mr. Att. Gen. When was this?

Bently. It was *January* or *February*, 99.

Mr. Foster. Did you ever see him before that Time?

Bently. Yes, several times—— He bought several Things in our Shop.

Mr. Foster. But no Masks?

Bently. No, but asked for Masquerading Masks or Vizards.

Mr. Att. Gen. My Lord, the Reason why we have been the more particular in this, is, that it has made a great Rumour and Noise, that it would be of great Disadvantage to *Mr. Hurly*; and therefore we go to these Particulars, that no Man may pretend but the Matter is made plain against him. We shall produce some few Evidences more.

Mr. Recorder. *Hurly* has lately published a Libel against the Gentlemen of the County.

Mr. Geary sworn.

Mr. Butler. Had you any Discourse with *Mr. Hurly*? And what?

Mr. Att. Gen. Pray give the Court and Jury an Account, Whether you know *Mr. Hurly*, and his Circumstances, and any great Quantity of Money that he had?

Mr. Geary. *Mr. Hurly*, in *February* last was Twelve-month, told me his Protection was out; and he desired me to get a Lodging for him. I desired him to come to my own Lodging in *Capel-street*. When he went out of Town I went with him as far as *Island-Bridge*: He said, he had

no Money: And a Day or two after he writ me a Letter, and desired me to raise his Wife some Money on a Bond of *Capt. Mac-Donnel's*. I sent to *Mr. Connor*, and got him to endorse a Bill to *Mr. Lum*, and the Money was supplied: And after he came to Town again, I went to his Lodging, to *Mr. Rascow's* in *Capel-street*; there were two Soldiers that would not let me in: I spoke to the Sheriff, *Mr. Cusack*; so I went into him, and told him, I was sorry for him. He said, it was for prosecuting *Sir Donat O-Brien*. Says he, you know *Sir Richard Nagle's* Hand, and *Sir Donat O-Brien's*; there are Letters to *King James*; and, said he, you and I must live, and we may get Money by it.

Mr. Sol. Gen. Now, my Lord, we call this Gentleman to shew, that at the Time of his sending this Money, *Mr. Hurly* was in an indigent Condition. When was it?

Mr. Geary. It was in *Michaelmas* Term, 1699.

Mr. Hurly. By Virtue of your Oath, Have you no Gratification for coming here?

Mr. Geary. No, by Virtue of my Oath, I have not.

Thomas Connor sworn.

Mr. Sol. Gen. What do you know of *Mr. Hurly*, about Money?

Thomas Connor. That Gentleman, *Mr. Geary*, came to me, and told me, it would be an Obligation on him to get twenty Pounds for *Mr. Hurly's* Lady: Upon that I drew a Bill of Exchange; so they had the Money, but what they did with it, I do not know.

Mr. Hurly. Was not the Money paid again?

Connor. Yes, it was paid.

Mr. Hurly. Then did I want Money, when you drew the Bill, and the Money was paid?

Mr. Att. Gen. My Lord, *Mr. Hurly* was not able to pay this Bill; and we shall give you an Account who paid it.

Capt. Mac-Donnel sworn.

Mr. Butler. You heard the Evidence of *Mr. Geary*?

Capt. Mac-Donnel. Yes.

Mr. Butler. What do you know of the Matter?

Capt. Mac-Donnel. I did owe some Money by Bond to *Mr. Hurly*, and he writ to me to pay thirty Pounds: I don't know what the Sum was that *Mr. Geary* had advanced; but I writ him word, I would not pay him any such Sum; but I bid him send my Bond to *Capt. Gardiner's* in *Limerick*, and the Money should be paid there; and it was sent accordingly, and the Money was paid: It was something less than 50*l.*

Mr. Att. Gen. Pray, when this Robbery was talked of, did any body apply to you to take you off, that you should not oppose the Presentment, but suffer it to go on.

Capt. Mac-Donnel. *Mr. Hurly* spoke to me to be his Friend. I was always his Friend: And *Capt. Bourk* spoke to me to speak to a Gentleman of the Grand-Jury, that lay with me, (that was much against him) to desire him, that he would not appear against him; and that he and his Tenants should be freed from paying any Part of the Money.

Mr. Ber-

Mr. *Bernard*. My Lord, I am Council for the Traverser. The Question is, Whether he be Guilty of Perjury in an Information, sworn before Mr. *Blood*.— If your Lordships will hear the Proofs, we shall turn the Table, and prove Mr. *Hurly* was a Man that came with a good Fund of Money into this Kingdom, and left a good Fund in *France*, and that he drew Bills of Exchange upon his Correspondent in *France*; that his Correspondent gave him an Account, that Mr. *Arthur* discovered where all his Effects lay, and all was seized; and the Bills came back protested. Then he comes and advises with Sir *William Hardcock*, who advised to an Accommodation with Mr. *Arthur*: And so we did, and agreed to give him what he demanded; and accordingly, we gave him Bonds. And in 1699, we brought a Bill in *Chancery*. We met Mr. *Arthur's* Brother in *Dublin*; he said, we should not be disturbed at the Assizes at *Emis*. We went down accordingly, and carried our Money along with us, and we did go another Way, and not by *Loughrea*. And we shall shew your Lordships further, that there was a Quarrel between Mr. *Hurly* and Sir *Donagh O'Brien*: Sir *Donagh* had such great Interest in the Country, prevailed with the Jury, for some Reasons, that the Presentment was not found for us at the Assizes; but four Men were taken up for the Robbery, and laid in Irons; and they were told, there was a Commission of *Oyer and Terminer* coming down, and that they should be Arraigned—Here is Life or Death proposed: If you confess the Matter, and place it upon *Hurly*, you shall have your Lives; but, if you do not, as soon as the Commission comes down, you shall stretch for it. The Persons were sensible, that those who threatened them could effect it, and they were kept close from all others but these Persons, and they solicited them, until they got them to give in Examinations against Mr. *Hurly*. But they came afterwards to Mr. *Hurly*, and told him, it was the Threats and Dangers they were in, made them do what they had done, and that they were troubled for it. And after that, they went before my Lord Chief-Justice *Pyne*, and they forswore all. After this the Contrivance of the Counters, that must be managed; and a Bag of Counters is brought down to *Hicky's* Wife, and she must hide it where it may be found by this *Huoxin*. My Lord, we shall shew your Lordship all these Matters. I apprehend they are Men of Credit that will swear the Matters in my Brief, that Mr. *Hurly* was really and truly Robb'd, and that these Prosecutions have been carried on by Bribery, and such-like Practices in the Country.

Mr. *Foster*. We'll shew you, that Mr. *Hurly* had 2000 *l.* and that he carried a Part of it into the Country to pay off *Arthur*. We shall shew where we had the Money, and that he brought it down.

Charles Fitz-Symmons, *Merchant*, called, did not appear.

John Hurly sworn.

Mr. *Foster*. Pray give an Account to the Court and the Jury, whether you were employ'd

to receive Money for Mr. *Hurly*, and of whom?

John Hurly. I was employed in 1696, and I received of Mr. *Jeremiah Donovan*, 200 *l.* and Col. *Lovet* paid me 490 *l.* for 500 *Louis d'Ors*.

Court. In what Year did you receive it from Col. *Lovet*?

John Hurly. It was in 96 or 97.

Mr. *Foster*. And how much more?

John Hurly. From Mr. *Fitz-Symmons*, 306 *l.* 10 *s.* in 1697.—And I received a Bill in *Limerick*, of 200 *l.*

Mr. *Foster*. What did he bid you do with the Money?

John Hurly. He sent me this Money out of *Holland*, and bid me secure it for him.

Mr. *Foster*. Did your Brother lay out any Money for a Mortgage.

John Hurly. Not any at all.

Mr. *Hurly*. I appeal to the Gentlemen of the Country, whether I did purchase any Thing.

Mr. *Recorder*. You are not accused for a Purchaser, Sir.

Court. Did you pay him that Money again?

John Hurly. Yes, my Lord.

Court. Was it before he was Robb'd?

John Hurly. Yes, it was.

Court. Pray what Discourse had your Brother with you concerning any Money he had by him?

John Hurly. He told me all along, that he could pay *Arthur*, and that he had a Fund to pay it. And I tell you, Sir, before this Robbery, I came to his House, and his Wife told me, My Brother will do very well, for that he has brought Money to pay off *Arthur*.—How do you know that, said I?—Says she, I saw a Bag of Gold with him.

Court. Were you there after the Robbery?

John Hurly. I came next Morning, and I found the Trunks broken open, and all the House in Disorder.

Mr. *Foster*. Do you know Capt. *Lynch*?

John Hurly. Yes.

Court. Do you take this *Lynch* to be a fair honest Man?

John Hurly. I will tell you what I know. About *Christmas* last, I came to the County of *Galloway* to Mr. *Lynch*.—There were some Land that my Father held from him; and he set the Reversion of the Land. I told him, that it was ill done, that we should not have the Preference of the Land; and I told him, my Brother would keep him out two Years.—The Servant that was with me, told me, that he proffer'd him Twenty Pounds to swear the Robbery upon my Brother.—When he came back, I asked him about it, and he said, he feared he would prove him not to be within the Articles of *Galloway*; and, said he, if he will give me quiet Possession of my Lands, 'tis well; if not, I'll give him a Lift.

Mr. *Foster*. Do you know of any Jewels that belong to Mr. *Hurly*, besides the Money.

John Hurly. He gave me a Diamond Ring for my Wife, and shewed me a Ring he said was worth 100 *l.*

Mr. *Foster*. Do you know of any Rewards proffered to swear against *Hurly*?

John Hurly. One *Hicky* shewed me a Note under Mr. *Hickman's* Hand, and Mr. *Cusack's* Hand. That

That *Hickman* and *Cusack* promised to intercede with the Government for Pardon for him and others, if they proved the Robbery on *Patrick Hurly*. — And that they should be found with good Meat, Drink, Washing and Lodging, and discharged without Fees. — He shewed me this Note within a Week or some short Time after he was discharged.

Court. You say, That this Note was no more, than that *Mr. Hickman* and *Mr. Cusack* promised they would intercede to the Government, if so be he would tell the Truth?

John Hurly. Yes. — In proving a Robbery upon *Patrick Hurly*.

Mr. Fester. Were you at *Emmis*?

John Hurly. Yes, I was.

Mr. Fester. Who was there examined on Oath to prove this Robbery?

John Hurly. There was *Dorothy Kemp*, and *Jane Hurly*, and this *Margaret Conneene*, and she was examined at Home.

Mr. Fester. Was *Mr. Ronane* examined?

John Hurly. Yes, and his Man too.

Mr. Sol. Gen. Now, Sir, I'll ask the Witness a Question. — Pray what Credit did the Jury give to it? Was you desired by your Brother, before the Robbery, or at the Time of the Robbery, to join with one *Cassey*, to be bound with him for the Money?

John Hurly. I was desired to join with *Cassey*. My Brother pretended I owed him Money. I told him it was an unreasonable Thing, for I had my Rent to pay.

Mr. Sol. Gen. Did you pass a Bond to *Cassey*, *Mr. Hurly*?

John Hurly. I did, Sir; I told you before.

Mr. Sol. Gen. Who was bound in that Bond?

John Hurly. None but my self.

Mr. Sol. Gen. Who did you give the Bond to?

John Hurly. I gave it to *Cassey*.

Mr. Sol. Gen. My Lord, about *Christmas* last was Twelve-month, he comes to this Gentleman, his Brother, and desired he would get him Fifty Pounds, and he told him, he craved yet the Money, if he would pass his Bond for it to one *Cassey*, which he accordingly did: This Bond comes into *Patrick Hurly's* Hand, and he enters up the Judgment, and an Execution upon it, against his Brother's Goods, for his own Use. Sir, had you any Money from *Cassey*?

John Hurly. No, I had none.

Mr. Sol. Gen. Who took the Execution out, and who took your Goods upon that Execution?

John Hurly. *Charles Mac-Donogh* did it; I paid him the Money.

Mr. Sol. Gen. Who had the Money for *Charles Mac-Donogh*?

John Hurly. I had it, Sir. — I will unriddle this Matter. — I was very unwilling to go to Law. — I came to *Cassey*, and desired him to pretend to lend me 50*l.* and my Brother would give him his Bond for it. — He will pay you, said I, but will not pay it me.

Court. Did you owe your Brother 50*l.*

John Hurly. I did owe him near it, only he took some Cattle of mine.

Mr. Att. Gen. Pray, Sir, are you in Custody of the *Marshalsea*, at your Brother's Suit?

John Hurly. Yes, I am; and likewise at *Mr. O-Brien's* and *Mr. Fitz-Simon's* Suit. The Money

that I received from *Mr. Fitz-Simons*, and paid my Brother the same Day, I am now in Custody for it since *April* last.

Mr. Recorder. You say, that you received several Sums of Money for your Brother, and you said, there was a Balance between you and your Brother: How much was that Balance? And what became of it? How much Money had your Brother in 97, 98, and 99?

John Hurly. When my Brother went into the Country, I discounted with him.

Mr. Att. Gen. You say, you received several Sums; that you paid 200*l.* to *Mr. Gardner*, and some other Sums: How much did you pay back in Specie to your Brother?

John Hurly. The Money *Mr. Fitz-Simons* gave me, I came to my Brother's Lodging, and paid it him.

Court. This is a Matter that has been transacted within the Compass of three or four Years, and this cannot slip out of your Memory. You say, all the Money you received of *Fitz-Simons* you paid your Brother again. — What more did you pay him?

Hurly. I paid him the 200*l.* in *Limerick*. — I paid him 190*l.* or thereabouts, more.

Court. When was that?

Hurly. I paid it him in the Year 1697, in the beginning of 98.

Mr. Sol. Gen. You say, you paid *Mr. Burton* 200*l.* — Did you pay any others?

Hurly. I paid him no more, but what I paid him for the Farm — I gave him Bullocks, 20 old Bullocks, at 46*s.* a-piece, and the rest came to 30*l.* more.

Mr. Sol. Gen. There was a Sum of 200*l.* paid, and the rest drawn out in small Sums from Time to Time, as he had Occasion to call for't: How much was *Brien's* Money?

Hurly. It was about 40*l.* and I gave him a Bond of *Capt. Lynch's*, of about 6*l.* 10*s.* and I gave him a Bond on a Brother-in-Law of mine, and a Bond on *Lynch*.

Mr. Att. Gen. How much of the Money that you received for *Patrick Hurly*, did you lend out, and to whom? — Did it amount to 200*l.*?

Hurly. Yes, it did.

Mr. Att. Gen. Did it amount to 300*l.*?

Hurly. No, it did not.

Mr. Att. Gen. Was this Money paid back again to *Mr. Fitz-Simons*?

Hurly. I have a Bill in *Chancery* against him.

Mr. Recorder. I desire to know, whether *Mr. Fitz-Simons* had the 300*l.* back again?

Hurly. My Brother told me he paid him every Farthing, and said, he had a Discharge from him.

Mr. Recorder. Pray how much of this Money had *Mr. Arthur*?

Hurly. I don't know of any Dealing with *Mr. Arthur*.

Mr. Att. Gen. I did hear, that he assigned a Bond of *Capt. Christopher O-Brien's* to him.

Hurly. That 300*l.* my Brother owed me; and the Bond my Brother gave for it, I gave *Mr. Fitz-Simons* the Bond, and he arrested him on it.

Mr. Att. Gen. Pray, Sir, did you send any *Holland* Sheets, after this pretended Robbery, to any Place?

Hurly. Yes, I did, to *Capt. O-Brien's*.

Mr. *Att. Gen.* Where did you find them?

Hurly. I will tell you, my Lord. — We were told, that one *Halloway* was coming to my Father's, at the Suit of one *Neylan*, to take all away. — My Father sent for me, and desired me to come to him, for *Halloway* was coming to ransack the House.

Mr. *Att. Gen.* How long was this after the Robbery?

Hurly. It was a Month afterwards. — I came there, and one of the Maids told me there was a Portmanteau in the Turf-stack. — I took it Home that Night, and I was order'd by her to deliver it to Capt. *Christopher O-Brien*. I sent for him to a Friend's House, and opened it before Capt. *O-Brien*, and took an Inventory of what was in it. — There were five or six Pair of *Holland* Sheets. — This was a Month or two after the Robbery.

Mr. *Recorder.* Another Man swore, it was the beginning of *May*, or the latter end of *April*.

Mr. *Foster.* We had this Money, and will shew you how we lost this Money, and shall prove the Robbery.

Dorothy Kemp sworn.

Mr. *Foster.* Pray Mrs. *Kemp*, where did you dwell in 99?

Mrs. *Kemp.* I dwelt in *Moughna* in the County of *Clare*, within a quarter of a Mile where Mr. *Hurly* lived.

Court. Where did you live at the Time that he was robbed? Were you in the House when the Robbery was committed?

Mrs. *Kemp.* Yes, I was.

Court. Pray give an Account what you know of that Robbery.

Mrs. *Kemp.* My Lord, There was Counsellor *Ronane* three Days waiting for Mr. *Arthur* to pay him some Money. My Mistress went out of Town upon *Saturday* before, and took some Gold out of her Chest, and shew'd some of it, and put it in again; and she did not come Home till *Monday* Morning after the Robbery was committed. I went to the Trunk, to get some Table-Linnen, and I laid my Hand on the Bag were the Gold was. My Master came in the mean time, and said, What do you do there? I said, I wanted some Table-Linnen; and my Master took away the Bag, and put it into the Closet.

Court. And so you concluded, that was the Bag of Gold?

Mrs. *Kemp.* Yes, I did.

Court. Did you know any of the People that were at the Robbery?

Mrs. *Kemp.* No, my Lord, I did not.

Court. How many Robbers were there?

Mrs. *Kemp.* As I understand, there were seven of them.

Court. Did you see them all?

Mrs. *Kemp.* Just after Supper, Counsellor *Ronane* got up to go to Bed, and went out of the Door, and then the Robbers got in. We went up to lay down the Bed, and my Master's Man came running and crying, my Master is murdered; so we got open the Door, and there was five came up with Swords and Pistols:

Court. Had they any Masks or Vizards?

Mrs. *Kemp.* I cannot tell. They commanded us into the Room, where my Master's Father lay Bed-ridden these three Years past.

Court. How many did you see there at that Time?

Mrs. *Kemp.* I saw five come up, and there was two more in the Parlour.

Court. Pray Mistress, by Virtue of your Oath, what Arms was there?

Mrs. *Kemp.* My Lord, we kept Arms just by the Door, a Carbine and Fuzee, because he was something in Debt.

Court. Were those the same Arms your Master had before?

Mrs. *Kemp.* I cannot tell; but they took his Pistols, and put Gravel into them.

Mr. *Att. Gen.* Who put the Gravel into the Pistols?

Mrs. *Kemp.* The Tories.

Mr. *Bernard.* Was there any Offers made to her to put Counters into *Hicky's* House?

Mrs. *Kemp.* My Lord, I was promised Ten Pounds, to put Counters into my Master's House.

Court. She says, she was desired by one *Murrough O-Brien*, to lay Counters in her Master's House, or *Hicky's* House; a Bribe of Ten Pounds was offered her, and she refused it. But that he sent to *Daniel Hicky's* Wife twenty times; and she has some of the Letters he writ.

Court. By whom were these Letters written?

Mrs. *Kemp.* By *Murrough O'Brien*, for his Man brought them.

Court. Pray when was this, that you were offered Ten Pounds to hide Counters in your Master's House, or *Hicky's*

Mrs. *Kemp.* It was before the Assizes a pretty while.

Mr. *Sol. Gen.* My Lord, here is *Donogh O-Brien*.

Court. Where was it he offered you this Money.

Mrs. *Kemp.* It was at *Shenoge*, a quarter of a Mile from where he lives.

Mr. *Recorder.* And he was to give you Ten Pounds to bury Counters in *Hicky's* House.

Mr. *Butler.* When the Rogues came in, how did they use your Master?

Mrs. *Kemp.* They ty'd him, and Counsellor *Ronane*.

Mr. *Foster.* You know *Murrough O-Brien*; Pray how often did you see him with Mrs. *Hicky*?

Mrs. *Kemp.* I saw him often with her. Said he, Mrs. *Hicky*, Mr. *Hicky* is cast down, and he is not worth a Farthing, he is ty'd Neck and Heels.

Court. Did you hear this?

Mrs. *Kemp.* She told me so.

Mr. *Foster.* We only offer it as far as it will go.

Mr. *Att. Gen.* It will not go at all.

Mr. *Sol. Gen.* I am told, that *Murrough O-Brien* is in Court; she speaks of some Words and Letters between her and him and Mrs. *Hicky*.

Mr. *Foster.* What Linnen was taken away by the Robbers?

Mrs. *Kemp.*

Mrs. Kemp. My Lord, I partly can swear, that I wash'd twenty Pair of *Holland* Sheets; there was thirty Pair, I wash'd twenty Pair my self.

Court. How many was left?

Mrs. Kemp. There was but five Pair.

Court. How came they to leave them behind?

Mrs. Kemp. They did not stay to take them away.

Murough O-Brien sworn.

Court. Pray had you any Discourse with this Woman concerning Counters?

O-Brien. By Virtue of the Oath I have taken, I never had.

Court. Did you never offer her 10 l. to lay Counters in Mrs. *Hicky's* House?

O-Brien. By Virtue of my Oath, I did not.

Mrs. Kemp. By Virtue of my Oath, you did.

Court. Did you send any Letters to *Hicky* or his Wife?

O-Brien. Yes, I did write to *Hicky*, and to his Wife.

Court. Upon what Occasion did you write?

O-Brien. *Hicky's* Wife came to me, and told me, that if I could get a Protection for her Husband, from Sir *Donough O-Brien*, he would make it plain, that this was a Sham-Robbery: And *Hicky's* Wife said, she could produce those very Counters. *Charles Mac-Donogh* was by when she said, If we would procure a Pardon for her Husband, they would produce the Counters, and and make the Matter plain.

Mr. *Soll. Gen.* This Woman says, that *Murough O-Brien* came to *Hicky's* Wife, and said so and so, and writ Letters to *Hicky's* Wife. *Murough O-Brien* comes now and says, that *Hicky's* Wife came to him, and told him, that her Husband could make out the Sham-Robbery, if he could get a Protection for him. Mr. *O-Brien*, this Woman says, that you did send to *Hicky's* Wife, and that you did tamper with her.

O-Brien. It's a very improbable Thing, if I had a mind to tamper with her, that I would tamper with *Hurly's* Whore — My Lord, if I wou'd have come on such a Business, would any one believe that I should employ this Woman, that has had a Bastard or two by Mr. *Hurly*?

Murough O-Brien's Letter to Hicky read.

Mrs. *Hicky*,

“ I pray do me the Favour to come hither as soon as possible; for I have some Business to talk with you, which chiefly concerns yourself: And least you may apprehend any evil Design against you, I do here promise you, that you shall be as safe as your Heart can wish, whilst you are in the Company of ”

Murough O-Brien.

A Second Letter read.

Mrs. *Hicky*,

“ When I sent for you on *Saturday* was Seven-night, I thought I should see you at *Mafs*, but I missed that Opportunity: I desire you

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“ will step hither To-morrow, and meet me in some convenient Place, where we may talk without Censure or Suspicion: I have no other Design, but to serve you and your Husband. Be sure you don't fail to come to me, if you ever expect any Friendship from”

Mac-B.

Daniel Mac-Cay sworn.

Mr. *Foster.* Where did you live in *March*, 99?

Mac-Cay. I lived with *Patrick Hurly*.

Court. Where were you the Time of the Robbery?

Mac-Cay. I was in his House, my Lord; I was there on *Sunday* the 3d of *March*, and there was *John Ronane* and himself, and they were just going to Bed, and *John Ronane* was going out of the Door, and there came five Persons with naked Swords, and rushed in; they were disguised and disfigured: My Lord, when they came in, they fell'd him down on his Face, and gave him some Strokes; and I was there, and they pursued me and *Gillian Hurly*, and we ran up, and they locked the Door after us; they made a Shot below; then I was assured it was some Bailiffs that came to take my Matter; some of the Family was in Bed, and some up.

Mr. *Recorder.* Your Master was upon his keeping then?

Mac-Cay. And when we heard the Noise below, we got some Sticks, and broke open the Door, and perceived two Fellows at the Door; they made a couple of Shots at us, but did us no Harm; and then came three or four, and one of them pursued me, and made a Shot after me, but did me no Harm. We did not go out till these Fellows went out, and then we broke open the Door, and we found my Master tied fast to his own Bed-side, and Counsellor *Ronane*; and all the Trunks were broke. My Master bid me go to the next Village, and raise the Neighbourhood; so I did.

Court. Pray, Friend, How many did you see of the Robbers?

Mac-Cay. I saw five, my Lord, and two without at the Window.

Court. The Woman said there were five in her Master's Parlour, and two at the Door. Sir, did you know any of the Parties that robbed him, upon your Oath? What Disguises had they? Were they black, or had they Vizards?

Mac-Cay. I cannot tell, my Lord.

Court. Did you take any Notice of any of the Arms, whether those Arms belonged to your Master? Take Care, upon your Oath, you speak nothing but Truth.

Mac-Cay. My Lord, we had Arms of my Master, which they seized on, and we found them abroad next Morn'ing.

Court. Did the Bullets hit any Part of the House?

Mac-Cay. No, my Lord, I did not observe that.

Court. Pray, Friend, was there any more than one Shot made?

Mac-Cay. There was, my Lord.

Court. Was there any Mark of any Bullet to be seen?

Mac-Cay. I did not see any.

Mr. Forster. You say, they came in with Fire-Arms and Swords; Had your Master any Swords?

Mac-Cay. There was none but one; and they had five naked Swords.

Mr. Forster. They had no Fire-Arms but your Master's?

Mac-Cay. We found them abroad next Morning in the Street.

Mr. Foster. What Road did your Master *Hurly* travel when he went from this Town, the last Time he was in *Dublin* before the Robbery?

Mac-Cay. He went through the County of *Galloway*, through *Mount-Talbot*.

Mr. Foster. Do you know Capt. *Lynch*?

Mac-Cay. Yes, he lives in *Capperquin*.

Mr. Foster. Were you with your Master all the Way home?

Mac-Cay. Yes, I was.

Court. Mr. *Lynch* said (I must do him right) that he did not remember what Company was with him, but that he drank a Bottle of Wine with him at *Loughbrea*, and there saw the Counters; and it is much about the Time this Man swears.

Mr. Recorder. Exactly, my Lord.

Mr. Foster. Were you with your Master when he was in *Dublin*? Did you see any Quantity of Money with him?

Mac-Cay. Yes, I did.

Court. Pray, did you see any Counters with him?

Mac-Cay. No, my Lord: I was offer'd to have my Fortune raised for ever if I would swear, that he bought the Counters, and brought them to the County of *Clare*.

Court. You saw Money with your Master: Where was it he receiv'd the Money?

Mac-Cay. I do not know; but he shew'd it me, and said, It was a sad Thing to pay away so much Money: And he put his Hand in his Pocket and pull'd out some Gold, some Broad-Pieces and a Gold Cob; and he said, he would keep the Purse, and not take any Thing out until he got home to pay Mr. *Arthur* off.

Carty. Was it in the Portmanteau?

Mac-Cay. Yes, it was.

Mr. Recorder. Was this the Time that your Master was in *Loughbrea*?

Mac-Cay. No, this was in *February*, and it was before *Christmas* he was at *Loughbrea*.

Court. Upon what Occasion was it that your Master shew'd you the Gold?

Mac-Cay. He told me, at his own Lodging in *Warbur-street*, Is it not a sad Thing to pay so much Money to that Rogue *Arthur*, that had serv'd him such a Trick?

Court. Did you take notice of it your self?

Mac-Cay. Yes: It was not Counters; no, I know Gold from Counters.

Court. Were they Guineas or Louis d'Ors?

Mac-Cay. They were Louis d'Ors.

Mr. Butler. Pray, when you went the last time with your Master from *Dublin*; what Way did you go to *Mount-Talbot*? At what Place did you cross the *Shannon*?

Mac-Cay. I do not know the Place; I do not know the Name of the Place at all.

Mr. Butler. Did you swim over, or go over a Bridge?

Mac-Cay. I think we went over a Bridge.

Mr. Butler. What Bridge?

Mac-Cay. I do not know the Name of it.

Court. Did you go thro' *Atblone*?

Mac-Cay. Yes, we went thro' *Atblone*.

Court. If I had said *Lancsborough*, he would have said so too.

Mr. Butler. You are positive, that in the last Journey before the Robbery, you nor your Master were not at *Loughbrea*?

Mac-Cay. I am positive.

Mr. Butler. Where did your Master lie the Night before you came to *Tiaquin*?

Mac-Cay. It was at *Balliboy*.

Mr. Butler. Pray, Sir, what Way did you go from *Atblone* to *Eyres-Court* or *Balliboy*?

Mac-Cay. I do not know the Names of the Towns.

Mr. Butler. Pray how far is it from *Tiaquin* to *Eyres-Court*?

Mac-Cay. I do not know.

Mr. Butler. What Way did you come to *Balliboy* back again, for that is on this side the *Shannon*, and many Miles on this side of *Atblone*?

Mac-Cay. My Master had his Brother-in-Law, Mr. *Terry*, along with him, and when he came to *Balliboy* he would see his Sister, and so he went to *Tiaquin*.

Court. How could you go from *Atblone* to *Balliboy*? Did you lie at *Atblone* that Night?

Mac-Cay. No, my Lord, we did lie beyond it, at a Place where there is a Bridge.

Court. Where is that Bridge?

Mac-Cay. It is on the *Shannon*, on this side *Aghrim*.

Mr. Butler. If you please, Sir, did you carry the Portmanteau to *Tiaquin*?

Mac-Cay. Yes, I did.

Mr. Butler. And was it not left at any other Place behind you?

Mac-Cay. No, it was not.

Mr. Butler. You are positive you carried it to *Tiaquin*?

Mac-Cay. Yes, I did carry it to *Tiaquin*.

Mr. Butler. Was it left at *Gort-Insbigory* before you went to *Tiaquin*, or after?

Mac-Cay. My Master hired a Horse, and he was lame; and he desir'd me to go on *Saturday*, before he came himself, or Capt. *Bourk*, and his Father-in-Law kept him.

Mr. Butler. Was the Gold in the Portmanteau at that Time?

Mac-Cay. Yes, it was.

Court. And you carried the Portmanteau to *Gort* from *Tiaquin*?

Mac-Cay. Yes; I came from my Master from *Tiaquin* to *Gort*; he sent me on *Saturday*, and he came on *Sunday* Night.

Mr. Butler. My Lord, I will make it appear, by three or four Men of undoubted Credit, that Mr. *Hurly* did swear, at the Assizes of *Ennis*, that he was at *Loughbrea* before he went to *Tiaquin*, and, that he left the Portmanteau there, and did not carry it to a *Tiaquin*.

Mr. Butler. Did your Master pay for the Horse he hired? or, Did you hear he gave a Bond for it?

Mac-Cay. I do not know.

Court. Do you know of any Bond given by

Mr.

Mr. Hurly, to pay the Hire of the Horse?

Mac-Cay. I do not know indeed, my Lord.

Mr. Recorder. He said, his Master shew'd him the Money in Town, and said it was a Shame to pay it to Arthur. Now, did your Master pay the Money?

Mac-Cay. He told me, that Arthur promis'd to come to his House in the County of Clare; and, that he would make him take it on easier Terms than if he should pay it in Dublin.

Court. If he had the Money, why did he not pay it him?

Mac-Cay. He said, he hoped to compound with Arthur easier than to give him all that he demanded.

Mr. Bernard. My Client tells me, that this Mac-Cay is a material Witness, as to Calaghan Carty: Do you know Calaghan Carty?

Mac-Cay. Yes, very well.

Court. How long have you known him?

Mac-Cay. These two Years.

Court. Were you with him before my Lord Chief-Justice Pyne?

Mac-Cay. Yes, I was; he made an Affidavit, and swore before my Lord Chief-Justice Pyne.

Court. What was the Substance of it?

Mac-Cay. That he knew nothing of the Robbery; and, that he was much concern'd he had sworn against Mr. Hurly. They lodg'd at the Black-Bull in Church-Street.

Court. Are you confident, that this Calaghan Carty swore before my Lord Chief-Justice Pyne?

Mac-Cay. Yes, he did.

Mr. Butler. Where did you lie the Night before you went thro' Athlone?

Mac-Cay. I am not sure of the Name of any Place where we did lie since we left Dublin.

Mr. Butler. You are positive you did lie in a Place that had a Bridge upon a River?

Mac-Cay. Yes, I am.

Court. Pray, one Question more: You say, you have gone with Mr. Hurly several times to the Country; How often did he go Conaught Way?

Mac-Cay. He went always Conaught Way.

Court. How often has he gone, that you can recollect your self?

Mac-Cay. We came from the County of Clare the Summer after I came to him, to Loughbrea, and Eyres-Court, and over Banagher-Bridge, and so to Munster-Evin.

Court. Which is the Way you used always to go?

Mac-Cay. That Way; but that Time he went to Athlone.

Christopher O-Brien sworn.

Mr. Butler. Pray, Sir, by Virtue of your Oath, did you offer any Money to that Man?

O-Brien. No, upon my Oath.

Mr. Butler. Did you offer him Money, or promise to raise his Fortune, if he would give Evidence about Counters?

O-Brien. Never, my Lord; he came to me and told me, there was some came to his Master, and would swear, that ——— were come from France.

Court. Did you ever make him any Promise, or any Offer at all?

O-Brien. Never in my Life, my Lord.

Mac-Cay. Did not you, at the Swan-Tavern, when I carried a Letter to Capt. Bourk?

Court. How long ago was this?

Mac-Cay. Before the Term, I think.

Court. Was it before Christmas?

Mac-Cay. No, my Lord, it was after Christmas.

Court. Mr. Hurly, you know the Contrary to this your self: If you'll have me, I'll send for the Examination sworn by your self concerning this Matter.

Pat. Hurly. He speaks to him more than once.

Mr. Recorder. Had you any Discourse with Mr. O-Brien about the Counters?

Mac-Cay. Yes, once or twice.

Mr. Recorder. Had you any Discourse about them more than once?

Mac-Cay. He never spoke to me about the Counters, but once at the Swan-Tavern.

Court. That of Mr. O'Brien's tampering with this Man; Mr. Hurly, you are complain'd of before Christmas last. He said, he was once with a Letter at the Swan-Tavern; and, that Mr. O'Brien did there talk to him about tampering with other Witnesses; but it was before that, that you said Mr. O'Brien tamper'd with himself about the Counters.

Court. Where was it?

Mac-Cay. At the Tavern.

Court. At what Tavern?

Mac-Cay. The Swan.

Court. When was this?

Mac-Cay. Before Christmas, or a little before the last Term.

Court. He says, it was the Time of his delivering of a Letter.

Mac-Cay. My Lord, I deliver'd a Letter to Capt. Bourk at the Swan-Tavern, and, I think, it was before Christmas.

Court. So that you deliver'd more Letters than one?

Mac-Cay. I deliver'd several to him.

Court. This Gentleman is accus'd by this Mac-Cay; and how far that will weigh with any Man, must be left to the Jury.

Mr. Butler. This Mr. Mac-Cay was very positive, that the Portmanteau was carried to Tiaquin, and, that it was not left behind. I am ready to prove, by two or three credible Evidences, that Mr. Hurly did swear at the Assizes, that it was left behind at Loughbrea, and, that it was not carried to Tiaquin.

Mr. Bernard. My Lord, I desire we may first produce another Witness to the Subornation; John Crips, a Person suborn'd to swear against my Client.

John Crips sworn.

(Per Interpreter.)

Court. Where does he live? and, With whom?

Interp. He lives at Moughna, in the County of Clare.

Court. Ask him, what he can say of any tampering with him to swear against Mr. Hurly.

Interp. He says, one Halloway and Walter Neylan tamper'd with him: That Halloway sent for him three Weeks after Mr. Hurly was taken to Ennis, and he ran into a Rabbet-hole, for he was

afraid of him, and sent his Wife to know what he would have of him.

Interp. And, my Lord, he is telling a long Story of this *Halloway* being a troublesome Man; and, that the whole Country would joyn with him, to give an ill Character of him, if it were not for the Persons he appears against. — And, he says, he was always inclin'd to do Evil, and every body was afraid of him.

Court. Ask him, Was there any Offer made to him?

Interp. He says, that *Neylan* and *Halloway* offered him Fifty Pounds to swear against Mr. *Hurly*, that he contriv'd the Robbery against himself.

Court. Were they both together? or, Did they speak to him severally?

Interp. They spoke to him severally.

Court. Ask him, Where was it that *Halloway* propos'd this to him?

Interp. About three Weeks after Mr. *Hurly* was put into Goal, he says, *Halloway* first spoke to him

Court. Did *Halloway* speak to him any more than once?

Interp. He says, He desir'd him to go with him before Mr. *O-Brien*; and he offer'd him Six Guineas to go and prove the Matter, and, that he would give him the rest afterwards.

Court. Was any body by?

Interp. He says, No body.

Court. Where was it that *Neylan* offer'd him the Money?

Interp. He says, my Lord, that *Halloway* used several threatening Words, if he did not comply with what he desir'd him to do; and, that he would send him to Goal at *Ennis*, where he should not see the Light any more.

Court. Can he remember the Day that this was?

Interp. About Six Weeks after *Hurly* was taken.

Court. Where was it that *Neylan* proffer'd him any Reward, and what it was he offer'd him?

[*At this the Fellow splutter'd, and made a terrible Noise in Irish.*]

Interp. My Lord, he will not answer to the direct Question. He says, my Lord, that *Halloway* threaten'd him, and broke open his Doors, and came there with Arms, and brought a disbanded Soldier, and took him by the Hair of the Head, and threaten'd him, because he did not come to him at the Time appointed.

Court. Did he complain to any Justice?

Interp. He says, He complain'd to Mr. *Fitz-Gerald*.

Court. Pray ask him, what *Neylan* said to him.

Interp. He says, He offer'd him the grazing of Six Collops free, and an House and Garden during his Life, to swear against *Patrick Hurly*.

Mr. Butler. What Time was it that *Neylan* made him this Offer? and, in what Place?

Interp. My Lord, the Answer he made to that is, That *Halloway*, after he had taken him out of his Bed, and dragg'd him by the Hair of the Head, that then they and *Neylan* met.

Court. Where was it he met *Neylan*?

Interp. At *Bally-Ryan*, in a House there.

Court. What Time?

Interp. About a Month before *Michaelmas* last.

Court. Pray ask him, where it was that Mr. *Neylan* did tell him he would give him the Six Collops grazing, to swear against *Patrick Hurly*?

Interp. He says, he will recollect it: He says, last Summer.

Mr. Recorder. I am inform'd, my Lord, that while this Man was ask'd the Question, *Hurly* said, last *Michaelmas*. ————Mr. *Hurly*. I never saw any Man, so far presum'd to be a Criminal, behave himself with so much Impudence before.

Court. Mr. *Hurly*, if you don't give over throwing out Words to your Witnesses, we must put you into the Dock. Ask him Interpreter, Does he know *Calaghan Carty*, that was Witness here to day?

Interp. He has known him since he was a little Boy, and his Father, Mother, and Family.

Court. What does he know of that *Carty's* Swearing before my Lord Chief-Justice *Pyne*?

Interp. He says, my Lord, that he did Swear before my Lord Chief-Justice *Pyne*, and there was a great Lady and a young Man by.

Mr. Bernard. Now, as to Mr. *Lynch*, whether he made any Proposal or Offer, or had any Discourse with him on *May-Day* last?

Interp. He says, He saw him the Day before *May-Day*; and, that he was very civil to him: There was some Controversy between him and Mr. *Hurly*, about the Land of *Moughna*; and he said to me, Now *Patrick Hurly* is gone to Goal, and so is *John* too, and they are both in Irons, and they will never retrieve it, and you had best come and live with me in *Conaught*. He told him, That neither his Wife, nor his Mother-in-Law, would consent to go to *Conaught*. Says he I have set the Land from the *Hurly's* to the *Bloods*, and *Hurly* shall never have any thing to say to it more.

Court. Did he ever persuade him to take a false Oath against Mr. *Hurly*?

Interp. He said, That in his Agreement with the *Bloods*, he reserv'd the Grazing of four Collops, which he should have, if he would swear, that he was one of the Robbers himself, and prove the Robbery upon *Hurly*: And he made answer to *Lynch*, Why should I do that, that will hang me? And then *Lynch* seem'd sorry that he had propos'd it to him.

Mr. Recorder. Ask him, Who was with him when *Calaghan Carty* swore an Examination before my Lord Chief-Justice *Pyne*?

Interp. *Daniel Hicky*, *Daniel Mac-Carty*, *Dough O-Brien Andrews*, and himself.

Mr. Recorder. How came he to go along with these Persons?

Interp. He says, That he came there to prevent being persuaded to take a false Oath.

Mr. Recorder. Does he know what *Calaghan Carty* swore?

Interp. He does not know.

Mr. Recorder. Who writ the Examination of *Calaghan Carty*?

Interp. He does not know.

Mr.

Mr. Butler. Was it written at my Lord Chief-Justice Pyne's? or, Had he it written before?

Interp. He brought it written to my Lord Chief-Justice Pyne.

Mr. Butler. My Lord, this Man does not seem to be a Man of any Credit. Neylan and Lynch are sworn, pray let them attend.

Court. If two Witnesses speak directly contrary one to the other, must not it be left to the Jury which they will believe? What does the Witness Crips say?

Interp. He desires a Guard, for the Safety of his Person.

Mr. Lynch stands up again.

Court. Mr. Lynch, had you ever any Discourse with this Man concerning Mr. Patrick Hurly and Mr. John Hurly's being in Goal?

Lynch. Yes, I had, my Lord: I said to him, that I heard he has been lately in Dublin, and, that he has been an Evidence for Hurly. No really, says he, I was not; I am weary of him, and if I could get these People, that you set the Land to, to let me be here a Year, I would not live any longer with him.

Court. Did you offer him the grazing of four Collops?

Lynch. I never did, my Lord.

Mr. Butler. The Credit of this Gentleman, and of that Fellow, is left to the Jury.

Lynch. This Discourse was about this Time Twelvemonth, at the Fair of Moughna, and Richard Hurly, Patrick's Uncle, declar'd to me, that it was a Sham-Robbery.

Walter Neylan stands up again.

Court. Mr. Neylan, had you any Discourse with this Man about Mr. Hurly?

Neylan. I never had any Discourse with him, or saw the Man, till this Day, never since he was born.

Court. What Time was it, he says, that he had this Discourse with Neylan?

Mr. Butler. In the Place where he says he had the Discourse with Neylan in a House; there never was a House, nor so much as a Hut there.

Neylan. No, my Lord, there never was a House there in my Memory.

Court. Mr. Neylan, how far is this Moughna from you?

Neylan. Three Miles.

Mr. Bernard. And you not know this Man!

Mr. Wakeham, my Lord Chief-Justice Pyne's Clerk, sworn.

Court. Mr. Wakeham, Sir, pray do you know any Person that came to swear Examinations before my Lord Chief-Justice Pyne, concerning the Robbery of Mr. Hurly in the County of Clare?

Mr. Wakeham. My Lord, there came four Men, but I was busy; the Gentleman read the Examinations.

Court. Do you know the Persons?

Mr. Wakeham. I do not know 'em; they were ordinarily clad; there was a Gentleman, one Mr. Terry, that brought 'em.

Daniel Hicky sworn.

Mr. Bernard. Pray give my Lord an Account of any Offers that were made you, or Threats used to you, to make you swear against Mr. Hurly?

Daniel Hicky. I told it twice before, my Lord, in August last. My Lord, I was taken by William Halloway and Thomas Bourk; they took me to Goal, and they bolted me; and there was Mr. Neylan in the Goal, and he spoke to me about the Robbery that was committed on Mr. Hurly. I said, I knew nothing of it at all: And he told me, I would be hang'd, for it was sworn against me: And I was brought before Mr. Hickman and Cusack, and they told me, That there was one Carty had sworn that I was at the robbing of Mr. Hurly, by his own Consent; and, that if I did not declare it, I should be hang'd; and said, That Mr. Hurly will hang us if we say we robb'd him. Never heed him, said they, it will be no Harm to any Man that swears against him.

Court. How long did you remain in Goal?

Hicky. I was kept in Goal till August, from the 26th of March.

Court. Was any body with you?

Hicky. Calaghan Carty and Daniel Carty.

Court. What had you a Day?

Hicky. We had Twelve Pence a Day; and Mr. Neylan brought red Coats, and would have us swear we had those Coats on when we robb'd Mr. Hurly. And they carried us before Mr. Butler, and we would not swear; and then we got but Nine Pence a Day.

Court. Did you swear, that Mr. Hurly was not robb'd?

Hicky. I did swear; that I was not at the robbing of him my self.

Court. But were you examin'd about this Robbery before Mr. Hickman and Mr. Cusack?

Hicky. They desir'd me to swear, that I was at the robbing of Mr. Hurly with Daniel Carty; and they told me, I should be hang'd if I did not swear it.

Court. Did you swear it?

Hicky. Yes, I did.

Mr. Bernard. After you satisfied these Gentlemen's Importunity, how long was it before you were discharg'd out of Prison?

Hicky. I was kept in Prison till after the Assizes.

Court. Who did you swear was with you at the Robbery?

Hicky. Calaghan Carty, Donogh O-Brien, and Daniel Carty.

Court. Has he any other Name but Donogh O-Brien?

Hicky. Yes, he generally goes by the Name of Donogh O-Brien Andrews; some call him so: His Name is Donogh O-Brien.

Court. How came you to get your Discharge out of Prison?

Hicky. My Lord, when my Lord Chief-Justice Pyne came, we were carried to the Bar. When I was at the Bar, I was told I must take the Affidavit against Mr. Hurly, and if I would not, I should

should return to Goal again. — The Goaler would let no body come near the Bar; for we said, We will tell the Truth, and would not tell a Lye against Mr. Hurly. And he went out, and came in again, and took us back to the Goal.

Mr. Bernard. How long after this were you discharg'd?

Hicky. We petition'd my Lord Chief-Justice, and sent after him to *Limerick*, but got no Answer; and then they sent a *Mittimus* to keep us in Goal. They said, If we got Bail, they would enlarge us: So *Donogh O-Brien's* Friends were bound for him, and I got a Friend to be bound for me; and I was bound for another of the Prisoners.

Court. Did you ever make an Affidavit before my Lord Chief-Justice?

Hicky. Yes, we came to Town, and made an Affidavit before him.

Court. Who was with you?

Hicky. *Calaghan Carty*, *Donogh O-Brien*, *Daniel Carty*, and *Crips*.

Mr. Foster. After you gave in that Affidavit, and went home, what did you do then?

Hicky. We went home then; and we heard that they had a Warrant against us.

Court. You say, you swore before the Lord Chief-Justice, and, that *Calaghan Carty*, *Crips*, and *Donogh O-Brien* were there: And you are very sure that *Calaghan Carty* was one?

Hicky. Yes, he knows me, and I know him; he is my Relation.

Court. Mr. Neylan, you are upon your Oath: Did you see this Person in the Goal at *Ennis*? Pray give an Account of what pass'd there, and what Fine was put upon him, to make him discover.

Neylan. My Lord, when he came to Goal, he fought for me, and I told him that one had discover'd: And he ask'd me, what I would advise him to do? and I said, I'd advise him to discharge a good Conscience.

Mr. Justice Coote. I am not a Judge of the Fact, but the Jury is. Hicky, you were brought before me; and when I examin'd you, you went backward and forward, and I committed you that Night to the Goaler's Care; and when you were brought into the Court, you said, You would stand by the Examination you swore before my Lord Chief-Justice *Pyne*.

Mr. Soll. Gen. What did Mr. Hickman persuade you to do when, he tamper'd with you?

Hicky. When *Walter Neylan* went from me, I was brought to Mr. *Hickman* and *Cusack*; and they told me, there was an Examination of Mr. *Daniel Carty*. It is in vain for you, said they, to deny the Fact; but you must say what we will have you to say, or else you shall be hang'd; for *Carty* has sworn, That you and he were at the robbing of *Hurly*; That you left all the Gold and Linnen in his Barn for him.

Mr. Attor. Gen. And did Mr. *Cusack* say so too?

Hicky. Yes, he did say so.

Mr. Soll. Gen. What should be the Seducement of Mr. *Hickman*, or *Cusack*, to have you forswear your self?

Hicky. There was a Contrivance between *Halloway*, *Hickman*, and *Carty*, to swear.

Mr. Soll. Gen. But why should Mr. *Hickman* do this? What End could he have in it?

Hicky. I cannot tell.

Mr. Attor. Gen. You Hicky, is Mr. *Hickman* a Papist, or Mr. *Cusack*?

Hicky. No, Sir.

Mr. Attor. Gen. For what Purpose should they come to you, to have you forswear your self?

Hicky. They did do it.

Mr. Dean. What became of that Note Mr. *Hickman* and *Cusack* gave you?

Hicky. *Calaghan* had it, and brought it to Town.

Mr. Butler. Hicky, you were examin'd at this Bar before: Did not you swear the same Thing against Mr. *Cusack*? And after, when he came into Court, and you saw him, did not you retract in open Court what you swore before? Did you? or, Did you not?

Hicky. I cannot tell what I did: I told him that he gave me the Note.

Mr. J. Coote. Then I'll tell you what you did. Mr. *Cusack*, to the best of my remembrance, came to the Side-Bar there. Mr. *Hurly*, you were there; and after Mr. *Cusack* came in, this Person was asked the Question, Whether that Mr. *Cusack* tamper'd with him? And he said, No, that he only desired him to swear nothing but the Truth.

Mr. Huish sworn.

Mr. J. Coote. I'll ask Mr. *Huish* a Question or two; for such a Fellow as this is not to be endured. Mr. *Huish*, was not you present when this Man was brought before me?

Mr. *Huish*. I was, my Lord.

Court. I only ask, what happened in my House, as to the Behaviour of this Man?

Mr. *Huish*. When I came first, the Book was put into his Hand, and he was sworn: But, on Examination, he seem'd to be sullen, and would not answer: But he owned, that the Examination he gave in the Goal was false, and the Examination he gave before my Lord Chief-Justice was true. And when you sat down to reduce what he said into Writing, he began to retract. When it was written, that he said, that before my Lord Chief-Justice was true, and the other false, he began to fall off and falter, and said, Did I say so? You examined him alone that time, and gave him Encouragement to speak the Truth. And after it was asked, Had you rather be examined before the Judge alone, or before all the People here? Then he was for being examined before the Judge alone. So I went out, and left him and this *Daniel Hicky* together for near three Quarters of an Hour: Then your Lordship called us in, and said, this Fellow is sullen, and will not give any Account.

Mr. J. Coote. I did press this Man to tell the Truth; did *Hickman* or any of those People entice him to swear any false Oath? and one Time he said, They did not; and another Time he said, They did.

Mr. Foster.

Mr. Foster. Did he at any Time desire that his Examination should be deferr'd, until he came to Court the next Day?

Mr. Huish. Truly, I don't remember that Particular.

Mr. Foster. Hicky, What was the Meaning, that when you were examined before Mr. Justice Coste, that you said, Did I say it? or did I not say it?

Hicky. I was afraid some of them would swear against me: They were following me all Day— Mr. O'Brien's Man was after me: And Mr. Husin came and told me, I should be hang'd if I did it not.

Donogh O'Brien Andrews sworn.

Mr. Foster. My Lord, if it please your Lordship, I desire he may give an Account of this Matter.

O'Brien. — My Lord, I was then Prisoner by Thomas Bourk, and they would shew no Warrant, till they had ty'd me with a Cord, carried me to Ennis, and bolted me; and afterwards brought me before Mr. Hickman — And they told me, that Daniel Carty had given an Examination against me, that I was one of the Persons employed to rob Hurly; and that if I did swear as Carty did, I should have the same Reward Carty had; and that it was not for me to pretend to live in the County of Clare, if I did not swear as Carty did.

Court. And did you swear then?

O'Brien. If your Lordship pleases, I'll declare the Matter, — Tom Hickman and John Cusack told me, that I had Reason to curse the Time that I did not swear as Daniel Carty did.

Mr. Att. Gen. How long is it since Mr. Hickman and you were so familiar, that you call him Tom?

O'Brien. They said, I should be hang'd for it, if there were no more Men in the Kingdom; and I was accordingly sent into the Dungeon, and hand-cuff'd, and they came and ty'd me, and told me, that Calaghan Carty and Daniel Carty had sworn; and they would put a Lump of Gold in my Wife's Lap, if I would swear I was employed to rob Mr. Hurly: And Halloway came to me, and said, Declare the Truth of the Matter, and swear as the rest did, and I'll go and speak to the Goaler, and get you eased as well as Carty. Every Day Halloway came to me and said, I should want for nothing, if I would swear as they did. So on Sunday Morning a Yoke was brought to me, and they were going to yoke me, but they did not do it; and after Service, that Sunday, Tom Buck came to me, and told me, they came from Tom Hickman, and if I did not say as the rest had said, I should be hanged; but I was weary of the Bolt and Hand-cuff, and I had not my Friends to come near me, nor my Wife, so I resolv'd I would do any thing, rather than lie in the Condition I was in, and I said, I would swear what they pleased.

Court. And did you swear?

O'Brien. My Lord, upon this Answer my Bolts were taken off, and the Hand-cuff; and I was carried abroad to William Butler, and he asked me, when I came before him, Why I was

so obstinate against the County, as I had been? But if you resolve to do it now, says he, it will do as well; and if you swear as the rest did, you shall have as good a Reward as Daniel Carty, and twelve Pence a Day, during the Time you was confined.

Court. Did you not repeat the Words he had then written down? — Did not you speak the Words he had written?

O'Brien. No, I did not.

Court. But you swore to them afterwards — Did he read the Examination to you?

O'Brien. Yes, he did.

Court. Did you swear to it?

O'Brien. Yes, I did it to ease my self.

Mr. Recorder. Is the Examination true, at this Day?

O'Brien. No, it is not.

Mr. Sol. Gen. I desire that Examination may be read, and he may tell us, what part of it is true, and what not.

O'Brien. My Lord, I after went to Goal, and received the Allowance Mr. Butler ordered me, twelve Pence a Day — And, my Lord, some time in Summer before the Assizes, Walter Neylan, that was now in Court, brought down one of Mr. Hurly's Coats, and asked us, Whether we knew these Coats that we wore in the Robbery? — He told us, Mr. Butler desired us to swear to the Coats; but we refused to do it; and then we were turned into the Goal, and 6 d. of the 1 s. taken from us.

Mr. Robbins. Were you sworn last August, and before whom?

O'Brien. Before the Lord Chief-Justice Pyne.

Mr. Robbins. Did Calaghan Carty make an Affidavit at the same time?

O'Brien. Yes, he did.

Mr. Sol. Gen. Who writ your Examination?

O'Brien. I writ it my self.

Mr. Sol. Gen. Who writ Calaghan Carty's Examination?

O'Brien. I do not know; I was by at the swearing of it.

Mr. Sol. Gen. Who writ Hicky's Examination?

O'Brien. He writ it himself.

Mr. Sol. Gen. How long were you in Town before you gave in your Examination?

O'Brien. It was not passing three or four Days.

Mr. Sol. Gen. Who came into your Company?

O'Brien. No body, until I came to Kiltartan, and that Night Madam Hurly came into the House, and lay in the House that Night, she and her Brother. — She ask'd me where I was going? I told her, I was coming to Town to declare the Truth.

Mr. Sol. Gen. And did you come to Town in their Company?

O'Brien. Yes, I did.

Mr. Sol. Gen. And what other Company came along with you and Mrs. Hurly?

O'Brien. There was no body but Terry and Crips.

Mr. Sol. Gen. And within three or four Days after you came, you swore the Examination?

O'Brien. Yes, I did.

Mr. Sol. Gen. How long after you came to Town, did you see *Calaghan Carty*?

O Brien. I saw him at *Kilcock*, before I came to Town.

Mr. Sol. Gen. And where did you meet *Daniel Hicky*?

O-Brien. Coming towards *Kilcock*.

Mr. Sol. Gen. It was remarkable, that he should accidentally meet Mrs. *Hurly* and her Brother at *Kiltartan*, and *Calaghan Carty* and *Hicky* and she should meet on the Road and Way together, to clear their Consciences! — Did *Hicky*, *Carty* and you lie in one Lodging?

O Brien. I lay in *Church-street*.

Mr. Sol. Gen. And *Calaghan Carty* and *Hicky* lay there too?

O Brien. Yes, they did.

Mr. Sol. Gen. Were you examin'd in Irons?

O Brien. No, I was not: I had them taken off me, and was carry'd abroad; and I was told, That if I did not swear as the rest did, I should be hang'd in eight Days time.

Mr. Recorder. Would Mr. *Butler* make you forswear your self?

O-Brien. He would make me swear as the rest did.

Mr. Sol. Gen. What Distance from the Goal was you examin'd?

O-Brien. Near the Goal.

Mr. Sol. Gen. Had you any Hand-cuffs, or Irons, when examined.

O-Brien. No, I had not.

Mr. Sol. Gen. My Lord, I must ask this Man, whether his Father be in Town, and whether he had any Discourse with his Father — Do you know your Father?

O-Brien. I know my reputed Father.

Mr. Attorn. Gen. By Virtue of your Oath, Did you see your Father since you came to Town?

O-Brien. No, I did not.

Mr. Attorn. Gen. Had you any Discourse with your Father concerning this pretended Robbery? — And did you say any thing to him about it, and what was't?

O-Brien. I saw him at Home; I never acknowledg'd to him I was concern'd in this Robbery.

Mr. Recorder. Pray, my Lord, did he declare to his Father, that he was concern'd in this Sham-Robbery?

O-Brien. No, I did not.

Mr. Recorder. Did you tell your Father any thing of the Contrivance; or would your Father have prevail'd with you to own you were in the Robbery?

O-Brien. Yes, he would.

Mr. Recorder. Did you ever tell your Father, that you used Mr. *Hurly's* own Arms in the Robbery?

O-Brien. No, I did not.

Mr. Recorder. Well, now we'll call your Father.

Donogh O-Brien Andrews senior sworn.

Mr. Sol. Gen. Pray, upon the Oath you have taken, give an Account of what Discourse pass'd between your Son and you about this Robbery?

Donogh O Brien Andrews senior. My Lord, this will be look'd upon to be very strange, and very unnatural, for a Father to appear against his Son; yet I must have regard to my Oath, and shall not be backward to declare the Truth — When this Robbery happen'd, some time pass'd, before the Contrivance of it was fully discover'd, and when my Son was taken and carry'd to Goal about it, I did not go near him for three Weeks. When I went to him, I was passionately concern'd for him, and I ask'd him, What should make him so wicked, as to be concern'd in such a Fact, as he and the other Rogues were accused of? And I asked him with Vehemence, Did you do it? He said, Yes, I did do it; and he never deny'd it, nor no one doubted of it until such time as he went afterwards to *Dublin*. The Particulars I was not curious in asking him, because I had an Account of them from others; and all Men allowed them to be true, because they own'd it themselves. After the Assizes, and that they came out of Goal, I took Opportunity to discourse my Son; but found by him, that he had no mind to discourse me — But then, my Lord, I asked him one Day, Whose Arms he had; were they *Patrick Hurly's*? Says he, Where else should I get Arms.

Court. Had you all this Discourse with your Son *Donogh O-Brien*, that young Man there?

Old Donogh. Yes, I had.

Young *Donogh O-Brien*. When he taxed me with this, I was indifferent in the matter; and when he asked me about the Arms, Whether they were *Patrick Hurly's* Arms? What else, said I.

Mr. Sol. Gen. Is the rest that your Father said true or not? You have heard what your Father said, That you confessed to him you were concern'd in the Robbery?

Young *Donogh*. I said what I told you of the Arms; but as to the other part, I do not remember that ever I said it to him.

Mr. Sol. Gen. Old Man, Do you remember?

Old *Donogh*. Aye very well, too well, to my Sorrow.

Mr. Recorder. Young Man, Do you believe that he is relating Truth or not?

Young *Donogh*. I do not know whether he is or no.

Mr. Sol. Gen. Are you a married Man?

Young *Donogh*. Yes, I am.

Mr. Att. Gen. Pray who are you married to? What Relation is your Wife to Mr. *Hurly*?

Young *Donogh*. Mr. *Hurly* is her Uncle.

Mr. Foster. Old Man, What Relation are you to Sir *Donogh O-Brien*?

Old *Donogh*. I know no Consanguinity between Sir *Donogh O-Brien* and me: But Sir *Donogh* purchased the Reversion of my Farm, and I live in it, paying him Rent.

Patrick Hurly. Pray whose Horse, and whose Expence brought him here?

Old *Donogh*. The Horse belongs to one Mr. *Everbing*.

Patrick Hurly. At whose Charge?

Old *Donogh*. At the County's Charge, who prosecuted you for Perjury.

Court.

Court. Do you expect any Abatement of your Rent?

O. Donogh. I am so far from it, that I am raised 50 *l.* this Year more than ever.

Court. By whom?

O. Donogh. By my Landlord, Sir *Donogh O-Brien.*

Court. Are you to have an Abatement from Sir *Donogh O Brien*, after this Year?

O. Donogh. I am not to have any. I have not any Trick or Quillet in any way: I do not expect any thing of that sort.

Mr. Sol. Gen. There is another Part of this Young *O Brien Andrews's* Evidence, that relates to the Justice of the Peace, *Mr. Butler*, and he is here in Court.

Mr. Attor. Gen. Your Lordship has heard the Evidence of this young *Donogh O-Brien Andrews*, wherein he has been flinging against a whole Court and County.

Court. It was never otherwise; tho' a Justice of Peace be in the just Execution of his Office, yet when Criminals come to be charged, they'll recriminate those that appear against them.

William Butler sworn.

William Butler. My Lord, I had an Account, that this Sham-Robbery, that *Mr. Hurly* set up, as I do believe, was discovered by *Carty*; and I had an Account that *Donogh O-Brien*, that young Man, was in Goal, and was willing to make an ample Discovery too; and I rid to *Ennis*, and went to my Quarters where I generally lodge, and sent to the Goaler for him, who brought him to me; and then I told him, my Business to Town was to examine him, if he were willing to give a true Account of the Matter. He went then about proposing to make Bargains with me, but I told him I had no more to say; but if he would give a true Account of the Robbery of *Mr. Hurly*, any Kindness I could do for him, it should be done. He said, he was afraid of the Gallows; and, sitting down, gave me that Examination which he has given me, and I have writ it down faithfully, as distinctly and truly, as if it was for Life and Death; and I promised him nothing, nor threatened him. He seemed to be so penitent for being concerned in the Action, and was so much troubled that it was discovered against *Mr. Hurly*, that he wept a great deal in my Company, and did declare, That if others had not discovered against *Mr. Hurly*, he never would. And I parted with him, and bid the Goaler be civil to him.

Mr. Sol. Gen. *Mr. Butler*, Did you tell him, that he should be hanged, if he did not swear?

Butler. By Virtue of my Oath, I did not.

Y. Donogh. Did not you tell me, the Quarter-Sessions was adjourned for a Week longer, on account of this Commission of *Oyer and Terminer*?

Butler. No, by Virtue of my Oath, I did not — I sent for *Mr. Hickman*, and he was with me by the time I went midway thro' this his Examination; and when I had finish'd it, it was read to him distinctly, and he swore to it.

Mr. Attor. Gen. Now, my Lord, if your Lord-

ship be pleased, the Examination that was taken by *Mr. Butler*, I desire it may be read Paragraph by Paragraph.

Mr. Sol. Gen. Was this Information written by *Mr. Butler* out of his own Head; or did you give him that Account as it is down there, or is it a Story framed by him?

Y. Donogh. *Mr. Butler* writ it. I told him several Things, but he framed them as he pleased himself.

Mr. Sol. Gen. What Information did you give then to *Mr. Butler*?

Y. Donogh. I don't remember.

M. Sol. Gen. 'Tis impossible for any Man to frame such a Thing out of his own Head

Mr. Foster. Whether there was not a Report, that there was a Commission to come down of *Oyer and Terminer*?

Mr. Butler. They did talk so, but I had no Discourse of it; I used him mildly, and only desired him to tell the Truth.

The Examination read.

Mr. Recorder. Did you lie at *Daniel O-Keans's* House that Night after the Robbery?

William Butler. Yes, I did.

Mr. Recorder. Who told *Mr. Butler* that?

Y. Donogh. I told him it.

Donogh O Brien's Second Examination, taken before Lord Chief-Justice Pyne, read; where he answers what he swore in the former.

Mr. Foster. I desire, my Lord, the Examination before *Baron Ecklin* may be read.

[*Clerk reads Calagan Carty's Examination before Baron Ecklin.*]

Mr. Sol. Gen. My Lord, I desire the same Method may be observ'd in this, as in other Cases; for Hands may be alike, and not the same.

Mr. Robbins. Here has been two Examinations of *Calaghan Carty*; one he owns, the other he denies. Now, my Lord, we have produc'd three or four Witnesses, that he was never before my Lord Chief-Justice, and there swore, that what he had formerly swore in the Country was false, that *Patrick Hurly* did contrive a Robbery against himself.

Mr. Recorder. *Mr. Robbins* (with submission, my Lord,) is mightily mistaken; they said, there was an Examination taken before my Lord Chief-Justice, but not that this was it.

Mr. Butler. You cannot here read an Affidavit sworn before a Baron of the *Exchequer*; there is no Colour for it.

Court. *Calaghan Carty*, Pray, were you examin'd before any of the Judges as to that Matter?

Carty. No, my Lord, never in my Life.

Mr. Sol. Gen. Never in his Life. — There is no proving it but by my Lord Chief-Justice, and to prove that this is the Man; for a Man may come in the Name of another Person and swear, and the Man he personates know nothing of the Matter. — Who drew your Examination, *Donogh O-Brien*?

Carty. I did it my self.

Mr. Sol. Gen. And who drew *Hicky's*?

Carty. Himself.

Mr. Sol. Gen. And who drew *Calaghan Carty's*?

— I can't tell.

Court. I never knew an Examination, but where the Person was examin'd, whether it was true or not; otherwise it goes for nothing; and if the Person does not own it now, it must be prov'd upon him.

Mr. Foster. My Lord, an Examination given in before the Court, and upon Record, we come and desire it may be read, to confront an Evidence; for this Man is forsworn.

Court. I had the Curiosity my self, for the Satisfaction of Justice, to send for my Lord Chief-Justice's Clerk, *Mr. Wakeham*, and examin'd him here in open Court. Being examin'd, I remember, said he, there did come such four Men, and they were sworn before my Lord Chief-Justice; but, that this is one of the Men, I cannot swear.

Mr. Sol. Gen. I have no such Examination at all. If you please, read the Affidavit before *Baron Ecklin*.

Mr. Recorder. [*Comparing the Affidavits.*] These are both the same, Word for Word, drawn both by *Mr. Terry*; they are both his Hand-writing.

Mr. Butler. I desire *Mr. William Butler* may give an Account (he is sworn) about the Portmanteau; Whether *Mr. Hurly* did not swear, that he left the Portmanteau at *Loughbrea*, at *Bargery's* House, whilst he went to see his Brother at *Tiaquin*?

Christopher O'Brien. My Lord, I ask'd *Patrick Hurly*, what Care he took of his Money at his coming to the Country? he said, He left it at *Loughbrea*, and would not carry it to *Tiaquin*, for that was a loose Family. — This he told at his own House, after he had sworn it in the Court.

Mr. Taylor sworn.

Mr. Butler. *Mr. Taylor*, declare what you know of *Mr. Hurly's* swearing at the Assizes, about the Portmanteau.

Mr. Taylor. I was at the Assizes at *Emmis*, and *Mr. Hurly* swore, that he left his Portmanteau at *Loughbrea* when he went to *Tiaquin*; and, that he told *Mr. Bargery* there was Matters of great Consequence in the Portmanteau, and desir'd him to take care of it; and, that *Bargery* did so, and deliver'd it safe to him at his Return.

Mr. Hurly. *Mr. Butler* knows the County of *Galloway*: I desire to know, whether it is likely for me, going to the County of *Clare*, that I should leave my Portmanteau at *Loughbrea*, and come back again?

Mr. Butler. I don't know that; but you did swear it.

Mr. Recorder. And his Man swore he carried it with him to *Tiaquin*. So 'tis — *Trim Tram, like Master like Man*, both forsworn.

Mr. Sol. Gen. My Lord, the Persons produc'd by *Mr. Hurly* are Men, by their own Confession, who at some Time or other were forsworn; and they are such Men as have nothing between them and the Gallows but this Shifting: They are sensible no Jury can believe them.

Mr. Robbins. My Lord, we are charg'd but with one Indictment; there is but one *Venire*, I think.

Mr. Butler. There are two.

Mr. Attor. Gen. *Mr. Robbins*, if your Client be guilty of the Perjury, clear him of the Cheat if you can.

Court. The constant Practice of this Court is, That if there goes a *Venire* between the King and a Party indicted, and that there be several Indictments against the same Party, the Court will charge the Jury with 'em all, unless he comes in by Council, and shew some good Cause why you cannot go on with some of 'em.

Mr. Attor. Gen. My Lord, I think that the Contrivance is made out so fully to the Satisfaction of every Man present, that there never was stronger Evidence than of both these Villainies, the Perjury, and Conspiracy to Cheat. When a Man has liv'd extravagantly, and then goes about all manner of Ways to retrieve himself, if Perjury goes unpunish'd, it shall lie at the Door of those Gentlemen that have heard this Matter so fully prov'd to day; and this poor Country must suffer by Perjury, if Care be not taken to suppress it. 'Tis now growing late, and I will not take up more Time in summing up this long Evidence to the Jury, but leave it to the Court.

Mr. Justice Coote. Gentlemen of the Jury, you have heard a very long Evidence; and I will repeat the Heads of it to you as well as I can, that you may discharge your selves with Honour and Conscience. You have taken an Oath, and I hope you will not be led to the preventing of Justice, one way or the other. *Mr. Hurly* stands indicted here of Perjury, for making a false corrupt Oath before a Justice of Peace, *Mr. Blood*; before whom he swore, in an Examination, that was read in Evidence, That he was robb'd of so many Guineas, Pistoles, and other Goods, at his Father's House in *Moughbna*, in the County of *Clare*: That he was robb'd by four Persons, whose Names he knows not, but by their Tone they seem'd to be *Irishmen*; and, that the same was not done by any Contrivance of his. After which, he did exhibit a Petition to the Judges of Assize, and did endeavour to recover from the County the Value of what he was so robb'd of.

Gentlemen, *Mr. Dean Blood* prov'd to you, That the Prisoner at the Bar did take his Oath, that the Contents of the said Examination was true, and, that he sign'd it in his Presence.

Gentlemen, the first Witness that was produced unto you to prove the Perjury, and that *Mr. Hurly* was not robb'd, but had sworn falsely in that Information, was one *Calaghan Carty*: And he being sworn, tells you, That at the Time that this Robbery was committed he was in *Mr. Hurly's* Service; and, that *Mr. Hurly* came to him, and made Moan to him, that he did owe Money; and, that he could pay his Debts if this same *Calaghan Carty* would observe his Directions, and do what he would have him to do; and, that thereupon this *Calaghan Carty* did tell him, he would; and the Direction was, That he should joyn other Persons, he nam'd, and put on a Disguise, and take an Opportunity when *Mr. Ronane* was at the House, and personate them-

selves to be Robbers, and take away the Goods and Money out of the House, and when they should have so done, to return them again. And this *Calaghan Carty* was to go to one *Mr. Foster's* for a Suit of black Clothes, and he was to come back again. These were the Orders he receiv'd, by the Direction of *Mr. Hurly*. He tells you, That he did accordingly join the rest; that they had Coats, Disguises, and Swords left for 'em in the Barn, which they took and put on; that they did actually bolt into the House at *Mr. Ronane's* coming out of the Door, and took those Fire-Arms that were laid for 'em; and, that they had their Intelligence from *Mr. Hurly*, the better to personate their being Robbers. And he tells you, That part of them went up to *Mr. Hurly's* Chamber, and there took the Bag; and, that they were directed by *Mr. Hurly* to pour it out before *Mr. Ronane* (the better to make the Pretence out against the County) and likewise, when they should get in, tie *Mr. Hurly* and *Mr. Ronane*; and, that a Bed-cord was laid in the Window for that Purpose: And he tells you, that they had fir'd off the Fire-Arms, and, that there was nothing in them but Powder. And, Gentlemen, you will see anon how far this Man swears the Truth, out of the Mouths of *Mr. Hurly's* own Evidence.

Mr. Hurly, to lessen this Man's Credit, has produc'd to you several Witnesses, who swear, That he swore an Examination before my Lord Chief-Justice *Pyne*, or Baron *Ecklin*; wherein he pretends, that this *Calaghan Carty* swears directly contrary to what he swore in his Information before a Justice of the Peace in the Country, and to what he pleads now. To this *Calaghan Carty* says, He never swore any Examination before any Judge; and if any was sworn in his Name, it was done by some other, that did personate him. That Examination was produc'd here; but there was no Evidence, that this *Calaghan Carty* was the Person that swore it, and he deny'd that the Name to it was his Hand-writing; and he seems to be too ignorant a Person to contrive such an Examination. Now, whether you credited him, or those Persons that swore against him, is left to you.

The next Witness in behalf of the King is *Margaret Conneene*: She tells you, That she was a Servant in the House, and, that these Persons did come into the House; and she hearing Murder cry'd out by *Mr. Hurly's* Servant, she came out of the Kitchen: She tells you, that they made several Shots, particularly at her, and, that there was no Hurt done, nor any Marks of the Shot or Bullets in the Wall. She tells you, That at first she was of Opinion, that it was a real Robbery; but afterwards, discoursing with *Calaghan Carty*, he told her how it was: And besides, that she was of another Opinion upon the account of a Table-cloth taken away at the Time of the Robbery, which she saw afterwards come back in a Trunk or Portmanteau that was sent to *Mr. O'Brien* after the Robbery.

Walter Neylan was likewise sworn; who gives you an Account, that he was in Prison at *Ennis* for *Hurly's* Debt, being bound for him to one *Thomas Arthur*, and that he was in the Prison when *Hurly* was brought thither: that they were

Chamber-fellows: That *Mr. Hurly* did go so far in the Confession of this Fact to him, that when *Daniel Carty* became a Discoverer, and began to accuse *Mr. Hurly* of this Matter, *Donogh O'Brien Andrews* junior, who was then likewise in the same Goal, did desire to know of him, what Method *Mr. Hurly* would take to get him discharg'd; and, that if he could not do it soon, that he must be forc'd to confess the whole Truth: And he swears, That he did acquaint *Hurly* therewith; who said, that he should be undone if the said *O'Brien Andrews* should confess it; and gave him a Piece of Money to give to the said *O'Brien*, and bid him tell him, that he would soon get him discharg'd. *Neylan* was so cautious of this, that he would not do it himself; but one *Daniel Carty* being present, he gave him the Money, and he gave it to *O'Brien*: That *O'Brien* said, This will not do, I must and will tell the Truth. He says, *Mr. Hurly* went so far, that he told him he would give any Gratification in the World to prevent *Donogh O'Brien's* coming in against him; for, if he did, he should be ruin'd entirely. Against this, *Mr. Hurly* says, that *Neylan* was exasperated for being in Prison thro' his Means, so that he tamper'd with Witnesses, and became his inveterate Enemy; and not only swore falsely himself, but tamper'd with others to swear falsely too; of which he has offer'd such Evidence, as I shall observe to you hereafter.

The next Evidence, Gentlemen, that was produc'd to you, was one *Charles Mac-Donogh*. He tells you, That he was employ'd as a Solicitor to *Mr. Hurly*; and, that he was intimately acquainted with *Mr. Hurly*, and knew a great deal of his Concerns; and, that one Night, being come back from *Dublin*, the very Time before he was robbed, he talk'd with him, and said, He was a strange Man to come to the Country without Money; and, that it would be too hot for him; that the present Sheriff was *Mr. Arthur's* Friend; and says, that *Hurly* did even then fortify his House, because he look'd upon himself to be in no condition to pay his Debts; that he was so extremely poor, that he durst not appear. He tells you, that *Mr. Hurly* did tell him, that he brought down Money; and tho' he did tell him so, that yet he did not believe it; because when he told him of the Sheriff, *Hurly* said, that *Sir Toby Butler* and Colonel *Macnamarra* had a great Influence upon the Sheriff, and would make Interest with him, so that he will do me no Harm.

He tells you, That much about this Time *Mr. Hurly* employ'd himself in reading Acts of Parliament, and one of 'em was the Act relating to the Articles of *Limerick* and *Gallway*; and, that he had some Discourse of being comprehended within the Articles of *Gallway*. That *Mr. Mac-Donogh* told him, he thought he was then in *France*, and that he was not there; and he said, He would prove that he was then in *Gallway*: And reading the *Rapparee* Act, he said, That it was a very pretty Way for Persons to recover Money from the County. He tells you, Gentlemen, that after this he left *Mr. Hurly*, and *Capt. O'Brien* writ him word that he was robb'd, and desir'd that he would come and sollicite at the Assizes of *Ennis* on his behalf: But he was so far from believing that he was robb'd, or yielding to that Design,

Design, that he writ back a Drolling Letter, as he calls it himself, and he did not think it proper to be concern'd for him. He further tells you, That there were some Persons that gave an Account to him of certain Counters, one *Hicky's* Wife, and, that if her Husband might be produced, he and she might make great Discoveries relating to these Counters.

This took Wind, and the Justices of the Peace gave a Warrant to the High-Constable, *Walter Huomin*, to search for those Counters. They came to the Place where this *Hurly* liv'd; the first Time he miss'd, but the second Time he sent one before, to take care that nothing might be remov'd: And when he came there, he observ'd there was a Dunghil; and, by the Behaviour of *Hicky's* Wife, he had reason to suspect that Place. He tells you, That the Woman held the Candle, and in digging the Place where the Dunghil lay, at length the Spade hit upon a Slate where the Counters lay: That he took up a Bag wrapp'd about with Hay, he call'd it a Suggane; and, that there those Counters, which he has here produced, were taken up. He told you, That the Woman was under so much Consternation, that she dropt the Candle; and when she was told she must go along with him, she said, Now that was found, she believ'd she must.

The next Person examin'd was *Thomas Edwards*. He swears, He was employ'd to go along with *Walter Huomin*; That he saw a Youth on his Knees by the Dunghil: He ask'd him what he was doing? he said, He was hiding his Potatoes; but he saw no Potatoes, which made him suspect that Dunghil; and, that digging there, they found the Counters, as *Huomin* has given an Account.

The next Man that was sworn was *Mortagh Mac-Carty*. He tells you, He had bought a Cow, and that she had stray'd away from him, and finding of her, and bringing her home, he call'd at this Place, where *Hicky's* Wife was, and she agreed to buy his Cow, and she brought out two Pieces of Gold, which she call'd Guineas: Says he, These are not Guineas; I believe this is some of *Patrick Hurly's* Gold. He ask'd her what she would take for them? and he said, I have Three Pence Half-penny, and a Quartern of Tobacco, which I'll give you for them; and she took it, and wish'd that the rest were sold so too. He says, He acquainted Sir *Donogh O-Brien* of this, and he directed him to Mr. *Bindon*, a Justice of the Peace, where he gave in the Examination; He produced to you these two Pieces, which you have here compar'd with the rest of the Counters.

Gentlemen, the next Person that was sworn was one *Joseph Lynch*. He tells you, That he was very well acquainted with Mr. *Patrick Hurly*, and, that *John Hurly* was married to his Sister; and, that Mr. *Hurly*, before or about *Christmas*, came to *Loughbrea*; and, that at one Mr. *Henry Barger's* House they were both together a drinking; and, that Mr. *Hurly* taking out some Linnen out of his Portmanteau, he saw a Bag that held about a Quart; and taking it to be Money, he look'd into it, and found in it all Counters; and he ask'd him what he did with them? he said, He intended to make use of them for his Diversion. He tells you after this, That he walk'd with Mr. *Hurly* part of the Way, and, that

Hurly discours'd him about Mr. *Banks's* Robbery. Mr. *Lynch* told him, that the Country had found for *Banks*, and, that he propos'd something in relation to his own Robbery, if Mr. *Lynch* would assist him; what a pretty Way it was to get Money! *Lynch* told him, in what was honest and just he would assist him, but in nothing else. Mr. *Hurly* then fell into Discourse with him about his Farm, and said, he would give up his Farm too, if he would come into the Design he had to get Money. Mr. *Lynch* answer'd as before, If it be honest and just, I will; if not, I will not; and for the Farm, said he, I'll force you to do that without it.

He tells you, That Mr. *Hurly* sent a Trunk of Linnen to his House after the Robbery was committed; and, that Mr. *Hurly* did desire no Body should see the Trunk with him; that he heard his Brother *Bourk* say, That it was Linnen, but he did not mind it, his Wife being then sick; and says, they took away the Trunk that same Night after Mr. *Hurly* was in Goal. He tells you, he had the Curiosity to go and see him in the Goal of *Ennis*, and after discoursing with him, he said, He had done something very irregular in *France*, and now to come into the Country and charge it with a Robbery, was very ill

The next Evidence is *Charles Cassidy*, Surgeon; and he gives an Account, That this *Hurly's* Father being sick, his Sister sent for him to come there; and after he came, they sent for one Dr. *Brodin*, a Relation of Mr. *Hurly's*; and, that this *Brodin* and he, some Time after, went to visit some other Patients; and being abroad, *Brodin* propos'd to him, says he, Mr. *Hurly* gives you small Fees, I can put you in a Way to get 20 Guineas; and told him of the Design, and how he might be a Party concern'd in the pretended Robbery; and he answer'd, He was a Man too well known; but he persuaded him to accept of the Employ. When they came home to *Hurly*, the Doctor told him, he had offer'd him 20 Guineas; and *Hurly* was so far from denying it, that he chid Dr. *Brodin*, and said, he would give him 40 Guineas; and then *Cassidy* said, he was afraid of being known: Hereupon *Hurly* told him he had provided Vizards, to prevent his being known; and after going home, his Heart fail'd him, and he would not be concern'd. He told you, he heard of this Robbery; but this Thing was not discover'd by him till last *Sunday*, where being at Church, he went with Mr. *Fitz-Gerald* to Dinner; and *Fitz-Gerald* talking of this Business of *Hurly*, *Cassidy* said, He knew a Person in the County, that could do him more Harm than any Man living: Says a Clergyman, there present, You ought to do the County that Right, as to find out that Person, that the County may not be so oppress'd, but Justice done to the Criminal. And, that he went home, and considering it, he went and gave in his Examination to a Justice of the Peace, who bound him over to prosecute, and accordingly he attended here.

The next Witness is *Daniel Kiese*. He tells you, That he was very well acquainted with Mr. *Hurly*, and, that Mr. *Hurly*, some Time before this Robbery was committed, came to Mr. *Bentley's* Shop, and enquir'd there for Masks, or Vizards, such as they use for Masquerades; and *Bentley* made answer, That they had none, but they might be had in *Christ-Church-Yard*. He tells

tells you, that thereupon *Hurly* went into the Yard. He tells you, that at that Time, hearing *Hurly* enquire for Masks, he was apprehensive that he had some evil Design in hand, and told *Bently* so; and *Bently* agrees in what *Keefe* swears, that he did enquire for Masks, and went into *Christ-Church-Yard* for them.

Mr. *Gray* (the next) tells you of the Poverty of Mr. *Hurly*; and that he could not have any such Sum of Money; that he desired him to raise some Money for him, and for better Security he lodged in his Hand a Bond of Captain *Mac-Donnel's*; and, accordingly, that he got Mr. *Connor* to indorse a Bill to Mr. *Lumm*; and Mr. *Hurly* afterwards paid the Money.

The next that was produced for the King was Captain *Mac-Donnel*; and he tells you, That he had given such a Bond to Mr. *Hurly*, upon Account of a Farm they had purchased jointly, and that he ordered him to pay this Fifty Pound that was borrowed; that he would not be concerned in paying part, unless he paid it all; that the Money was paid.

Mr. *Attorn. Gen. Cassidy* tells you, That he had used to play at *Tables* with *Hurly* at his House; and that *Hurly* got him to send for a Dozen of Bottles of Wine to *Emmis*, to drink with *Hurly*, because *Hurly* had no Money.

Mr. *J. Coote*. I will give you an Account now as faithfully as I can, of what is sworn for the Traverser.

But I should have told you first, That Captain *Mac-Donogh* gave you an Account of the greatest Severity used by *Patrick Hurly* towards his Brother *John*, which, he said himself, he would not have done, but that he was forced to do it, by reason of his own necessitous Condition.

Now Mr. *John Hurly* he tells you of considerable Sums of Money he received from *Holland*, viz. 490*l.* from Colonel *Lovet*, and 200*l.* from *Jeremiah Donavan*; and in 97 from Mr. *Fitz-Symons* 300*l.* 10*s.* and 200*l.* more in *Limerick*. He tells you, that of those Sums received, he paid again in Cash to Mr. *Hurly*, all but a little that is received from Mr. *Fitz-Symons*: He paid him in Cash but a little; and he had Forty Bullocks, and some Sheep, towards the Balance of what remained unpaid. That here was some Money paid to Mr. *Arthur*, and some to Mr. *Burton*, and more laid out other ways. He tells you, that he saw with *Daniel Hicky* a Note that was given him by Mr. *Hickman*, a Justice of Peace of the County, and by Mr. *Cusack*, then Sheriff, whereby they promised, that if he would make a true Discovery of the Robbery of *Hurly*, that they would intercede to the Government for a Pardon for him. This is the Substance of what *John Hurly* has sworn.

The Witness for the Traverser was *Dorothy Kemp*, who was a Servant, she tells you, to Mr. *Hurly*, when this Robbery was committed. She tells you, That Seven Persons came into the House; that Five of them went up into her Master's Chamber, and Two staid in the Parlour: That there were several Shots made, and that there was no Harm done, nor no Marks or Prints of Bullets or Shot in the Wall or Ceiling: That there were Two Men without at the Window,

and being called *Rapparees*, they thrust their Swords through the Window: And that Mr. *Ronane* was going out, when they rushed in, and that they threw him down, and that they tied *Ronane* and *Hurly*; and to shew you there was Money, she tells you, that the Wife of Mr. *Hurly* took out of a Trunk a great Bag of Gold, and shewed it to her; and then took part of it, and put it into her Pocket: And after that, this *Dorothy Kemp* going to the Trunk for Linnen, she was strangely surprized to find the Bag there; that Mr. *Hurly* came in at the Time, and was inquisitive to know what she did there; she told him, she was looking for Linnen: That then he took the Bag out himself, and convey'd it to his Closet.

She tells you likewise, That there was one *Murough O-Brien* did endeavour to tamper with her, to perswade her to swear about the Counters, that they were to be lodged with her, or with *Daniel Hicky's* Wife; and this *Murough* promised her a great Reward, if she would let this Trick be put upon her Master; but she would not. She tells you, that this *Murough O-Brien* not only tamper'd with her, but also with *Hicky's* Wife; and that he sent Letters by his Servant to *Hicky's* Wife, and that they were delivered; and that the Contents of the Letters was, desiring her, that she would suffer those Counters to be lodged in *Hicky's* House. She tells you, that Mr. *Hurly* had a considerable Quantity of Linnen taken away from him; that she had washed Twenty Pair of Sheets her self, and that there was Ten Pair more, and that all was taken away except Five Pair; which is the Substance of what she swore.

But *Murough O-Brien* was sworn, and he deposed, That he was so far from tampering with *Dorothy Kemp*, that he did not think it safe to converse with her, because she was kind and civil to Mr. *Hurly*, and bore a Child or two by him; and to the contrary he swore he had no Communication at all with her: But as for *Hicky's* Wife, he says, she told him she would discover all, if he would bring her Husband home again; and, in pursuance of that, he writ Letters to *Hicky*, and that the Purport of them was only to satisfy him, that he might come with Safety, and treat with him. The Letters being read, they import no more.

Gentlemen, the next Witness, *Daniel Mac-Cay*, says, That he was a Servant to Mr. *Hurly* a considerable Time; that he was in the House when the Robbery was committed; and that there was only Five of the Robbers that he saw; that some of them put the Family in Terror, and others made it their Business to fall on the Master: He at first thought they were only Bailiffs come to arrest his Master; but when they came and broke open the Door that they had lock'd upon his Master, he found they were Tories: That there were several Shots made. I asked him, Was there any Hurt made by the Shots? and he said, No. Was there any Marks of the Bullets? he said, No. He said, there was some at the Window, that did thrust in their Swords. He tells you, there was one *Christopher O-Brien*, who did endeavour to tamper with him

to take off the Evidence, to whom he went with a Letter to the *Swan-Tavern*, and that Mr. *O'Brien* discoursed with him about the Counters.

He tells you, That his Master had a great deal of Money; and that when he was to go down into the Country with his Master, they were so great together, that his Master acquainted him with a great Sum of Money he had, and that he told him he intended to pay Mr. *Arthur* with it; but that *Arthur* did exact a great Sum for Exchange, and therefore he did not pay the Money in Town, but expected to get easy Terms from him in the Country; and it was because he feared to be robbed, that he did shew his Servant a great Sum of Money he had to carry down into the Country: And then he was examined by Mr. *Butler*, as Council for the King, by what Road they went at that Time to the Country, and at what Place they went over the *Shannon*? He said, it was over a Bridge, but he did not know what Bridge. And being asked, Whether they went through *Abblone*? it being a casual Question, he said, They did go through *Abblone*. And being asked, Where he lay that Night? he said, At *Balliboy*, or *Eyres-Court*. And being urged to be exact, he said, He thought it was *Balliboy*; and then he said, they laid at *Killigby*.

Gentlemen, you know the Country, and that *Balliboy* and *Killigby* are near the *King's County* on that side the *Shannon*; and *Eyres-Court* on the other side, in the County of *Galloway*.

Now, Gentlemen, because Mr. *Patrick Hurly*, in the Course of the King's Evidence, denied positively that he was at any Time about *Christmas* at *Loughrea*; I asked this *Mac-Cay*, if his Master went down any other Time? he said, He did a little before *Christmas*: And then I asked, if he was at Mr. *Bargery's* House in *Loughrea*? he said, He was; but he could not tell whether Mr. *Joseph Lynch* was there or not. And being asked, Whether he carried his Master's Fortmantau to *Tiaquin*? he said, He did; and that his Master hired a Horse at *Tiaquin*, and sent him before him to *Gort*. I asked him, Whether he were sure the Money his Master produced to him in *Dublin* was Gold, or no? He said, He was sure it was Gold, it was Louis d'Ors, though, by Mr. *Hurly's* Information, there was more Guineas than Louis d'Ors. He tells you likewise, Gentlemen, that this *Calaghan Carty* had discovered upon his Oath, before my Lord Chief-Justice, what he had formerly sworn before a Justice of the Peace concerning this Robbery: And being asked, Who were present? he said, My Lord Chief-Justice's Clerk was there; which gave Occasion to the Court to send for the Clerk.

The next Man examined was one *Crips*. He says, That one *Halloway* did beat him, and take him by the Hair of the Head, because he would not swear against *Patrick Hurly*; and that *Neylan* offered him Six Collops grazing, if he would swear that *Hurly* contrived this Robbery himself, and that he was by when *Calaghan Carty* was sworn before my Lord Chief-Justice *Pyne*; but he cannot tell what it was

he swore, and he does not seem to be capable of knowing it, for he does not speak *English*. And then he says, Mr. *Lynch* offered him considerably to come and swear against *Hurly*; and bid him come to *Cannaught* and live with him, for *John* and *Patrick Hurly* were both ruined. Mr. *Lynch* has been examined; and he swears, he had no other Discourse with this Man, but about the Farm at *Mougna*, that the *Hurly's* held from him; that they were in ill Circumstances, and that he would be rid of the whole Family. *Neylan* tells you, That, to his Knowledge, he never saw this Man 'till this Day. *Crips* said, upon his Oath, That it was at a House, in such a Place, that *Neylan* tampered with him: And *Neylan* tells you, upon his Oath, That there was not any House at all, within his Memory, in that Place; and that he never had any Communication with this *Crips*, directly or indirectly. So when Persons swear directly one against another, You, Gentlemen of the Jury, must weigh the Evidence, and the Arguments they offer to induce your Belief.

The next Witness is *Daniel Hicky*; who tells you, He was sent to Goal and bolted there; and after he was told, that one *Daniel Carty* confessed the whole Matter, he was forced before a Justice of Peace, and there was forced to swear, by the Management of Mr. *Hickman* and Mr. *Cusack*, who told him, That if he did not swear, he must be hanged: And that, through Fear, he was compelled to give that Information, wherein he proves the Robbery was contrived by Mr. *Hurly*, and that he was one of the Actors in it: And when he was told, that he should be called before my Lord Chief-Justice *Pyne*, and he was brought into the Bar, he said, he would swear nothing but Truth before my Lord Chief-Justice: That hereupon the Goaler carried him back, and he never after could get Opportunity of giving my Lord Chief-Justice an Account of the Matter, though he sent Petitions after him. He says, That before he discovered, he was treated barbarously; but afterwards he was treated very well, and had Twelve Pence a Day; but that after they were in the Court, and said they would say nothing but the Truth before my Lord Chief-Justice, they were allowed but Nine Pence, and there was a *Mittimus* sent to confine them closer. He says, *Daniel Carty* procured Bail, and he was bail'd by some Friend of Mr. *Hurly's*. He tells you, he came to Town, and that he went to the Lord Chief-Justice *Pyne*, and there swore an Examination contrary to what he swore before, and says, that he was conscious of the Injury he had done Mr. *Hurly*; that he writ his sole Examination himself; and says, he had been tampered with, and nothing would do. That he was afterwards brought into this Court, and there did own his Examination before my Lord Chief-Justice to be Truth; but after he charged Mr. *Cusack*, the Sheriff, with having tampered with him, when Mr. *Cusack* appeared here and confronted him, he went back from what he said.

The next is *Donogh O'Brien Andrews junior*: He tells you, he was manacled and fettered in the Goal, till such time as by the Persuasion of Mr. *Neylan*, and the Threats of the Goaler and of Mr. *Cusack*, That if he did not swear, he should be severely neck-yoked; he went before a Justice of the Peace with Mr. *Butler*, who used several Insinuations to him, as he says, to procure him to swear the Robbery was contrived by *Hurly*; which, through Fear, he consented to; and says, That Mr. *Butler* put his Information into Writing; Part, says he, I told him, and Part, he says, Mr. *Butler* put down as he pleased: I did swear to it, says he, but it was against my Conscience, for I was forced to it. He says, That Mr. *Neylan* brought Coats to him in the Goal, and they would have him swear they were the Coats they robbed in, but he would not swear by any means. He says, That after they were discharged, he was so conscious to himself of the Injury done Mr. *Hurly*, that he came towards *Dublin*, that he lay in the same House with Mrs. *Hurly* and her Brother at *Kiltartan*, and, that coming nearer to Town about *Kilcock*, he met with *Crips* and *Carty*, that they lodged together in one House; and being asked, Whether he spoke any thing to his Father about this Robbery? he said, He never did.

The Father is there produced; and he tells you, though it would reflect upon his Son, yet he would perform Truth, being upon his Oath; and so swears, That hearing how his Son had been concerned in the Contrivance of this Robbery, after he had been three Weeks in Goal he went to see him, and when he came to him, check'd him; and his Son told him, as he understood him, that the Robbery was only a Contrivance of Mr. *Hurly's*. That after he was out of Goal, he spoke to him concerning the Arms, where they had them, and whether they were *Patrick Hurly's* Arms? to which he answered, Where else should he get Arms. And this *Donogh O'Brien Andrews junior*, being asked again, Whether it was so as his Father deposed? he said, It was not so. Now the Father and the Son swearing one against the other in this Matter, you must be Judges who has sworn true.

The next is Mr. *Butler*, who tells you, That in taking the Examination, he was so far from using any Threats to this *Donogh O'Brien Andrews junior*, that as soon as he came to *Emmis*, hearing he was willing to make a Discovery of the Matter, he sent for him to his Lodging; that he caused him to sit down; and that he writ every Word as he spoke; it and that there was not a Word but what came from his own Mouth: And the Examination was here read; and if you observe it, there are several Things in the Examination, that the Party owns came from himself, and several Things which could not possibly come within the Knowledge of Mr. *Butler*; so that it is impossible to be contrived by Mr. *Butler*, because they were Things wholly in the Informer's own Cognizance.

There is one Thing offered in the Close of the Evidence in behalf of the King, which does not only relate to *Mac-Cay*, but to all the rest. Mr. *Butler* and Mr. *Foster* upon their Oaths tell you, That Mr. *Hurly*, when he preferred his Petition concerning this Robbery before the Judges of the Assizes, and he did also swear, That when he went to *Tiaquin*, he left his Portmanteau with Mr. *Bargery* at *Loughbrea*, with a strict Charge to take special Care of it, for that there was something of great Consequence in it; and *Christopher O'Brien* swears, That Mr. *Hurly* told him likewise, that he left the Portmanteau at Mr. *Bargery's* when he went to *Tiaquin*, and said, He would not carry it to *Tiaquin*, because that was a loose Family; so that Mr. *Hurly* swore fully against what *Mac-Cay* swears now.

Hurly swore he was robbed but by Four Persons, and that agrees with what *Calaghan Carty* swears. One Woman swears there was Seven, another swears Nine; so that out of the Mouth of Mr. *Hurly* himself his own Witnesses are contradicted. But Mr. *Hurly* would take off the Probability of his saying thus (for he denies the saying of it). Is it likely, says he, that I should come back from *Tiaquin* to *Loughbrea*, and so go on again to *Gortnishigory*? But *Mac-Cay*, his Boy, tells you, that his Master hired a Horse for him to carry the Portmanteau before him to *Gortnishigory* on *Saturday*, and that his Master followed him on *Sunday*: Now, if the Portmanteau had been at *Tiaquin*, why should he send it by *Mac-Cay* before-hand to *Gort* on *Saturday*, that he was following thither on *Sunday*? And when Mr. *Hurly* was going down to the Country, what can be imagined; why he should make a Boy acquainted with his carrying so much Money with him? And that Mr. *Hurly* should leave the Key of the Trunk with Mrs. *Kemp* to take out Linnen, and so great a Sum of Money there? I do but lay the Facts before you as they stand upon the Evidence, as well for as against the Prisoner; and I hope you will do Justice both to the Prisoner and to the King. Gentlemen, if you are satisfied upon the whole Matter, that Mr. *Hurly* is guilty of the Perjury, you will find him Guilty; if not, you will acquit him.

If you think him Guilty of the Contrivance to Cheat the County, you will find him Guilty; if not, you will acquit him.

The Jury went out, and returned in Half an Hour; and brought in their Verdict, Guilty on both Indictments.

Mr. *Attorney-General*. May it please your Lordship, *Patrick Hurly* has been indicted for Perjury and a Cheat, and is found Guilty of both Indictments, I humbly pray your Lordships Judgments.

Court. How have you laid your Indictment?

Mr. Sol. Gen. At Common Law.

Court. In what Circumstance is *Mr. Hurly*?

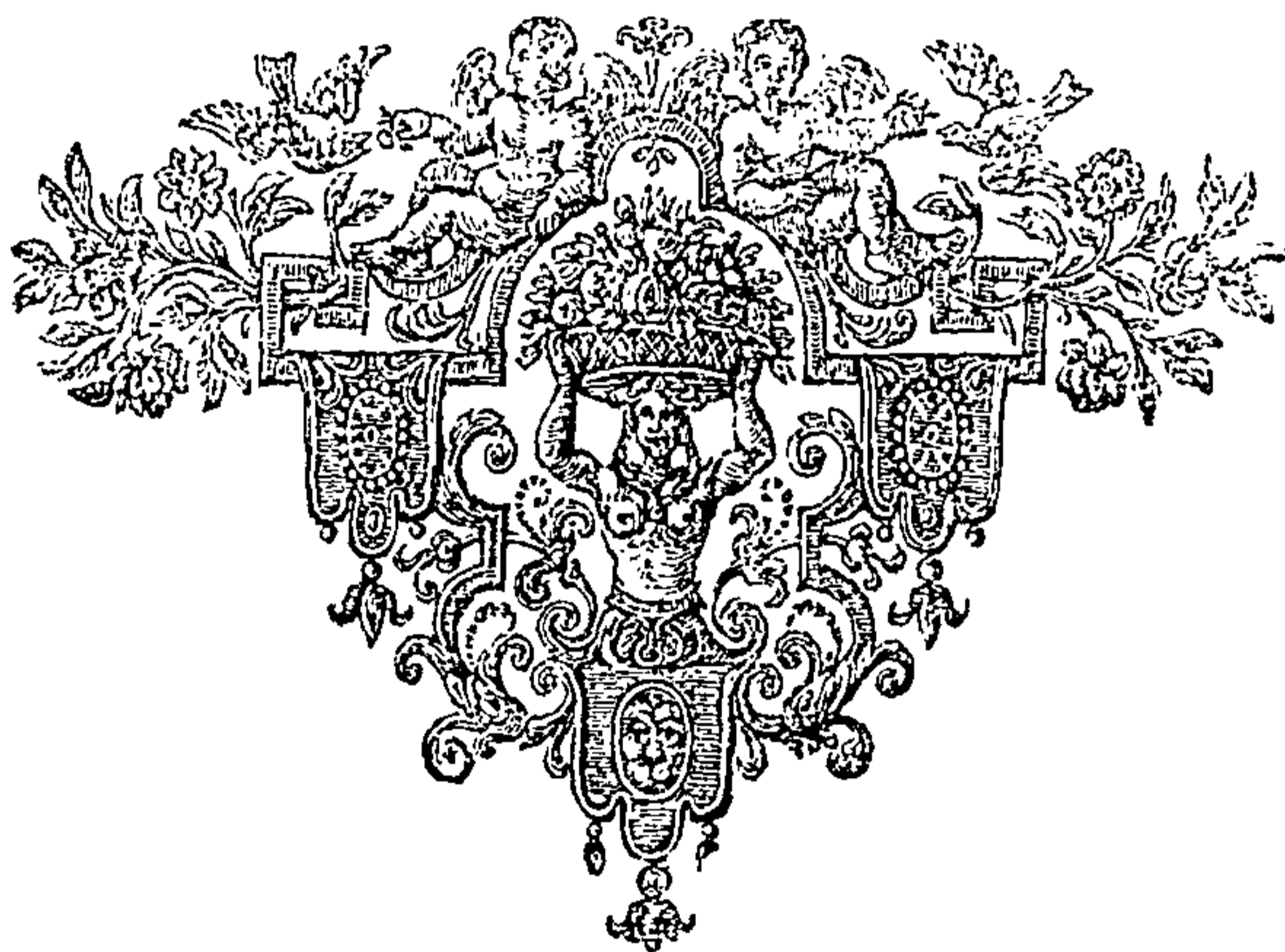
Mr. Butler. I hope, my Lord, if it is only a Fine, it can't be less than the Sum he designed to get from the County by the Perjury.

Court. As to the Perjury, the Judgment of the Court upon that Conviction is, That *Mr. Hurly* be Fined for the Perjury 100*l.* and be Imprisoned till he pay it to the King.

Mr. Att. Gen. We will move the Court next *Monday* for your Judgment upon the other Indictment.

Mr. Butler. My Lord, we insist upon it, That the Pillory is the Punishment for the Cheat.

Court. We know, if *Mr. Hurly* be not able to pay the Fine, he ought to suffer Corporal Punishment.



CLXXII.

*The TRIAL of**Colonel NICHOLAS BAYARD,*
in the Province of New-York, for High-Treason,
Febr. the 19th, 1701-2, 14 Will. III.

On the Sixteenth of *January*, 1701, Captain *John Nanfan*, Lieutenant-Governor, and the Council, made the following Order.

To the Honourable *John Nanfan*, Esq; Lieutenant-Governor, and the Honourable Council of the Province of *New-York*.

The Humble Address of Nicholas Bayard, Rip van Dam, Philip French, and Thomas Wenham, on behalf of themselves, and some of the rest of the Freeholders and Inhabitants of the Province of New-York.

At a Council held at Fort William-Henry this 16th of January, 1701, Present the Honourable John Nanfan, Esq; &c.

IT is hereby order'd, That Alderman John Hutchins do appear before this Board To-morrow Morning, and then and there produce to the Board the Address to his Majesty, the Address to the Parliament, and the Address to the Lord Cornbury, which was signed by several of the Inhabitants of this City, and Soldiers of the Garrison, in this House, about three Weeks since, on the Penalty that shall thereon ensue.

By Order of the Council,

B. COZENS.

Whereupon Mr. *Hutchins* appear'd; and for neglecting or refusing to deliver up the said Addresses, on the Nineteenth of *January* was committed to the common Goal of the City of *New-York*, for the signing of Libels, said to be against the Administration of the Government.

On the 20th Col. *Bayard*, Mr. *Rip van Dam*, Mr. *Philip French*, and Mr. *Thomas Wenham* address'd the Lieutenant-Governor and Council, as followeth; *viz.*

Humbly sheweth,
THAT whereas by a Mittimus, bearing Date the Nineteenth of *January*, 1701, Alderman *Hutchins* stands committed for signing Libels, said to be against the Administration of the Government; which pretended Libels we understand to be an Address to his Majesty, another to the Parliament, and another to my Lord *Cornbury*, whom we understand, by certain Advice we have received from England, to be nominated by his Majesty to succeed the late Earl of *Bellamont* as our Governor; Copies of which (by the said Mittimus) we find are expected from the said *Hutchins*, and is Part of his Charge in the Commitment, the Copies of which Originals (being in our Hands or Custodies) he cannot deliver. If there be no further Crime to be alledg'd against him, we hope to make the Legality of the said Addresses, and pray, That the said *Hutchins* may be releas'd from his Imprisonment, or be admitted to Bail: And your Petitioner shall ever pray.

N. B. R. v. D. P. F. T. W.

Colonel *Bayard*, and the other three Gentlemen, having personally deliver'd this Writing, and refusing to surrender the Copies of the said Addresses, had Time given them, on their Parole, to appear next Day. And afterwards, the

H h h 2

same

same Day, the Lieutenant-Governor did deliver the above Address to his Majesty's Attorney-General of this Province, for his Opinion in Law therein, which the said Attorney-General gave in Writing; and on the Twenty-first Day came into the Council-Chamber, and there deliver'd it to the Lieutenant-Governor; which was read, and order'd to be enter'd in the Council-Book, *in hæc Verba*.

May it please your Honour,

I Have well consider'd the humble Address of Nicholas Bayard, Rip van Dam, Philip French, and Thomas Wenham, for the Release of Alderman Hutchins from his Imprisonment, sent me by your Honour yesterday; and have also weigh'd the several Matters sworn, and otherwise taken in Council before your Honour, which do in any respect relate thereto; and, upon the whole, in Obedience to your Honour's Commands, I humbly present you with my Judgment and Opinion in Law, as follows:

First, That neither the Address or Petition itself, or any Matter therein contained, is Criminal and Illegal.

Secondly, That the Refusal of the Petitioners, at the Council-board, to produce the Copies (of certain Original Addresses mention'd in their Petition) own'd by them to be in their Custody, and by their Petition also, is not such a Contempt to the Council, or other Offence against the Law, for which the Petitioners may legally be committed.

Jan. 21.
1701.

Sa. Sh. Broughton.

And afterwards the said Persons appear'd, and continuing their Refusal to surrender, the said Copies, notwithstanding the Opinion of the Attorney-General, the said Lieutenant-Governor and Council issued the following Warrant.

By the Honourable John Nanfan, Esq; his Majesty's Governor and Commander in Chief of the Province of New-York, and Territories depending thereon in America, &c. and his Majesty's Honourable Council for this Province, To Isaac d'Reymer, Esq; High-Sheriff of the City and County of New-York, Greeting.

forders that have lately happen'd within this Province, and for establishing and securing their Majesties present Government against the like Disorders for the future; *It is among other Things enacted*, That whatsoever Person or Persons shall, by any manner of Way, or upon any Pretence whatsoever, endeavour by Force of Arms, or other Ways, to disturb the Peace, Good, and Quiet of this their Majesties Government, as it is now establish'd, shall be deem'd and esteem'd as Rebels and Traytors unto their Majesties, and incur the Pains, Penalties and Forfeitures as the Laws of England have for such Offences made and provided: *Notwithstanding which*, Colonel Nicholas Bayard, as has appear'd by the Oaths of several Persons examin'd before Us in Council, by Conspiracy and Combination with John Hutchins, Esq; lately committed by Us, together with several other Persons disaffected to this his Majesty's Government, to the manifest Disturbance of the Peace of the same, by divers indirect Practices both drawn in Soldiers, and others, to sign scandalous Libels, whereby they have endeavour'd to render the past and present Administration vile and cheap in the Eyes of the People: And the said Colonel Nicholas Bayard hath incited the People to disown the present Authority, and cast off his Majesty's Government, as it is now establish'd: The Council have unanimously thought fit, and do resolve, That the said, Nicholas Bayard be committed for High Treason. These are therefore, in his Majesty's Name, to require and command you, immediately on your receipt hereof, to take into your Custody the Body of the said Col. Nicholas Bayard, and him in the common Goal of this City in close Custody to keep and secure, until he shall be from thence delivered by due Course of Law; and for your so doing, this shall be your sufficient Warrant. Given under Our Hands and Seals at Fort William-Henry in New-York, in Council this Twenty-first of January, Anno Domini 1701, and in the Thirteenth Year of the Reign of our Sovereign Lord William III. by the Grace of God, of England, Scotland, France and Ireland King, Defender of the Faith.

John Nanfan,
A. D. Peyster,
S. Staats,
R. Walters,
T. Weaver,
W. Atwood.

True Copy, examin'd by me, I. D. Reimer, Sheriff.

Which Act of Assembly, mention'd in the Warrant of Commitment, followeth in these Words, viz.

Whereas by an Act of General-Assembly of this Province, made in the Year 1691, Entituled, An Act for the quieting and settling the Di-

An Act for the quieting and settling the Disorders that have lately happen'd in this Province, and for the establishing and securing their Majesties present Government against the like Disorders for the future.

“ **F**Orasmuch as the Good and Quiet, Ease, Profit, Benefit, and Advantage of the Inhabitants within this Province doth chiefly consist in, and altogether rely and depend upon their bearing true Faith and Allegiance unto Their Majesties Crown of *England*, which is, and can only be, the Support and Defence of this Province. And whereas the late hasty and inconsiderate Violation of the same, by the setting up a Power over their Majesties Subjects, without Authority from the Crown of *England*, hath vitiated and debauch'd the Minds of many People, &c. and hath also brought great Waste, Trouble, and Destruction upon the good People of this Province, their Majesties Loyal Subjects: For the Prevention whereof in Time to come, Be it therefore Enacted and Ordain'd by the Governor, and Council, and Representatives met in General-Assembly, and it is hereby Published, Declar'd, Enacted, and Ordain'd by the Authority of the same, That there can be no Power and Authority held and exercis'd over their Majesties Subjects in this their Province and Dominion, but what must be deriv'd from their Majesties, their Heirs and Successors. And We do hereby recognize and acknowledge, That their Majesties *William* and *Mary* are, and as of Right they ought to be by the Laws of the Realm of *England*, our Liege Lord and Lady, King and Queen of *England*, *France* and *Ireland*, and the Dominions thereunto belonging, &c. That thereby their Princely Persons are only invest'd with the Right to rule this their Dominion and Province; and that none ought or can have Power, upon any Pretence whatsoever, to use or exercise any Power over their Subjects in this Province, but by their immediate Authority under their Broad-Seal of their Realm of *England*, as now establish'd.

“ And be it further Enacted, by the Authority aforesaid, That whatsoever Person or Persons shall, by any manner of Way, or upon any Pretence whatsoever, endeavour, by Force of Arms or otherwise, to disturb the Peace, Good and Quiet of this their Majesties Government, as it is now establish'd, shall be deem'd and esteem'd as Rebels and Traytors unto their Majesties, and incur the Pains, Penalties and Forfeitures as the Laws of *England* have, for such Offences, made and provided.

Upon Colonel *Bayard*'s Commitment, the City Militia were, by Beat of Drum, call'd to Arms, and a whole Company daily appointed to guard the Prison, for about a Week following, and Defaulters strictly punish'd; which was burdensome to the People, and occasion'd great Clamour; whereupon it was taken off.

The Prisoner being inform'd, That a Special Commission was order'd for their speedy Trial; petition'd the Lieutenant-Governor and Council, on the Sixth of *February*, in these Words:

To the Honourable *John Nanfan*, Esq; Governor, &c. and the Honourable Council, &c.

The Humble Petition of *Nicholas Bayard* and *John Hutchins*,

Sheweth;

THAT your Petitioners are very sensible of the Favour intended them by your Honours, in appointing a Special Court for their Trial; that, in consideration of their Age, they might not be confin'd in a Prison till the ordinary Time for meeting of the Supreme Court: But the Papers being at present out of their Hands, which they shall have Occasion for, in order to make their Innocency appear, and not being likely to get them in so short a Time as is prefix'd for the said Trial; your Petitioners humbly pray, That they may not be oblig'd to come to Trial before the usual Sitting of the Supreme Court. And your Petitioners shall ever pray, &c.

To which a Verbal Answer was given to Colonel *Bayard*'s Son, That out of meer Grace the Court should be deferr'd for Five Days.

On the Nineteenth of *February* the Commissioners fate, and publish'd their Commission in these Words; viz.

“ **W**ILLIAM the Third, by the Grace of God, of *England*, &c. To Our loving Subjects *William Atwood*, Esq; *Abraham d'Peyster*, Esq; and *Robert Walters*, Esq; sendeth Greeting. Know Ye, That We have assign'd you, or any Two or more of you, whereof you the said *William Atwood* We will to be One, our Justices, to enquire by the Oaths of good and lawful Men of the City of *New-York*, and by such other Means, Ways and Methods which to you shall be the better known, by whom the Truth of the Matter may be the better known, on the 19th Day of this Instant *February*, of whatsoever Treasons, Misprisions of Treasons, Insurrections, Rebellions, Murders, Felonies, Manslaughters, Homicides, Rapes, Burglaries, Misprisions, Confederacies, False Reports, Trespases, Riots, Routs, Unlawful Assemblies, Contempts, Faults, Negligences, Concealments, Oppressions, Champarties, Deceits, Misdemeanors, and other Misdeeds, Offences, and Injuries whatsoever, committed by *Nicholas Bayard* and *John Hutchins*, and also the Accessories of them, in the Province of *New-York* aforesaid; and by who or by whom, to who or to whom, how, when, and in what Manner, and of other Articles and Circumstances in the Premises, either or any of them concerning; and the same Treasons, Offences, and other the Premises for this Time, to hear and determine according to the Laws and Customs of *England*, and of this our Province

“ of *New-York* in *America*. And we command,
 “ That on the said Day, at the City-Hall of
 “ the said City, you, or any Two or more of
 “ you, as is aforesaid, diligently make Enquiry
 “ upon the Premises, and all and singular the
 “ Premises hear and determine, and do accom-
 “ plish these Things in Form aforesaid, which
 “ unto Justice appertains to be done thereupon,
 “ according to the Laws and Customs of our
 “ Kingdom of *England*, and of our said Pro-
 “ vince; saving unto Us our Amerciaments, and
 “ other Things thereof unto Us belonging. Also
 “ we command Our Sheriff of Our said City,
 “ That on the said Day, on the said Place, he
 “ cause to come before you, or any such Two
 “ of you, as aforesaid, or more, such and so
 “ many good and lawful Men of his Bailiwick,
 “ by whom the Truth of the Matter may be the
 “ better enquir’d into. *In Testimony whereof,*
 “ We have caused the Great-Seal of Our Pro-
 “ vince to be hereunto affix’d. Witness *John*
 “ *Nansan*, Esq; Lieutenant-Governor and Com-
 “ mander in Chief of the Province of *New-*
 “ *York*, &c. in Council at *Fort William-Henry*,
 “ the 12th Day of *February*, in the 13th Year
 “ of our Reign, *Anno 1701*.

And Proclamation being made in the usual Manner, the Pannel of the Grand-Jury was call’d over: Those who appear’d and were sworn, were

<p><i>Johan. d’ Peyster</i>, Foreman, <i>David Provoost</i>, <i>Martin Clock</i>, <i>Leendert Huygen</i>, <i>Barent Reynders</i>, <i>Johannis vander Spiegell</i>, <i>Johannis Outman</i>, <i>Hendrick Gillisen</i>, <i>Peter van Tillburgh</i>, <i>Johannis van Giesen</i>, <i>Abraham Keteltas</i>,</p>	<p><i>Aryen Hogelant</i>, <i>William Jackson</i>, <i>John Corbitt</i>, <i>Johan. van Cortland</i>, <i>Caleb Cooper</i>, <i>John van Hoorn</i>, <i>Burger Myndero</i>, <i>Gerret van Hoorn</i>, <i>Jacobus d’ Key</i>, <i>Abraham Kipp</i>, <i>Johannis van Santa</i>.</p>
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Jacob Boelen and *Johannis Hardenbroek* did not then appear.

Before the Jurors were sworn, the Council for the Prisoner objected against some of them, for declaring before several Witnesses, then ready to be produc’d in Court, *That if Bayard’s Neck was made of Gold, he should be hang’d*; at the same time boasting, that they were of the Jury; and pray’d, That since that Jury was summon’d upon that Special Matter, such might not be sworn. Which the Court over-ruled.

Mr. Atwood, the First Commissioner, gave a long Charge to the Jury, aggravating the Facts suppos’d against the Prisoner, and positively asserting, That those Facts were Treason, not only within the Words of this Act of Assembly, but also by the Common Law before the Statute of the 25th of *Edw. III*.

The Jurors having receiv’d the Charge, the Court adjourn’d till next Day.

The Court being met the 20th, the Indictment against Colonel *Bayard* was deliver’d by the Court to the Grand-Jury; and *Mr. Weaver* (appointed Solicitor-General for this Service) attended them with the Proofs, and insisted to be present with

the Grand-Jury, and that no Person should be sent for, but whom he should name; and, that no Question should be ask’d them, but such as he should approve of. On the other hand, *John Corbitt*, *Caleb Cooper*, *John Cortland*, and *Jacob d’Key* insisted, That the King’s Council ought not to be present with them at their private Debates; and, that they had a Right to send for what Persons, and ask what Questions for their Information they should think needful. Whereupon *Mr. Weaver* did threaten them, and (to use his own Expression) *would cause them to be troune’d*, taking down their Names. And the Grand-Jury broke up without acting.

The Court, in the Afternoon, met according to Adjournment; and the Grand-Jury being sent for, *Mr. Weaver* made Complaint, That he was obstructed by some of the Grand-Jury, who would not acquiesce to his being present at the Examination of the King’s Evidence, and would have other Evidences sent for, than what were by him produced. And thereupon *Mr. Atwood* did discharge the abovesaid Four Persons from their further Service, and caus’d *Jacob Boelen*, who was absent when the others were sworn, to be sent for from his House, sworn, and added to the Grand-Jury; and the Court adjourn’d till Seven a-Clock that Evening, but did not meet till about Midnight; when sending to know if the Jury had found the Bill, and being inform’d they were separated, he adjourn’d the Court till next Morning at Eight a-Clock; and in the Way from the Court, in Passion said, *If the Grand-Jury will not find a Bill against Col. Bayard, I will bring an Information against him of High-Treason, and try him upon that*.

February 21. The Court met, and the Grand-Jury appearing in Court, the Indictment was brought in by the Foreman, endorsed *Billa Vera*, and signed with his Name. Upon which *Mr. Atwood* immediately discharged the Jury.

Whereupon the Counsel for the Prisoner informed the Court, That the Bill was not found by Twelve Jurors. And upon Examination it appeared to the Commissioners, that of such of the Jurors who remained in Court, Eight of the Nineteen were against finding the Bill; as appears by the Minutes of the Court entered by Order; *viz.*

<p><i>Jacob Boelen</i>, <i>Abraham Kipp</i>, <i>John van Hoorn</i>, <i>Gerret van Hoorn</i>,</p>	<p><i>Johannis van Santa</i>, <i>William Jackson</i>, <i>Burger Myndero</i>, <i>Johan. vander Spiegell</i>.</p>
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Which Eight importuned the Court, That the Foreman might be brought upon his Oath, and the rest sent for to witness the Truth, that they only Found the Signing the Addresses, and not the Treason. To which *Mr. Atwood* made Answer, They were no longer Jurors; they had presented the Bill, and the Court was possess’d of it; it was now a Record, and there is no Averment against a Record.

Ordered, The Prisoner come to Trial on *Monday* next come Sevensnight; to which Day the Court adjourned accordingly.

On *Monday* the 2d of *March*, the Commissioners met according to Adjournment.

Mr. *Nicholl*. (Counsel assigned for Col. *Bayard*) moved, that the Indictment might be quashed, not being found by Twelve Men: And to prove the Matter of Law, offered to produce Authorities; and to prove the Matter of Fact, offered to produce Evidences in Court, if either were insisted on, the Grand-Jury being then by *Subpœna* in Court.

Mr. *Soll. Gen.* What is moved in behalf of the Prisoner, is most improper; forasmuch as the Indictment is found, and signed by the Foreman *Billa Vera*, there can be no Averment allowed against a Record brought in by the Body of a Grand-Jury; and therefore I desire the Prisoner may be sent for, and arraigned.

Mr. *Nicholl*. This is a Matter of great Weight and Moment; and concerns not only the Life and Fortune of the Prisoner and his Posterity, but the Right of every *Englishman* in the Province: It is not only lawful, but highly reasonable, that an Indictment for High-Treason should be found by Twelve Men at least. By the Statute 13 *E. 1 W. 2. c. 13.* reciting, That Sheriffs feigning many times certain Persons to be indicted of Felonies and other Trespases, take Men not culpable nor lawfully indicted, and imprison them.

“Whereas they were not lawfully indicted by Twelve Jurors, it is ordained, That Sheriffs, where they have Power to enquire of Trespases by the King’s Precept, or by Office, shall cause Inquests, &c. to be taken by lawful Men, and by Twelve at least, which shall put their Seals to such Inquisitions.” [Here it is observable, that there is twice *legitimo modo* in a few Lines.]

Coke Inst. 2. Part 387. says, Two Things are provided, or rather declared, by this Act:

1. *Per legales homines ad minus duodecim faciant Inquisitiones.*

Coke Inst. 1. fol 126. The Indictment is defin’d an Accusation found by an Inquest of Twelve or more upon their Oath.

Poulton de Pace, &c. An Indictment of Treason, Felony, Trespass, or any other Offence, is an Inquisition taken and made by Twelve Men at least.

Coke Inst. 3. fol. 30. No Peer of the Realm, or other Subject, shall be convicted by Verdict; but the said Offence must be found by above Four and Twenty, that is, by Twelve or above, at his Indictment, &c.

11 *H. 4. 9.* Inquests had been taken of Persons named to the Justices, without due Return of the Sheriff; of which some outlaw’d before the said Justices of Record, some fled to Sanctuary, &c. for Treason, some for Felony: Granted, That henceforth no Indictment be made by such Persons, but by Inquests of the King’s lawful Liege People, in such Manner as was used in the Time of his Noble Progenitors; and if any Indictment be made hereafter in any Point to the contrary, that the same Indictment be also void, revoked, and for ever holden for none.

Crook Eliz. 654. *Clyncard* was indicted on the 8th of *H. 6.* The Record was *ad Sessionem Patris, &c. per Sacramentum A. B. C. D. & aliorum legalium hominum in Comitatu prædicto presentatus existit, &c.* And it appeareth not that it was *per*

Sacramentum duodecim; for it was presented by a lesser Number; it was clearly ill, therefore it was revers’d.

Mr. *Atwood*. There can be no Averment against a Record. If you can produce any Authority, that it was ever allowed to make an Averment against a Record; and speak to that Head, you shall be heard; but to go upon this Head, Whether or no the Grand-Jurors are or can be brought to reveal the Counsel which they are sworn to keep secret; cannot be allowed.

Mr. *Nicholl*. The Grand-Jury consisteth of Nineteen Persons, whereof Eight have openly in Court protested, that they found no Treason.

Mr. *Atwood*. I have by me the Oaths of Two Men, That the Bills were found by Fourteen *Billa Vera*; they are so endors’d, have been publicly read in Court, and are of Record; for which Reason I nor no Body else can enquire further of it.

Mr. *Nicholl*. This concerns the Subject’s Life, and your Honour ought to be Counsel for the Prisoner; and if a Misunderstanding happens by the Ignorance of the Jurors, so that the Bill is returned contrary to their Intendment, the Prisoner ought to be assisted.

Mr. *Soll. Gen.* Pray shew us any Authority, where an Averment has been offered against a Record.

Mr. *Emot*. May it please your Honour, I am joined with Mr. *Nicholl* as Counsel for the Prisoner. The Question that now seems to lie before your Honour is, Whether there can be any Averment offered against a Record? There is an Act of Parliament of the 11th of *H. 4.* wherein it is enacted, That a Grand-Jury shall consist *de bonis & legalibus hominibus*: And so likewise runs the Tenor of the Writ of *Venire*; for want of such Persons, the same Statute does declare the Indictment void. So that it is a good Exception to an Indictment, to aver, that any one of the Grand-Jury was an Alien; which is Matter of Fact. How shall this Averment be made, if so be there be no Averment against a Record? And what Benefit has the Prisoner of this Act, unless an Averment be allowed against the Record of this Indictment, if it should so happen, that some of the Grand-Jury are not so qualified as the Act requires? Which seems to me sufficient Reason, that an Averment in the Case at the Bar, is good against a Record.

Mr. *Atwood*. The Statute gives the Particulars that may be averred, and no others can be allowed.

Mr. *Emot*. ’Tis very hard upon the Subject: The Court appoints the Foreman of the Grand-Jury, and he may chance to be a Person prejudiced against the Prisoner, who may sign and return the Bill *Billa Vera*, without the Consent of his Fellows, or a sufficient Number: And because it’s Matter of Record, shall no Averment be allowed against the Bill!

Mr. *Atwood*. A Grand-Jury in a certain Case, on an Indictment for Words spoken, found *Billa Vera*; but as to the *malitiose Ignoramus*; which made the Bill void. So in this Case, if the Jury, as to the Fact in the Indictment, had found *Billa Vera*, and as to Treason *Ignoramus*, the Bill had been void, and the Court must have taken

Notice

Notice of it. But to this Bill there is no Endorsement but *Billa Vera*: The Court has received and published the Verdict, and therefore will proceed.

Mr. *Emot*. But the Matter of Fact only appeared to the Jury; and when they understood the Bill to be laid treasonable, they immediately objected against it.

Mr. *Atwood*. The Bill is found, and appears to the Court, Matter of Record; so that you need not insist any further upon that Head. A Grand-Jury is an Inquest of Office; and an Inquest of Office may be found by a less Number than Twelve. Mr. Sheriff, bring your Prisoner to the Bar.

Mr. *Nicoll*. I have something else to offer.

Mr. *Atwood*. Sheriff, stay a little.

Mr. *Nicoll*. I have a Second Objection in Behalf of the Prisoner; and it is, That the Juries should have been returned by Precepts under the Hands and Seals of the Commissioners; which we understand was not.

This appears in *Hale's Pleas of the Crown*, Pag. 134. Sir *Edw. Coke's* 4th Page of the *Institutes*, Title *Oyer and Terminer*, says the same. There is a special Clause in the Writ of *Oyer and Terminer*, which says, *We have commanded our Sheriff to summons, at such Days and Places as you shall appoint, such good and lawful Men, by whom the Truth may be the better known.* How shall the Sheriff know those Days and Places, but by the Commissioners Precept? And how shall the Truth be known, if the Grand-Jury are permitted to have no other Evidence but what are brought *ex parte Regis*?

Mr. *Sol. Gen.* The Grand-Jury are only to enquire for the King, and to receive or send for no other Evidence than what are brought for the King.

Mr. *Nicoll*. You may tell that to somebody else, not to me; that is contrary to their Oath, which is, That they shall diligently enquire, and true Presentment make.

Mr. *Atwood*. All the Books speak of the King's Evidence only, and agree, that the Grand-Jury may and ought to Find upon probable Evidence, as appears in *Babington*.

Mr. *Emot*. Sir *Edw. Coke* says, Part 4. of the *Institutes*, Title *Oyer and Terminer*, That the Juries ought to be returned by Precepts under the Hands and Seals of the Commissioners. There is no Distinction made between the Grand-Jury and the Petty-Jury; so that the *Venires*, as well for one as the other, ought to have been under the Hands and Seals of the Commissioners.

Mr. *Sol. Gen.* When you had the Government, Dr. *Staats* had a Bill found against him by Eight Men of a Jury of Fifteen.

N. B. *A private Person opposed the Assertion; but he was commanded Silence.*

Mr. *Nicoll*. I never heard of it, nor believe it to be true; but that is not to be taken for a Precedent, were it true.

Mr. *Atwood*. Gentlemen, you seem to mistake the Lord Chief-Justice *Coke*, where he says, There shall be 24 Peers upon the Arraignment of a Peer, &c. for if there be but 13 Peers, and the Major

rity agree to it, it is understood to be found by 12 of them.

There is something in that which you offer, of the Precept being under the Hands and Seals of the Commissioners in the Return of the Petty-Jury; but this does not at all affect the Grand-Jury: For which Reason, if you see Cause to move it, Time may be granted to mend that Mistake. Is there nothing else you have to offer?

Mr. *Nicoll*. Nothing at present.

Mr. *Atwood*. Mr. Sheriff, bring the Prisoner to the Bar.

Which was done accordingly.

Clerk of the Crown. *Nicholas Bayard*, Hold up thy Hand. You stand indicted, &c.

City and County of New-York, in the Province of New-York in America, Anno Regni Regis Gulielmi Tertii, nunc Anglie, &c. Decimo Quarto.

“ THE Jurors sworn, and charg'd to en-
 “ quire for our Sovereign Lord the
 “ King upon our Oaths, do Present *Nicholas*
 “ *Bayard*, of the City of *New-York* in *America*,
 “ Esq; for that he the said *Nicholas Bayard*, the
 “ Fear of God in his Heart not having, nor the
 “ Duty of his Allegiance weighing, but being
 “ moved and seduced by the Instigation of the
 “ Devil, as a Rebel and Traytor against the
 “ most Serene, most Illustrious, most Clement,
 “ and most Excellent Prince, our Sovereign
 “ Lord *William* the Third, by the Grace of God,
 “ of *England, Scotland, France* and *Ireland*, and
 “ of this Province of *New-York*, King, Defen-
 “ der of the Faith, &c. His, the said *Nicholas*
 “ *Bayard*, supreme, true, lawful, and undoubt-
 “ ed Sovereign Lord; the cordial Love, and
 “ true and due Obedience, Fidelity and Allegi-
 “ ance, which every Subject of our Lord the
 “ King, that now is, towards him our said Lord
 “ the King should bear, or of Right ought to
 “ bear, withdrawing, and utterly to extinguish;
 “ intending and contriving, and with all his
 “ Strength purposing, designing, conspiring and
 “ endeavouring, with divers other Rebels and
 “ Traytors, to the Jurors unknown, the Go-
 “ vernment of this Province of *New-York*, under
 “ him our said Sovereign Lord the King, that
 “ now is of Right happily and duly established,
 “ to defame, subvert, change and alter, and to
 “ disturb the Peace, Good and Quiet of this his
 “ said Majesty's Government of this his said
 “ Province of *New-York*, as it is now, and hath
 “ been for several Years last past established; On
 “ the Tenth of *December* last past, and in the
 “ 13th Year of the Reign of our Sovereign
 “ Lord, that now is, in the Dock-Yard of the
 “ said City and County of *New-York*, and divers
 “ other Times and Days as well before as after,
 “ at the said Ward, and elsewhere in the City
 “ and County of *New-York* aforesaid, falsely,
 “ maliciously, devilishly, rebelliously and trait-
 “ terously did compass, imagine, contrive, pur-
 “ pose, design, intend and endeavour to defame,
 “ subvert, change and alter, and to disturb the
 “ Peace,

“ Peace, Good and Quiet of this his Majesty’s
 “ Government of *New-York*, as it now is, and
 “ hath for several Years past been established.
 “ And the same most abominable, wicked and
 “ devilish, rebellious, treasonous and traiterous
 “ Contrivances, Intentions, Purposes and Endeavours
 “ aforesaid, to fulfil, perfect, and bring
 “ to effect, he, the said *Nicholas Bayard*, by Con-
 “ spiracy as aforesaid, afterwards, to wit, the said
 “ Tenth Day of *December* last past, in the Year
 “ aforesaid, in the said City and County of *New-*
 “ *York* aforesaid, and divers other Days and
 “ Times, as well before as after, falsely, malici-
 “ ously, advisedly, clandestinely, rebelliously,
 “ and traiterously, with Force of Arms, &c.
 “ did use divers indirect Practices and Endeavours,
 “ to procure Mutiny and Desertion among
 “ the Soldiers in Pay, belonging to his Majesty’s
 “ Fort and Garrison of *Fort William-Henry*, in
 “ or near the said City and County of *New-York*
 “ aforesaid, and did draw in Numbers of them,
 “ the said Soldiers and others, to sign false and
 “ scandalous Libels against his Majesty’s said Go-
 “ vernment, as it is now, and hath for several
 “ Years last past been established in this Pro-
 “ vince: Which said Libels, by the Procure-
 “ ment of the said *Nicholas Bayard*, as aforesaid,
 “ were signed by the said Soldiers and others,
 “ and were likewise signed by him the said *Ni-*
 “ *cholas Bayard*; in one or more of which said
 “ Libels, amongst other Things highly reflect-
 “ ing on the last and present Administration of
 “ the Government under his Majesty in this Pro-
 “ vince, it is insinuated and declared, That his
 “ Majesty’s Subjects within this Province, are,
 “ and have been for some Years last past, by
 “ Persons entrusted with the Administration of
 “ the said Government under his Majesty, op-
 “ pressed; and that the said Government hath
 “ been, and is rendered *cheap and vile* in the Eyes
 “ of the People, as also that the present *General*
 “ *Assembly* of this Province is not a lawful As-
 “ sembly. By which, and divers other malicious
 “ Scandals in the said Libels contained, he, the
 “ said *Nicholas Bayard*, hath incited his Majesty’s
 “ Subjects of this Province to disown the present
 “ Authority, and Government thereof, and to
 “ cast off their Obedience to his Majesty’s said
 “ Government, as it now is, and hath for several
 “ Years last past been established, against the
 “ Duty of his, the said *Nicholas Bayard*’s, Alle-
 “ giance, against the Peace of our said Sovereign
 “ Lord the King, that now is, his Crown and
 “ Dignity, as also against the Form and Effect
 “ of one Statute or Act of General Assembly of
 “ this Province, enacted in the Year of our Lord
 “ God, 1691, Entituled, *An Act for quieting*
 “ *and settling the Disorders that have lately hap-*
 “ *pened within this Province, and for establishing*
 “ *and securing their Majesty’s present Government*
 “ *against the like Disorders for the future.*

Clerk. What say you, Are you Guilty, or Not Guilty of the Indictment?

Prisoner. Not Guilty: And puts himself upon God and the Country, &c.

Prisoner. I desire I may be allowed two Clerks to take the Minutes of the Trial.

Mr. *Atwood*. No: You have a Solicitor allowed, he may take Notes; any other will not be suffered to do it.

Prisoner. I find it was allowed my Lord *Ruffel*, and others, to employ Clerks to take their Trials: I pray the same Liberty.

Mr. *Atwood*. It was allowed my Lord *Ruffel*; but you would not be willing to meet with the Hardships of his Trial.

Mr. *Soll. Gen.* Perhaps the Counsel will not insist upon the Mistake of the *Venire*.

Mr. *Nicholl*. We shall not insist on that.

Mr. *Atwood*. But we will have it mended; and thereupon order’d a Precept to be directed to the Sheriff, under the Hands and Seals of the Commissioners, to return a Petty-Jury the Sixth Instant; to which Day the Court adjourn’d.

March 6th. The Commissioners met. The Prisoner was brought to the Bar, and the Petty-Jury being call’d, consisting of Eighty, some of them did not appear: Whereupon it was order’d, that the Defaulters of the Petty-Jury be amerced Ten Pounds each, if they did not appear in the Afternoon, or shew a reasonable Cause; and the Court adjourn’d till Three in the Afternoon, when they met again.

Mr. *Soll. Gen.* mov’d, That the Court might be adjourn’d till To-morrow Morning, the King’s Evidence being disguis’d with Drink; which was granted.

Mr. *Nicholl* mov’d, That it would be a Favour to the Prisoner, to put off the Trial till *Monday*.

Mr. *Atwood*. No: I will take care to do my Duty, whatever other People do. We shall not give Mr. *Veasy* the Opportunity of another Sermon against us.

Mr. *Atwood*. I observe Mr. *Jamison* to have Pen and Ink: Mr. *Jamison*, you are not permitted to write.

Jamison. I only take Minutes for my private Satisfaction.

Mr. *Atwood*. ’Tis true, an Attorney or Practitioner of the Court may take Notes for his private Use; but you are no longer an Attorney of this Court, nor shall you be permitted to practise, until you purge your self of having sign’d the Addresses. Put up your Pen and Ink.

March 7th. The Commissioners met, and the Attorney-General was call’d, but did not appear.

Mr. *Atwood*. Mr. Secretary, let a Minute be made, That it appears to this Court, That the Attorney-General hath neglected his Majesty’s Service. ’Tis no Wonder the People here condemn his Majesty’s Authority, since the Attorney-General, tho’ commanded to prosecute by the Government, hath neglected to do the same, and hath given a Judgment and Opinion directly contrary to the Lieutenant-Governor and Council.

Mr. *Atwood*. Sheriff, fetch the Prisoner. Which was done.

Mr. *Secretary*. Before we proceed, read the Petition, which was given me this Morning by Colonel *Bayard*’s Son. Which was read *in hæc Verba*.

To the Honourable *William Atwood*, Esq;
Abraham d'Peyster, Esq; and *Robert Walters*, Esq; Judges of this Special Court.

The Humble Petition of Nicholas Bayard;

Sheweth,

‘ **T**HAT your Petitioner’s Council have in-
‘ form’d him, That on Yesterday they
‘ pray’d in the Petitioner’s Behalf, the Favour
‘ of this Court, to prove before your Honours,
‘ by the Oaths of the major Part of the Grand-
‘ Jury, there also *subpœna’d* in Court, that the In-
‘ dictment brought in for High-Treason against
‘ your Petitioner by Capt. *Johannes d’Peyster* (as
‘ being Foreman of the said Grand-Jury) was
‘ not Found, nor Agreed to, by any Twelve of
‘ that Jury, tho’ the most Part of them (as is evi-
‘ dently known) are your Petitioner’s mortal
‘ Enemies, for no other Cause, but on account
‘ of the unhappy Divisions within this Province.
‘ Which said Prayer of your Petitioner’s Coun-
‘ cil (as he is also inform’d) your Honours have
‘ been pleas’d to over-rule, as not being practi-
‘ cable by the common Form of the Court’s Pro-
‘ ceedings. But, *may it please your Honours*, this
‘ being a Matter of that moment, whereof hardly
‘ a Precedent is to be found, as that a Foreman
‘ shall so far impose upon a whole Grand-Jury,
‘ as to bring in an Indictment *Billa Vera*, which
‘ the said Inquest did not Find nor Agree unto,
‘ neither in Matter nor Form: Your Petitioner
‘ therefore most humbly prays, That your Ho-
‘ nours will be pleas’d to take the Premises into
‘ your Honours serious Consideration, and to
‘ grant your Petitioner that Favour, as to have
‘ all the said Nineteen of that Grand-Inquest sworn
‘ before your Honours to discover the Truth,
‘ and to afford your Petitioner such Relief therein,
‘ as to your Honours shall seem most just and
‘ expedient. But if it should so happen (as your
‘ Petitioner does not hope) that your Honours
‘ do not think fit to grant this your Petitioner’s
‘ most humble Request, your Petitioner further
‘ prays leave to acquaint your Honours with the
‘ excessive and almost unparallel’d Hardships your
‘ Petitioner, in this very Trial, labours under.
‘ In the first place, for that the Grand-Jury, al-
‘ tho’ your Petitioner had often pray’d Mr. Sher-
‘ riff, that he might have the Favour and Justice
‘ of being try’d by *English* Men, and of *English*
‘ Extraction, of the best Character for Know-
‘ ledge, Integrity, Justice, Conscience, and Es-
‘ tates; yet notwithstanding your Petitioner had
‘ not one allow’d him of *English*, but all of ’em
‘ of *Dutch* Extraction and Education, and several
‘ of ’em ignorant to that degree, that they can
‘ neither write nor read, nor so much as under-
‘ stand the *English* Language, tho’ sufficient
‘ Numbers of *English* Men of very good Abili-
‘ ty, Understanding, Integrity, Conscience, and
‘ Estate, were to be had in the Bailiwick.

‘ And, for a second Instance of your Petition-
‘ er’s Hardships, he finds now also a Petty-Jury
‘ impanel’d to serve upon his Trial, all of ’em,
‘ except Five or Six, in like manner of *Dutch*

‘ Extraction and Education, most of ’em Handi-
‘ craft and Labouring Men; very few that ever
‘ were of any Juries whatsoever, and extream ig-
‘ norant in the *English* Language.’

Your Petitioner therefore most humbly prays,
That your Honours will be pleas’d to take the
Premises into your Honours favourable and
serious Consideration, and to afford your Pe-
itioner such Relief therein as to your Ho-
nours in Justice and Equity shall seem fit.
And, as in Duty bound, &c.

N. BAYARD.

Mr. *Atwood*. Let a Minute be enter’d, That
the Petition was read; and, that it does appear
to the Court, that the Bill was found by more than
Twelve of the Grand-Jury.

Mr. *Atwood*. Colonel *Bayard*, the Laws do in-
dulse you with Counsel; Did you advise with
them concerning this Petition?

Bayard. No, I did not.

Mr. *Atwood*. ’Twere better you had; for you
have acted very indiscreetly in this Matter, to
arraign the Justice of the Grand-Jury.

The Jury being call’d, appear’d.

Timon van Bursfert. Prisoner accepts.

Mr. *Soll. Gen.* I challenge him for the King.

Mr. *Emot*. You are not to challenge, Mr. *Solli-*
citor, without Cause, by the Statute 23 *Edw. I.*

Mr. *Soll.* By the Common-Law the King could
challenge without Cause, but, by the Statute, that
was taken away; and in the late Trial of *Peter*
Cook, it is said by Lord Chief-Justice *Treby*, That
the King should shew Cause, if not enough on
the Pannel to serve, but not else.

Mr. *Atwood*. It is a Thing so plain, I wonder
you will insist on it.

Mr. *Nicholl*. We say the King should shew
Cause, but do not say when.

Gysber van Inbrough. Prisoner accepts.

Mr. *Soll.* challenges for the King.

Gerryt Unkle. Prisoner accepts.

Mr. *Soll.* challenges, &c.

William Janeway. Prisoner accepts.

Mr. *Soll.* challenges, &c.

Isaac Stoutenburgh. Prisoner accepts.

Mr. *Soll.* I don’t challenge him, but desire he
may be sworn on a *Voire dire*, whether any Per-
son hath been with him on behalf of the Prison-
er, to desire him to be favourable to the Prisoner
on this Trial.

[*Who was sworn upon a Voire dire, and*
afterwards for the Trial.]

Richard Saetel. Prisoner. I make no Challenge.

Mr. *Soll.* I desire to know whether I may not
first have him sworn upon a *Voire dire*, and after-
wards challenge him.

Mr. *Atwood*. No; you must challenge peremp-
torily first.

Prisoner. I pray the Solicitor may first make
all his Challenges, and only leave me a Pannel
of Forty-eight Jurors.

Mr. *Atwood*. No, that must not be.

[Memor-

[Memorandum. *The rest of the Eighty Jurors in the Pannel were in like manner challeng'd by the Prisoner or Sollicitor, till the Number of Twelve were sworn, viz. one of them an Alien, two no Freeholders, and all the rest Dutchmen, or of Dutch Extraction, born here, very ignorant of the English Language, and of mean Capacities to an extream Degree.*]

The Names of the Petty Jurors were as follows; viz.

Isaac Stoutenburgh,	}	Barent Kool,
Jacob vander Spiegell,		Goert Olpherto,
Andries Marshalk,		Samuel Beckman,
Gerret Viele,		Cornelis Clopper,
Thomas Saunders,		Conrael Teneyck,
Jacob Cornelisse,		Jacobus Goelet.

Mr. Sollicitor made an Introductory Discourse and Harangue of about an Hour long, and had some Sheets of Paper in his Hand, out of which he read several scurrilous and false Reflections on the *English* Inhabitants of this Colony, with the *French*, and principal *Dutch*, having Retrospection for many Years past, only design'd to incense and enflame the Jury, charging the Prisoner to be the *Head of a Faction*, a malignant Party, who had endeavour'd to introduce *Popery* and *Slavery*, Disturbers of our *Israel*, as they had been that of Capt. *Leyster's* Government, which (he said) was now justified at Home to be Legal: That the said Party was a *Nest of Pirates*, *Betrayers of our Prince and his Laws*, a *Parcel of Banditti's*, who offer'd the late Earl of *Bellamont* a Reward of Ten Thousand Pounds to connive at Piracies, and One Thousand Pounds to himself to sollicite it: That some mean and broken Merchants in *London* had made Complaints in their behalf to the Lords of Trade and Plantations, and to the Parliament, against the said Earl; but that the said Earl's Proceedings were approv'd of; and used scandalous Reflections on Mr. *Veasy*, Minister of *Trinity Church*, and against Col. *Smith*, the first Member of Council, tho' nothing relating to this Trial, and own'd himself of the *Leysterian* Party, and that he would stand and fall by it, &c.

Then call'd his Witnesses; who gave their Evidences in the following Words, as they were taken in open Court, and since agreed unto by all of them respectively, as followeth.

Samuel Clows sworn, saith:

Gentlemen, when I come to speak of the Addresses, I must pray you to take notice, that I can speak positively to but very few Things that is in them: What I say is to the best of my Remembrance and Understanding, for I may be mistaken in both.

'Twas about a Fortnight or Three Weeks before Colonel *Bayard's* Commitment, that I happen'd to come to his House about some Business, not at all relating to this Matter; concerning which, as we were talking, Colonel *Bayard* ask'd me, if I had seen the Addresses? I answer'd, No. He then shew'd me three Addresses; the first was to my Lord *Cornbury*; the Persons addressing

in it call'd themselves Inhabitants of *New-York*, and others distant from it: And because some of them could not perhaps be present at his Lordship's Arrival here, did, by way of Address, congratulate his Lordship into this Government, wishing him all Health and Prosperity here, and that the Name of *Party* might be banish'd from among us. After I had read it, Colonel *Bayard* ask'd me, if I had any thing to say against it? I answer'd, No, and then sign'd it. The other two Addresses were, one to the King, and the other to the House of Commons, or to the Parliament (I am not positive which): As I had read them, I remember I made this Observation in my self, That they contain'd nearly both the same Things; and in them, or one of them, to the best of my Remembrance, were contain'd these Things, The Persons addressing, call'd themselves *Englishmen and others*, who, tho' Foreigners, were entituled to the Privileges of *Englishmen* here. It speaks concerning the late Revolution here, of which I have but a confused Idea, and can remember nothing particular: Afterwards it speaks concerning my Lord *Bellamont's* Administration; in several Articles, of which I can remember but one, which is, That the *Hottest* and *Ignorantest* of the People were put into Places of Trust. Then it speaks concerning the late Assembly here, and tells you, That after this Assembly had chose a Speaker, some of the Representatives were inform'd that he was an *Alien*; upon which they made a Motion to the House, that that Matter might be enquir'd into; but that Motion being refused, one half of the Representatives, or Ten of 'em, left the House; notwithstanding which, the remaining Part of the Representatives, with some others they took in, did proceed to make Acts: In one of which Acts they gave a Sum of Money to the Lieutenant-Governor, to tempt him to pass these Acts; and likewise a Sum to the Chief-Justice of this Province, to find Law and Form for their Proceedings; and, that these Things tended to the rendering the Government vile and cheap in the Eyes of the People.

Mr. *Soll.* What Names do you remember you saw to the Addresses?

Clows. I saw several Names there; but whether to all Three, or Two of 'em, or only to that of my Lord *Cornbury*, I cannot say; but I did, to the best of my Remembrance, see the Names of *Rip van Dam*, *Matthew Ling*, *Charles Wooley*, *Robert Livingstone*, and Mr. *Anderson*; but I am not certain whether I saw Mr. *Jamison's* Name there or no. When I had read them, I told Colonel *Bayard*, they contain'd Things done before my Time, and I did not therefore think it proper for me to sign 'em; upon which he reply'd, Then don't sign 'em.

Mr. *Soll.* I shall read what you said before the Council.

Clows. Do so, if you please.

Mr. *Soll.* Don't you remember that it was said, that my Lord *Bellamont* had put the most ingenious and honestest Men of the Province out of all Places of Trust?

Clows. No, I can't remember that.

Mr. *Soll.* I think you said so before the Council.

Clows. Perhaps I might say something like it when I was before the Council, tho' I don't believe there is any essential Difference between what I now say, and what I said to the Council; yet if there be, I hope what I then said will not be taken to my Prejudice: I was then sent for by the Governor's Letters, which seemed to import, that he had Business with me of a far different Nature than to examine me about this Matter; so that I was then in a Surprize.

Mr. Soll. But you believe what you then spoke was true?

Clows. Without doubt; and I hope *Mr. Cofens* took care truly to write down what I then deliver'd; but, whether he did express my Meaning right or no, I know not; for I did not look over his Notes till the Day I saw them at your Chamber.

Mr. Soll. Was not the Assembly call'd an Illegal Assembly; and, that they had made Acts prejudicial to the Country?

Clows. No, I do not remember that.

Mr. Soll. Was it not said, That the Scum of the People were put into all Places of Trust?

Clows. Perhaps I might before the Council use the Word *Scum*; but I now think it was, That the *Hottest* and *Ignorantist* were put into Places of Trust.

Mr. Soll. *Mr. Clows*, pray tell us, What was the Reason you did not sign the other two Addresses?

Clows. I think I am not at this time oblig'd to tell that, being it does not at all affect the Matter.

Mr. Atwood. Yes, but it does; you must tell us.

Clows. One of the chief Reasons was, because I then thought, that the saying the Assembly had given a Gift to the Lieutenant-Governor, to tempt him to pass their Acts, was a Reflection upon the Lieutenant-Governor; but it is my Judgment now, that it was no Reflection at all upon him.

Mr. Soll. How! and don't you think so now?

Mr. Atwood. He only speaks it as his Judgment.

Mr. Soll. Don't you remember, that the Assembly was call'd *The Pretended Assembly*?

Clows. No.

Mr. Soll. Don't you remember 'twas said, *their Illegal Proceedings*? Don't you remember the Word *Illegal*?

Clows. No, I cannot remember that; and I did desire you, at your Chamber, to put that Word out of the Clerk's Notes.

Col. Bayard. Did I ever ask you to sign them?

Clows. No, you did not; you was so far from doing that, that you rather persuaded me not to sign 'em; and so did *Madam Bayard*, who was then in the Room.

Mr. Nicholl. Do you remember any thing of the Word *Oppression* in the Address?

Clows. No, I do not remember that Word.

Mr. Soll. That the King's Subjects were oppress'd here?

Mr. Nicholl. Was the Assembly call'd an *Unlawful Assembly*?

Clows. No, Gentlemen; I can speak positively to but few of these Things; what I say is, to the best of my Remembrance and Understanding.

Peter Olyre, a Frenchman, sworn; and for that he could speak no English, *Mr. Bricfack*, Chaplain to the Garrison, was sworn to be his Interpreter.

Mr. Soll. What do you know of the Papers that were at *Col. Bayard's*? and, Did you sign them? or, Who desir'd you so to do?

Odyre. Going by *Colonel Bayard's* House, one *Mr. Bodinst* told me, I must step in to *Col. Bayard's*, and sign an Address to the King; and as I was a going in, I met *Col. Bayard* coming forth of his House; and going in, I saw the Addresses lying on the Table.

Mr. Soll. Did *Colonel Bayard* then persuade you to sign them? or, Did he tell you it was for your Good to sign them?

Odyre. *Colonel Bayard* then told me, I might sign if I would, or that I might not; and the *Colonel* also told me, it was for the Good of the Country, and, that if I was willing I might sign them; if not, I might let them alone; and then went away.

Mr. Soll. I will now prove the Addresses sign'd at the Coffee-house, and that *Colonel Bayard* attended there for that Purpose.

W. Richardson, Inhabitant and Housekeeper in the City, sworn.

Mr. Soll. What do you know, *Mr. Richardson*, concerning the signing the Papers at the Coffee-house?

Richardson. One Day drinking at one *Spencer's*, I was desir'd to go to the Coffee-house, which I did; and, when there, I saw a great many People, I believe near an Hundred; and coming above Stairs, I saw Papers on the Table, which were call'd *Addresses*, which I sign'd with others; and I saw, among others, *Colonel Bayard* there; but he seem'd to be no more acting or concern'd than any other.

Mr. Atwood. You are very forgetful of what you swore before the Governor and Council; but, to put you in mind of somewhat of it, Did nobody tell you what Papers were to be sign'd?

Richardson. No body at all.

Mr. Soll. How many Papers did you sign?

Richardson. I sign'd three, but did not know what they were, but was told they were Addresses to the King, and my Lord *Cornbury*, and the Parliament, but did not read any of them; but, I think, one of them complain'd, that the People lay under some Hardships here.

Mr. Soll. You declar'd much more before the Council.

Richardson. I was then call'd suddenly before the Council, and was surpriz'd.

John Bashford sworn.

Mr. Soll. *Mr. Bashford*, tell the Court and Jury what you know concerning the Papers at the Coffee-house.

Bashford. I was at the Coffee-house, where I saw the Papers, or Addresses, but don't know what they were or contain'd; and I sign'd four or five Papers there, but did not stay half a Quar-

ter of an Hour. When I was there, I saw Colonel *Bayard* amongst many others in the Room, but did not see his Name, as I remember, to any of the Papers.

N. B. *These five Papers were the three Addresses and the two Duplicates.*

Mr. *Atwood*. These Witnesses are very unwilling, or very forgetful, having given a much different Account of Things upon their Oaths before the Governor and Council.

Bassford. I have now had Time to recollect myself, but was then under a surprize, not knowing what I was sent to for.

Mr. Michael Christian *sworn*.

Mr. *Atwood*. Mr. *Christian*, What do you know concerning the Papers, or Addresses, sign'd at the Coffee-house?

Christian. I remember, some Time since, about *Christmas* I believe, I was at the Coffee-house, where I saw the Addresses with many other People, but can't tell how many.

Mr. *Atwood*. Do you believe there were more than Twenty?

Christian. No, I believe there were not. I found three Addresses there, and sign'd 'em all, but the Substance thereof I cannot now remember; 'tis a good while since, and therefore I cannot speak positively to it. I remember, a Question was ask'd me at the Council, Whether there was any Complaints in the Addresses that the Soldiers wanted their Pay? I believe I might then answer something about it, but I do not know any such thing in the Addresses, either of the Soldiers or their Pay. I remember, that Colonel *Bayard* was then at the Coffee-house when I sign'd the Addresses, but don't remember that any body desir'd me to sign.

Mr. *Atwood*. How many Hands, Mr. *Christian*, did you see to the Addresses?

Christian. I cannot tell how many, but remember Colonel *Bayard* amongst others was there; but he never ask'd me to sign either of the Addresses; nor can I remember, that there was any Thing concerning either the Soldiers or their Pay in the Addresses.

Mr. *Atwood*. Certainly these Gentlemen are very unwilling Evidences: Mr. *Christian* is a Gentleman of good Learning, and it's strange that he should be so forgetful, that he cannot remember what was given in on his Oath before the Governor and Council: He has either a weak or treacherous Memory.

Mr. Hugh Gray *sworn*.

Mr. *Sol*. Mr. *Gray*, What do you know concerning the signing of those Papers at the Coffee-house?

Gray. About *December* last, being at the Coffee-house, I met there one Mr. *Scot*, who ask'd me to go up into the Upper-Room, which I accordingly did; and when there, I saw on a Table some Papers, which afterwards I understood were Addresses to the King, Parliament, and Lord *Corn-*

bury. Some body ask'd me to sign 'em, which I did accordingly, but don't know who it was. I remember Col. *Bayard* was there amongst others, smoaking a Pipe of Tobacco: I believe there might then be about ten Hands to the Papers, and about five in the Room; that I read all the Addresses, but cannot now remember the Contents of 'em.

Mr. *Atwood*. Mr. *Gray*, Do you remember there was any Complaints against the Government in those Addresses?

Gray. No.

Mrs. Hannah Hutchins *sworn*.

Mr. *Sol*. Now, may it please your Honours, I will prove the Papers sign'd at another Place.

Mr. *Atwood*. Mrs. *Hutchins*, What do you know concerning these Papers brought to your House?

Mrs. *Hutchins*. About *Christmas* last Col. *Bayard* brought some Papers to my House, and left 'em with me, but did not stay at all, but bid me shew them to my Husband, who was then at Church. These Papers remain'd at my House about three Days, and then I deliver'd 'em to a Negro, who was sent for them, but do not remember whose Negro it was: Col. *Bayard* was not at our House while the Papers lay there.

Mr. *Sol*. Now I shall proceed to prove what sort of People were drawn in to sign these Papers.

John Read *sworn*.

Mr. *Atwood*. What do you remember concerning any Addresses or Papers at the House of Alderman *Hutchins*?

Read. Being on the 26th of *December* at Mr. *Hutchins*'s House, I there saw some Papers, which one Mr. *Burroughs*, then present, ask'd me to sign, telling me, they were Addresses to the King, Parliament, and Lord *Cornbury*, made for the good of the Country, and which were lying on the Bed there; and thereupon I sign'd them, but did not read 'em: I did not see Col. *Bayard* there, but believe I saw his Name to the Papers. I saw a great number of Names subscrib'd to the Papers, as near as I can judge, about Two hundred.

Mr. *Sol*. Of what Age are you?

Read. About Seventeen Years of Age.

Edward Marshal *sworn*.

Mr. *Atwood*. Where did you see these Papers? and, What do you know of them?

Marshal. Going one Day, about *Christmas*, to the House of Mr. *Hutchins*, to get a Witness to a Letter of Attorney, I saw there five Addresses, which I sign'd; one was to the King, another to the Parliament, and another to the Lord *Cornbury*, congratulating his Arrival: I read some of them, but found nothing in any of 'em that reflected upon the Governor: There was some Complaint of the Speaker of the Assembly being an *Alien*. Looking on the Names of the Subscribers, I saw the Name of *Edward Marshal* before I had sign'd, but I don't know but there may be more *Edward Marshals* than one in the Province. I did not see Col. *Bayard* at the House, nor his Name to the Papers.

John Buckley *sworn.*

Mr. *Atwood.* What do you know concerning any Papers at the House of Mr. *Hutchins*?

Buckly. Coming home from the Fort, and passing by Mr. *Hutchins*'s House, I was ask'd to walk in by Mr. *Hutchins*, which I did; and being come into the Upper-Room, I saw some Papers there, which were call'd *Addresses*; but I did not read any of 'em, but that to my Lord *Cornbury*, which, as I understood, was a Compliment and Congratulation to him at his Arrival here. Mr. *Hutchins* then ask'd me to sign it, but I refused, because being a Lieutenant in the Garrison, I was unwilling to do any such thing before any of my elder Officers had done it. But I did not see Col. *Bayard*, nor his Name there.

Francis Cherman *sworn.*

Mr. *Atwood.* Give an Account what you know concerning any Papers or *Addresses* at the House of Alderman *Hutchins*.

Cherman. Coming a while ago to Mr. *Hutchins*'s House, and going up Stairs, I saw certain Papers there, and some People: Mr. *Hutchins* ask'd me to sign those Papers, telling me they were *Addresses* to the King and my Lord *Cornbury*; that they were for the good of the Country and the *English*; and I expected by it to be made Free of the City, and sign'd therefore; but did not see Col. *Bayard* there, nor don't remember the Contents of the Papers.

One Button *sworn.*

Mr. *Atwood.* What do you know concerning the Papers, &c.?

Button. Hearing by some of my Fellow-Soldiers that there were some Papers or *Addresses* at Capt. *Hutchins*'s, I was willing to go and see what they were; and coming to the House, there I found Five Papers, and sign'd them all Five, but do not remember to whom they were directed. Capt. *Hutchins* was there, but said nothing at all to me about the Papers, or signing them; nor can I remember whether they were in Paper or Parchment. I believe there were then about thirty Names subscrib'd, but saw neither Colonel *Bayard* nor his Name there.

i. e. The three *Addresses*, and the Duplicates of two of them.

Robert Crannel *sworn.*

Mr. *Atwood.* What do you know, &c.?

Crannel. Some Time since I came to Mr. *Hutchins*'s, and there found Five *Addresses*: I read that to my Lord *Cornbury*, and some of the two others to the King and Parliament: In one of 'em, to the best of my Remembrance, was contained a Complaint, That the People of this Province lay under more Hardships than formerly, and that the Speaker of the Assembly of this Province was an Alien. I saw Col. *Bayard*'s Name to that to my Lord *Cornbury*, but am not acquainted with his Hand-writing at all. After I had read some Part, and been told what the rest of the Papers were, I signed them all Five, but no body desired or persuaded me to do it.

Mr. *Atwood.* Your Evidence is not so full as when you gave in your Information on Oath before the Council.

Crannel. But it is, and I know nothing more.

One Griggs *sworn.*

Mr. *Atwood.* What do you know, &c.

Griggs. I was desired by one *Bovell*, a Soldier in the Garrison, to go to Mr. *Hutchins*'s House, and sign some Papers: I was told, and believed, it was to make me Free of the City: Thereupon I went to Mr. *Hutchins*'s, and there signed them, but did not see Col. *Bayard* there.

One Garnet *sworn.*

Mr. *Atwood.* Tell the Court what you know, &c.

Garnet. A great many of the Soldiers of the Garrison signed, and they expected thereby to be made Free of the City, many of them being Tradesmen.

One Fleming *sworn.*

Mr. *Atwood.* What do you know, &c.?

Fleming. Coming some time since to the House of Mr. *Hutchins*'s, I there saw some Rolls opened, with a great many Names thereto, but did not see any other Writing: To this I put my Name, and also then put down two or three Names for others, at their Request, they having first put their Marks. I and the others expected by this to be made Free of the City. I believe out of 160 Men now belonging to the Fort, or thereabouts, there may be about 30 that signed.

After the addresses were full, they signed on the Backside.

One Bovell *sworn.*

Mr. *Atwood.* What do you know, &c.?

Bovell. Coming to Capt. *Hutchins*'s, I was shewn some Papers, which I was told were *Addresses*, to which I put my Mark, without being desired by any body; I cannot write nor read. When I had set my Mark, Mr. *Hutchins* told me, That if any of my Fellow-Soldiers would come and sign also, they might; if not, they might let it alone. By this signing I expected to be made Free of the City, but not from being a Soldier; but never heard Capt. *Hutchins* say so.

Mr. *Sol. Gen.* I have now no more Witnesses against the Prisoner. Here is a Paper signed by him; I desire the Clerk of the Council may be sworn to prove the same.

Mr. *Cofens*, the Clerk of the Council, *sworn.*

Col. *Bayard.* I own that Paper: It is a Petition to the Lieut. Governor and Council in Behalf of Ald. *Hutchins* then in Prison; owning, with Mr. *French*, Mr. *Wenham*, and Mr. *Van Dam*, that the Copies of three *Addresses* to the King, the Parliament, and the Lord *Cornbury*, were in our Hands.

Then the Petition was read, and was the same as is entered in Pag. 419.

After this, the Act of Assembly, on which the *Militium* is grounded, was read; and after that, the Commission to the Lord *Bellamont* at large, and the Lieut. Governor's Commission.

Mr. *Sol. Gen.* I desire Mr. *Emot* may be sworn, Whether he did not give Advice to a certain Person about that Clause in the Address to the Lieut. Governor in Favour of Ald. *Hutchins*; viz. *That the Lord Cornbury succeeded the Earl of Bellamont as Governor in New-York?*

Mr. *Emot* was commanded by Mr. *Atwood* to be sworn; and being sworn, said, I told Mr. *French* these Words in the said Address did not run current, and might give ground of Exception to some who would be apt to strain every Word to the Prisoner's Disadvantage. To which Mr. *French* replied, They had drawn the Addressees themselves, and believed it was well enough.

Mr. *Sol. Gen.* I have now prov'd by the Witnesses those false and scandalous Libels set forth in the Indictment, whereby the Good, Peace and Quiet of the Government has been disturbed, which by this Act of Assembly is High-Treason. I have likewise proved, that the Soldiers were drawn in to sign those scandalous Libels, and that some did sign blank Rolls, which was listing of Soldiers, and is Treason. By these Words in the Petition to Lieut. Governor and Council, viz. [*Who we understand, by certain Advice we have received from England, to be nominated by his Majesty to succeed the late Earl of Bellamont as our Governor*] is a disowning and casting off the present Authority, and his Majesty's Government.

Mr. *Nicholl.* Your Honour and the Jury will please to take Notice, that the Indictment consists of divers Heads; as, That the Prisoner did compass, imagine, contrive, propose and design to defame, subvert, &c. the Peace, Good and Quiet of this his Majesty's Government.

That he used divers indirect Practices and Endeavours to procure Mutiny and Sedition amongst the Soldiers.

That he drew in Numbers of them, the said Soldiers and others, to sign false and scandalous Libels; and that he had signed them himself.

That in these Libels it is declared, That the Subjects in this Province are and have been for many Years last past, by those entrusted in the Administration of the Government, oppress'd; and that the Government hath been, and is rendered cheap and vile in the Eyes of the People; as also, that the General Assembly of this Province is not a lawful Assembly: By which means, &c. he hath incited his Majesty's Subjects to cast off their Obedience to his Majesty's said Government.

The Prisoner is not directly charged here with any Fact, except his own signing the said Libels, but for Endeavours; the rest are forc'd Conclusions and strain'd Inferences drawn from thence. It is not alledg'd, that the Peace of the Government hath been disturb'd, or that any Mutiny or Sedition hath been amongst the Soldiers, or that any one of his Majesty's Subjects hath cast off his Obedience to his Majesty's said Government. By the Course of the Evidence, it appears there was an Address to the King, an Address to the House of Commons, and an Address to my Lord *Cornbury*, and a Petition or Address to the Lieut. Governor and Council; but

all the Evidence is very lame and weak, as to the three first, if we should admit the making or signing of them to be any Fault or Crime, more especially if the same should amount to Treason: For by none of the Evidence it does appear, that those Addressees signed at the Coffee-house were the same Addressees which were at Col. *Bayard's*, or that the Addressees at Ald. *Hutchins's* were the same which were at the Coffee-house, or the same which were at Col. *Bayard's*: There is no Proof that the Prisoner signed these Addressees: Here is not so much as the Likeness or Comparison of Hands produced, alledged, or proved; tho' if it were, that would not do. In the great Trial of the Bishops, Mr. *Pollexfen* there affirms, p. 60. *That Comparison of Hands is not good in a criminal Case*; and offers the Lady *Car's* Case in *Siderfin's* Reports, p. 418; 419. where it is so adjudged.

But I shall not dwell upon the Evidence; it is certainly the Right of the Subject to petition the King, whenever he conceives himself aggriev'd. In the Bishops Trial, p. 160. Mr. *Pollexfen* says, *I never thought it, nor hath it since been thought by any body else, to be a Crime to petition the King.* Pag. 121. Serj. *Levinz* affirms, *The Subjects have a Right of petitioning the King in all their Grievances.* So say all our Books of Law; so says the Statute of the 13th of Charles II. *They may petition.* P. 126. Sir *Thomas Powys*, then Attorney-General, acknowledges Access to the King by Petition is open to every body; the most Inferior Person is allowed to petition the King. Pag. 135. Mr. Justice *Holloway* says, *It's the Birthright of the Subject to petition the King.* If it's the Birthright of the Subject to petition the King, to procure or draw in Men to do what it's their Birthright to do, can never amount to a Crime.

Mr. *Atwood.* I do not say petitioning the King is a Crime, but it may be to petition the House of Commons in the Plantations, where the King governs by Prerogative.

Mr. *Nicholl.* I cannot think it is a Crime for the Subjects of the Plantations to petition the House of Commons; it's every Day's Practice: Consult the Votes in every Sessions, you'll find many Addressees, Petitions, and Complaints from the Subjects of the Plantations: It seems to be the Right of the Subjects to petition the House of Commons. The Statute of the 13th of Charles the II. c. 5. restrains the Common-Law; by that it plainly appears to be the Right of the Subject to petition the House of Commons, or the King. The Proviso in that Act says, *That neither that Act, nor any thing therein contained, shall be construed to extend or hinder any Person or Persons, not exceeding the Number of Ten, to present any publick or private Grievance or Complaint to any Member of the House of Commons after his Election, or to the King's Majesty.* The Act of Recognition of *primo William and Mary*, declaring the Rights and Liberties of the Subjects, and settling the Succession of the Crown, thereby it is enacted amongst other Things, *That it is the Right of the Subject to petition the King; and all Commitments and Prosecutions for such Petitioning are illegal.* And they do claim, demand, and insist upon all and singular the Premises, as their undoubted Rights and Liberties; and that no Declaration, Judgment, Doings or Proceedings to the Prejudice of the People, in any the said Premises, ought in any
wise

wise hereafter to be drawn into Consequence or Example. Here is no Grant of any new Privilege, but a Claim and Acknowledgment of an Ancient Right; and Petitions to the Parliament are as ancient as Parliaments themselves. If the Subjects of the Plantations may not petition and complain to their Prince, they are in a worse Condition than Slaves. The Cries of the Oppressions in the Plantations have gone up to Heaven, and are again come down upon the Earth, and have inspired and moved the King and Parliament of *England*, to make a Law to check the exorbitant Actions of Governors in the Plantations, and make them accountable in *England* for their Miscarriages abroad; which can never be discovered to the King but by Petition. The Statute is in these Words.

An Act to punish Governors of Plantations in this Kingdom, for Crimes by them committed in the Plantations.

WHEREAS a due Punishment is not provided for several Crimes and Offences committed out of this his Majesty's Realm of *England*, whereof divers Governors, Lieutenant-Governors, Deputy-Governors, or Commanders in Chief of Plantations, and Colonels within his Majesty's Dominions beyond the Seas, have taken Advantage, and have not been deterred from oppressing his Majesty's Subjects within their respective Governments and Commands, nor from committing several other great Crimes and Offences, not deeming themselves punishable for the same here, nor accountable for such their Crimes and Offences, to any Person within their respective Governments and Commands: For Remedy whereof, *Be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal and Commons in Parliament assembled, and by Authority of the same*, That if any Governor or Commander in Chief of any Plantation or Colony within his Majesty's Dominions beyond the Seas, shall, after the First Day of *August*, 1700, be guilty of oppressing any of his Majesty's Subjects beyond the Seas, within their respective Governments or Commands, or shall be guilty of any other Crime or Offence, contrary to the Laws of this Realm, or in force within their respective Governments and Commands, shall be enquired of, heard and determined in his Majesty's Court of *King's-Bench* here in *England*, or before such Commissioners, and in such County of this Realm, as shall be assigned by his Majesty's Commission, and by Good and Lawful Men of the same County; and that such Punishments shall be inflicted on such Offenders, as are usually inflicted for Offences of the like Nature committed here in *England*.

This Prosecution seems to be made to frustrate and evade this Act of Parliament. The Subject is oppress'd, or conceives himself to be so, and complains of this Oppression; this Complaining is made TREASON! Here is a strange and fatal Dilemma on the Subjects of the Plantations; They must either suffer their Oppressions, or be hang'd for Traitors if they complain!

What relates to the Act of Assembly of this Country, it can by no natural or legal Construction be extended to make the Prisoner culpable. It is plain by the whole Purport of the Act, that it has made no new Treason; it only recognizes the King and Queen; and enacts, That those who shall do any thing destructive to that Establishment, by Force of Arms or otherwise, shall be *Rebels and Traitors*; which they would be without this Act. If this Address and Petition had been to the *French* King, the Thing had been of another Nature. By the same Construction, every petty Battery, or other little Trespafs, may be a Treason.

The Petition of *Col. Bayard*, and the other three, is so far from disowning the Government, that it is a direct Acknowledging of the same. The Direction of the Petition is, *To the Lieutenant-Governor, and the Council*: The Expression [*That they have Advice that the Lord Cornbury is to succeed the Earl of Bellamont*] can with no Justice or common Sense be construed to be a disowning and casting off of the Government. I think it will hardly be affirmed, That the Council succeeded the Earl of *Bellamont*, and *Capt. Nansan* the Council; if so, after the Earl of *Bellamont*, who was Captain-General? We had Seven Captains-General; which is an Absurdity, I suppose, none will alledge.

Some time after the Death of Capt. Nansan the Lieut. Governour was at Barbados.

A familiar Example will demonstrate the Weakness and Falsity of this Construction. If a Captain of a Company be killed or absent, the Lieutenant or next Officer has the full Command of the Company, as the Captain had, or could have; but I think no Man will say he succeeds the Captain, or that when another Captain is appointed, he succeeds that Lieutenant or other Officer. So that I cannot think there is any Fact or Crime alledged or proved against the Prisoner, to charge him with this high Crime of Treason, or indeed with any other Crime whatsoever.

Mr. Emot. By your Honours Permission, I am of Council for *Col. Bayard* the Prisoner at the Bar: But by reason I am unwilling to spend too much of your Time, this Trial already having been very long; and *Mr. Nicoll*, who is also of Council of the same Side, having amongst other things made it very evident, that for the Subject to petition his Majesty, is their ancient and undubitable Right; I shall therefore make it my Business only, as near as I can, to demonstrate to this Court and Jury, That had the King's Council made ample Proof of all the Matters of Fact alledged in the Indictment, as the signing the Addresses, and other Things therein contained, to have been true; yet, in point of Law, they cannot amount to that grand Crime of High-Treason.

In order to this, I shall, with as much Brevity as I can, examine into, and put your Honours in mind, and withal inform the Gentlemen of the Jury, what the Law of *England* (by which we are or ought to be govern'd here) hath been, for near the Space of Four hundred Years last past, relating to this grand Crime of High-Treason; whereby it will manifestly appear, how cautious the Parliaments of *England* have been in making and increasing the Laws to take away Mens Lives, and particularly for High-Treason. And I shall begin with the Statute of the 25th of *Edw. 3.* a Statute

to which the greatest regard has been paid of any Act of Parliament whatsoever, unless *Magna Charta*, as hereafter I shall briefly shew.

I must also observe to your Honours, That before the making of this Act of Parliament of the 25th of *Edw. III.* which was in *Anno 1350*, and which was the very first Act relating to Treasons; so many Things were charged as High-Treason by the Common-Law, and there were so many Ambiguities and Diversities of Opinions, that both History and our Books of the Law sufficiently inform us, scarce any Man knew how to behave himself. But now, by this Statute, the Particulars and Species of this grand Crime are reckon'd up, and all others excluded, till declared by Parliament. For tho' nothing can concern the King, his Crown and Dignity, more immediately than High-Treason, which our Law calls *Crimen læsæ Majestatis*, a Crime wronging Majesty; yet this good King *Edward III.* at the Request of the Lords and Commons of *England*, in a Parliamentary Way, and to make all After-ages happy, makes a plain Declaration of such Offences as should for the future be deem'd for High-Treason, and none other, unless declared by Parliament.

This Act of Parliament is branch'd out by Sir *Edward Coke*, in the Third Part of his *Institutes*, into Six Classes or Heads; which I shall the rather take notice of, for that Trials of this nature are very rare in the Plantations; and they are these:

1. The Compassing or Imagining the Death of the King, Queen or Prince, and declaring the same by some Overt-Act.

The Killing or Murdering of the Chancellor, Treasurer, Justices, &c. in their Place doing their Office, &c.

2. To violate, or carnally to know the King's Consort or Queen, the King's Eldest Daughter unmarried, or Prince's Wife.

3. Levying of War against the King.

4. Adhering to the King's Enemies, and declaring the same by some Overt-Act; and this must not be *Inimicus*, sed *Hostis*.

5. Counterfeiting of the Great-Seal, Privy-Seal, or King's Coin, &c.

6. And lastly, Bringing into the Realm, Counterfeit-Money, to the Likeness of the King's Coin, &c.

Now, if there is any other Offence which was not comprehended within one of these Classes, the same was thereby declared to be no Treason.

In a Clause of which Act of Parliament we find these Words; which I shall rather read, because I apprehend it will very much concern this ensuing Trial.

“ And because that many other like Cases may happen in Time to come, which a Man cannot think or declare at this present Time, it is ordained, That if any other Case, supposed Treason, which is not above specify'd, do happen before any Justices, the Justices shall tarry, without any going to Judgment of the Treason, till the Cause be shewed and declared, before the King and his Parliament, whether it be judged Treason or other Felony.”

By this we may easily perceive, and it's very obvious, that this Clause was made to prevent the Judges from taking upon them to declare any things to be High-Treason; but such as are particularly express'd by this Statute of the 25th of *Edw. III.* or by some other subsequent Act.

Again, in the Reign of *Richard II.* we find sundry other Things were declared by Parliament to be High-Treason, which were not comprehended within the Statute of 25th *Edw. III.* But yet upon the coming in of *Hen. IV.* it was again enacted and declared, That nothing should for the future be adjudged High-Treason, but what was so ordained by the aforesaid Statute 25 *Edw. III.* The Words are these:

1 *H. IV. c. 10.* “ That whereas in Parliament, in the 21st Year of the late King *Richard*, divers Pains of Treason were ordained by Statute, inasmuch as there was no Man who knew how he ought to behave himself, to do, speak or say, for doubt of such Pains; it's accorded and assented by the King, Lords and Commons, That in no Time to come, any Treason be adjudged otherwise than it was ordained by the Statute, in the Time of his Noble Grandfather King *Edw. III.*”

Now this Statute, I am humbly of Opinion, is directly in the Negative, which says, That for the future nothing shall be adjudged Treason, otherwise than it was ordained by the aforesaid Statute of the 25th of *Edw. III.*

Yet, nevertheless, this Indictment is grounded upon an Act of Assembly of this Province; which is, I am humbly of Opinion, not only contrary, but directly repugnant to the aforesaid Statute (which appeareth to me to limit all new Species of Treason to be declared by Parliament, and not elsewhere) which, if it should admit of such a Construction as is now intended, I think I may modestly say, it will introduce Five Hundred several new Species of Treason: So that his Majesty's good Subjects of this Province would fall under much greater Hardships than whatever the People of *England* were sensible of before the making of this Act (which I cannot too often mention) of the 25th of *Edw. III.*

If we look further downward, upon the coming in of *Edw. VI.* which was in the Year 1546, sundry new Species of Treason having been again introduced by Act of Parliament, it was in the very First Year of his Reign enacted, That no Offence, made Treason by any Statute, should be so deemed and adjudged for the future, but such as were made Treason by the aforesaid Statute of 25 *Edw. III.* other than such as were by that present Statute ordained and declared.

But yet in Queen *Mary's* Time, in the 1st Year of her Reign, this grand Crime was brought to its ancient Standard; and it was then declared in Parliament, *That no Act or Offence whatsoever should be deemed Treason or Misprision of Treason, but such as were declared by the Statute 25 Edw. III.* And the Substance of the Preamble is this, *That the State and Safety of the King standeth more assuredly by the Love of his Subjects, than Fear of his Laws.*

So that upon Examination, we find how careful and cautious the People and Parliament of *England* have been in introducing and increasing of Sanguinary Laws, and that thro' the Revolution of many Ages. And hereby it's very remarkable, what a great regard has been in all Ages paid to this venerable Statute of 25 *Edw. III.* which with great Care has been continued down to us to this very Time, and is now in its full Force. Sir *Edward Coke*, treating thereof, tells us, That the Parliament, in which this Act was made, for many Years after was called, *Benedictum Parliamentum*, the Blessed Parliament.

If we look but into the Bill of Attainder of *Thomas Earl of Strafford*, in the Year 1640 and 41, even in those Times, what regard was paid to this Statute, which I have so often mentioned, wherein it was provided, That the Judgment against the said Earl should never be drawn into Precedent: And the Words are these, “ Provided, “ That no Judge or Judges, Justice or Justices “ whatsoever, shall adjudge or interpret any Act “ or Thing to be Treason, nor hear or determine “ any Treason in any other Manner, than he or “ they should or ought to have done before the “ making of this Act.

Now, if we do but reflect upon the great Concern and Care that has been taken thro’ all Ages, by the wise People of *England*, in preventing the Judges from interpreting any Act or Thing whatsoever to be Treason, but such only as are enumerated in the Statute of *Edw. 3.*

And at the same time give our selves leave to think, how industriously we labour to introduce an Act of Assembly of this Province, to make, as I said before, even Five hundred new and never heard of Species of Treason: I say, if we do but consider this, ’tis Matter of great Amazement, and more especially in such an Age as this, and in so happy a Reign, where no Man ever questioned, or at least doubted of the true Enjoyment of our Laws and Liberties, tho’ never so remote from the Fountain Head.

I am afraid, I have already trespassed upon your Honours Patience: I shall therefore conclude with some Observations upon the Act of Assembly, upon which this Indictment is laid.

Now both the Title, Preamble and Words of this Act of Assembly, and the Cause of making thereof, is very obvious (however the same may be now interpreted) which were these Two:

1st, For the future, to prevent the setting up a Power over his Majesty’s Subjects in this Province, without Authority from the Crown of *England*; which was found to be of fatal Consequence in the late unhappy Disorders in this Province.

2^{dly}, To express the Love, Loyalty and hearty Affection of the People to their Majesties King *William* and Queen *Mary*; and, as far as in them lay, to recognize them their Sovereign Leige Lord and Lady. I doubt not but your Honours will see Cause to recommend the same to the Jury, in delivering the Charge: And that no strain’d Construction of this Act of Assembly can ever affect the Prisoner, *Col. Bayard*, or in the least blast his long-experienc’d Loyalty to the Crown of *England*, and in a special manner to his present Majesty King *William*.

I had almost forgot to beg Leave of the Court to apply my self to the Gentlemen of the Jury, to obviate some Objections, or rather a vulgar Error, that usually hath crept in amongst them upon Trials, and particularly upon Indictments; which is, they do believe,

That if the Matters of Fact alledged in the Indictment be but proved, they are to have no regard to Matter of Law: Which I take to be a very great and dangerous Error in them.

For tho’ it be true, and must be granted, that Matters of Fact are the most common and proper Objects of a Jury’s Determination, and Matters of Law that of the Judges; yet as Law ariseth out of, and is interwoven and complicated with Fact, it cannot but fall under the Jury’s Consideration: For, should it be otherwise, if a Person should be in-

dicted for doing any common, innocent or lawful Act, if it be but cloathed and disguised in the Indictment with the Name of Treason, or some other high Crime, and proved by Witnesses to be done, then the Jury would lie under a Necessity of finding the Prisoner Guilty. No:

Do we not find in most general Issues, upon *Not Guilty* pleaded, as upon Indictments of Trespasses, Breach of the Peace, Felony, and even in Cases of High-Treason; yet the Jury do not find the Fact of the Case by it self, leaving the Law to the Court, but find the Party *Guilty*, or *Not Guilty*.

And this will more evidently appear upon Indictments of Murder, that the Jury are Judges as well of Matter of Law as of Fact. For is it not every Day’s Practice, where Persons are indicted of Murder; the Jury doth not only find them *Guilty* or *Not Guilty*, but many times, upon hearing and weighing of Circumstances, the Jury brings in the Prisoner not only *Guilty* or *Not Guilty* in general, but brings them in either *Guilty of Murder* or *Manslaughter, by Misadventure or Se Defendendo?* &c.

So the Jury being well apprized of the true Matter of Fact, of which they are sole Judges, can better apply the Matter of Law; for, says my Lord *Coke*, *It’s by fitly applying Matters of Fact and Law together, that the Jury brings forth their Verdict*; which, I hope, you Gentlemen of the Jury will carefully do.

Prisoner. I desire some of my Evidences may be called, to give an Account of my Life and Conversation. Which was granted.

Mr. Veasy, Minister of *Trinity Church*, being sworn, said, I have been for Six Years personally acquainted with *Col. Bayard*; during which Time his Life and Conversation recommended him in the World as an Exemplary *Christian*: And the frequent Expressions of his Zeal and Affection to his Majesty’s Person and Government, convinced me, that he was a good Subject.

Pris. Call Capt. *John Kipp*. Who being called, was absent.

Call Capt. *Tudor*.

Tudor sworn, said, I have known *Col. Bayard* 26 Years, a moderate, civil, good Man, has been employed in almost all Offices of the greatest Trust in the Government, never disaffected, but stood up for the *Protestant Religion* and King *William*.

Pris. To prove that I have upon sundry Emergencies, during the late War, advanced of my private Fortune upon Loan without Interest, several considerable Sums of Money, for the Preservation of his Majesty’s Interest and Government in *New-York*, of which upwards of 200*l.* Money in Specie lent, is still unpaid; I desire *Mr. Jamison*, who was then Clerk of the Council, may be sworn.

Jamison being called, appeared.

Mr. Atwood. *Mr. Jamison* has refused to purge himself of signing those Addresses, and is *Particeps Criminis*, for which Reason he cannot be allowed to be an Evidence.

The Evidence being sworn and examined, the Solicitor-General, without answering the Authorities offered by the Prisoner’s Council, relating to the Treason, summ’d up the Evidence, as to Matter of Fact.

Mr. Atwood gave the Charge to the Jury, in a long Discourse; and among other Things insisted, That the Indictment was not laid upon the Act of 25 *E. 3.* nor any Act of Parliament, but upon an Act of Assembly of this Province, confirmed by

by his Majesty, which had Power to make Acts for High-Treason, as well as the Parliaments of England; and that the said Statute was confined to England, because by the same Statute it is enacted, That if any Doubt should arise, the same be adjourned unto Parliament; which must be understood of the Parliament of England.

That it is High-Treason, by the Act of Assembly, by any Manner of Ways, or upon any Pretence whatsoever, by Force of Arms, or otherwise, to disturb the Peace, Good and Quiet of the Government, as it is now established; which he said was proved by Overt-Acts laid in the Indictment; which were, by signing of Libels against the Government, and thereby enticing the People to cast off and disown the same; and chiefly, by the Soldiers signing Complaints against their chief Officers; which tended to Mutiny, and was Treason by the Common-Law.

That by bringing the Papers to *Hutchins's* House, the Prisoner had made himself guilty of all that was done there, by the Soldiers and others signing those Papers.

That the Right of petitioning the King was not in Dispute, but the Manner of doing it made it criminal.

That it was plain the Address of the Prisoner and his Three Fellows, was a disowning of the present Authority, and casting off his Majesty's Government as it was then establish'd; for Capt. *Nansan* succeeded the Lord *Bellamont* (as by the Commission appeared) and not my Lord *Cornbury*; which was a plain Overt-Act of Treason, by the Meaning and Words of the Act of Assembly.

That it appeared undeniable, that the Prisoner and his Son were always by the Papers, and that it was done with a great Number of People to affront the Government.

That the drawing in Soldiers to sign Petitions, is Mutiny and Sedition by the Law; and drawing of them in, on false Pretences, in hopes of Freedom in the City, and subscribing their Names on blank Lists, is lifting of Soldiers, and may be applied to invite in any Foreign Power: And thereupon strenuously insisted on the Validity of the Evidence, That the Facts laid in the Indictment were undeniably proved, and that those Facts did amount to High-Treason, within the Words and Meaning of this Act of Assembly; and that therefore the Jury could not do otherwise than bring in the Prisoner Guilty.

The Constable being sworn to keep the Jury, the Court adjourned till Nine a-Clock at Night: And the Jury then not being agreed, the Court did adjourn till Monday Nine a Clock, the 9th of *March*.

On Monday the 9th, the Prisoner was brought to the Bar, and the Jury sent for: They were asked, If they were agreed in their Verdict? They answered, they were not agreed, but desired some Direction of the Court. *Jacob Goelet* appeared as Foreman of the Jury, and read some Notes of what he said the Witnesses had sworn: Which were denied to have been sworn by the Council for the Prisoner, who prayed Mr. *Atwood* to satisfy the Jury of the Truth of the Evidence.

To this he answered, That he could not do it after the Charge given; but affirmed, it was no new Thing (as some pretended) after Charge given, to satisfy the Jury in some Matters of Law; and told, that he had received Letters from the Jury, and answered them; which Answers

were only his private Opinion. That if they were under any Difficulty, whether the Matters of Fact alledged in the Indictment, and which were proved to them, were Treason or no, they might find the Prisoner Guilty; who had his Advantage in moving in Arrest of Judgment, and might be relieved as to Matter of Law.

Mr. *Emot*. This is not fair, to give the Jury a Handle to find the Prisoner Guilty in Expectation of Relief in Arrest of Judgment; for they are Judges both of Law and Fact, as the Case is now circumstanced: If they will enslave themselves and their Posterity, and debar themselves of all Access to their Prince, they will be worse than Negroes.

Mr. *Atwood*. This is not to be suffered, to offer these Things to the Jury after they have received their Charge; therefore be silent. Then proceeding, he renewed his Charge to the Jury, aggravating the supposed Crimes for the Space of about half an Hour.

Mr. *Emot*. I pray your Honour to be heard one Word. (*Which he often repeated, and at last was granted him.*) The Facts laid in the Indictment were not proved, as to the disowning and casting off the Government, encouraging of Mutiny in the Soldiers, or disquieting the Peace of the Government. Addressing the King is the undoubted Right of the Subject, both by Common-Law and Acts of Parliament. If the Subject for Complaints of Grievances, set forth by Petition, shall be attainted of High-Treason, we are in a worse Condition than Slaves.

Mr. *Atwood* check'd him, and commanded Silence.

Mr. *Nicholl*. The Act of Parliament to punish Governors in the Plantations for oppressing the Subject, is rendered useless and of no Effect, if the Subjects are depriv'd of this Liberty to complain, and set forth their Grievances, by Petition to their King.

Prisoner. I crave that *Jacobus Goelet* may read over his Paper concerning the Evidence given, and Liberty to controul the Mistakes. *This was denied.*

Pris. I crave that Col. *DePeyster* and Capt. *Walters*, who are joined in the Commission, will declare their Opinions singly, if they have agreed that to be Treason which Mr. *Atwood* has declared to be so, either by the Common-Law, or Act of Assembly, if the Facts laid in the Indictment should be admitted to be proved, as indeed they are not.

To this he received no Answer.

After this the Jury were sent out, and the Court adjourned till Three a-Clock in the Afternoon.

At which Time the Commissioners meeting, the Prisoner was brought to the Bar; the Jury were sent for: And being come, were asked, If they were agreed of their Verdict? Which they answered in the Affirmative, and that they found the Prisoner Guilty.

Council. We pray Time to offer Reasons in Arrest of Judgment.

Mr. *Atwood*. Let these Reasons be offered Tomorrow Morning.

Court adjourned till Eleven a-Clock next Morning.

March 10th. The Commissioners met, and the Prisoner being brought to the Bar, he offered the following Reasons in Arrest of Judgment, in these Words, viz.

Bayard. That no Overt-Act, alledged in the Indictment, is prov'd by the Oaths and Testimonies of Two lawful Witnesses, as by the Statute of 7 W. 3. is directed

That if the Overt-Act, as alledged in the Indictment, should be admitted to be so proved, yet neither by the Law of *England*, or by any legal genuine Construction of the Act of Assembly of this Country, on which the Indictment is grounded, any of the said Overt-Acts can amount to High-Treason.

Mr. *Atwood*. Tho' the Reasons offered by the Prisoner's Council, are properly and learnedly offered, I could off-hand answer and controul them all; yet I will not do it; let them be left with the Solicitor-General. And adjourn'd the Court until Ten a-Clock the next Morning; which accordingly was done.

March 11. The Commissioners met, and the Prisoner brought to the Bar.

Mr. *Nicholl*. It does not appear, that any one Overt-Act, alledged in the Indictment, has been proved by the Oaths of Two lawful Witnesses, as by the Statute of 7 *W.* 3. ought to be done.

Mr. *Atwood*. The Jury are the sole Judges of the Evidence; and if there has been any Omission in that, it is now help'd by the Verdict.

Mr. *Nicholl*. Tho' 'tis very plain to me, and I suppose to the Court, that what I have affirmed in this Matter is Truth, yet I shall not much insist upon it, because if the Acts themselves should be admitted to be true, they do not fall under any of the Heads or Species of Treason so made by the *English* Laws, or by any natural and reasonable Construction of the Act of Assembly of this Government; which being wholly Matter of Law, I shall leave to your Honours Consideration.

Mr. *Emot*. I very well remember, that the Court was pleas'd to tell the Jury, after they had been together some Days, and not being agreed upon the Verdict, *That if they were under any Difficulty, whether the Overt-Acts laid in the Indictment, if proved, were Treason; if they found the Prisoner guilty, he had his Remedy, by moving the Matter of Law in Arrest of Judgment.*

I therefore humbly offer in Arrest of Judgment, That if the Overt-Acts laid in the Indictment were admitted to be proved, yet in Point of Law they cannot amount to High-Treason, within the Meaning of the Act of Assembly upon which the Indictment was laid.

For I take it, that all Acts of Parliament, and consequently Acts of Assembly, are to be understood and taken by reasonable Construction, to be gathered and collected out of the Words of the Act only, and that according to the natural, grammatical, plain and legal Sense thereof, without any forced Interpretation.

Then if so, this Act of Assembly, both by the Title, Preamble, and the enacting Part thereof, plainly demonstrates the Meaning of the Law-makers, and what was thereby designed for the future to prevent. The Title of this Act is in these Words: *An Act for the quieting and settling the Disorders that have lately happened within this Province, and for establishing and securing their Majesty's present Government against the like Disorders for the future.* Now what these Disorders were, we have great cause to remember; and they are very well known to this Court to have been occasioned by some Persons setting up an Arbitrary Power over the King's Subjects without Authority from the Crown of *England*, as appears from the Preamble of the said Act, Part whereof is in these Words: *And whereas the late and inconsiderate Violation of the Good and Quiet of this Province,*

by the setting up a Power over their Majesties Subjects, without Authority from the Crown of England, hath vitiated and debauched the Minds of many People, &c. For the Prevention whereof in Time to come, be it enacted, &c. That whatsoever Person or Persons shall by any manner of Ways, or upon any Pretence whatsoever, endeavour, by Force of Arms, or otherwise, to disturb the Peace, Good and Quiet of this their Majesties Government, as it is now established, shall be deemed and esteemed as Rebels and Traitors, &c.

From hence it plainly appears, that the Intention of the Law-makers was only to declare such Person or Persons Rebels and Traytors, as should for the future set up a Power over his Majesty's Subjects in this Province, without Authority from the Crown of *England*; which undoubtedly is Treason within the Statute of 25 *E.* 3.

But it can never be understood (without offering the greatest Violence to the reasonable Construction of the said Act of Assembly, and the plain Intention of the Makers thereof) to be construed to extend to the signing the Addreses mentioned in the Indictment, which is the only Thing the Prisoner is positively charged withal; for all the rest are only presumptive, constructive, and accumulative Crimes, drawn from thence.

But, says Mr. *Solicitor*, the Words of this Act of Assembly are in Generals; *That if any Persons shall endeavour, by Force of Arms, or otherwise, to disturb the Peace, Good and Quiet of the Government, shall be deemed and esteemed Rebels and Traitors.*

Now from the Word [*Otherwise*] Mr. *Solicitor* would fain insinuate, that the Prisoner is within the Meaning of the Act of Assembly: A very fine Explanation! For by such a Construction as this, every Breach of the Peace, sudden Quarrel, or small Battery, shall be deemed Treason. I shall not further add upon this Head, but only offer my humble Opinion, That here, in the Plantations, we are not capable in our Assemblies to make and declare any new Species of Treason, but such as are comprehended in the Statute of 25 *E.* 3. or some other subsequent Statute.

Tho' what already has been offered, I hope will be sufficient to stay and arrest Judgment, yet I have several other Things in behalf of the Prisoner (by your Honours Permission) to move in Arrest of Judgment, and which are not mentioned in the Reasons which were assign'd in Writing; and I pray Liberty to offer them *Ore Tenus*.

Mr. *Atwood*. Mr. *Emot*, you have Liberty granted you: Go on.

Mr. *Emot*. I thank your Honour. And the Reasons that I shall now further assign, why Judgment ought not to pass against the Prisoner, according to the Verdict of the Jury, are these Three:

1st. That *Andries Marshalk*, one of the Petty-Jury, is an *Alien*, and of foreign Birth, born in *Zealand*, and came over into this Province in the Year 1684; and that *Jacobus Golet*, the Foreman of the Jury, is also an *Alien*, and hath lately sent to *England*, for to procure a Denization.

2dly. That the *Wifne*, or *Venire*, in the Precept to summon the Petty-Jury, under the Hands of the Commissioners, is wrong awarded, or rather not awarded at all.

3dly. That the said Precept is not returned by the Sheriff, or any Endorsement thereupon, and signed by him, against the known Laws of *England*, and more particularly the Statute of 12 *E.* 2. Cap. V. called, *The Statute of York*.

Mr. *Atwood*

Mr. *Atwood* in a long Speech said, What the Solicitor has offer'd, is sufficient to over-rule the Reasons exhibited in Arrest of Judgment; for 'tis evidently proved, that the Prisoner has disturbed the Peace, Good and Quiet of the Government, as it is now established; viz.

1st. By enticing the People to sign scandalous Libels against the Government, at the Coffee-House, and at his own House, by the Oath of *Peter Odyre*, telling him, it was for the Good of the Country; and his bringing them to Alderman *Hutchins's*, makes him equally guilty to the Soldiers signing Complaints against their chief Officers, thereby enticing them for Mutiny; which Soldiers are part of the Seven thousand Men raised by Act of Parliament for the Defence of the Kingdom; which is High-Treason by the Common-Law, as well as by Act of Assembly.

2^{dly}. By the Prisoner's disowning the Assembly to be lawful.

3^{dly}. By charging the Lieut. Governor to be brib'd to pass their Acts of Assembly.

4^{thly}. By charging the Government to be in the Hands of hot and ignorant Men.

5^{thly}. By the Address to the Lieut. Governor, disowning and casting off the present Authority, declaring the Lord *Cornbury* to succeed the late Earl of *Bellamont* in the Government.

I hope the Prisoner by this Time is convinc'd of his Crime, as well as that Clergy-man who spoke so much in his Vindication; and that the Prisoner will now be duly penitent, and make a true Confession of it.

Col. *Bayard*. May it please your Honour, I ever aborr'd that heinous and abominable Crime of High-Treason, as much as Death it self. I call God and my own Conscience to witness, That I am as innocent of it as the Child unborn: I never spoke to any of the Soldiers to make any Complaint, or sign any Adresses, or other Paper whatsoever. I own I was present at the Coffee-House, at the signing of an Address to the King, another to the Parliament, and another to the Lord *Cornbury*; and I own the Two first contained some Complaints of Grievances we supposed to lie under, and the latter a Congratulation.

I had the best Council I could get for so doing, and that it was the Subjects Right to Petition the King, by the Act of the First of *W & M*. and I think the Subjects should be worse than Slaves, if they shall be arraigned for High-Treason for complaining to their Prince.

I must further beg leave to say, Your Honour was much mistaken in summing up just now what the Witnesses had sworn; and the Jury (by that Paper the Foreman read in Court) had likewise a wrong Notion of it; which I desired then I might controul; but your Honour over-ruled, as not to be allowed after the Charge was given. It was not proved by any of the Witnesses, that the Peace of the Government had been disturbed; none of 'em said I had enticed any Person whatsoever to sign the Adresses; nor that I was present at the Soldiers signing at *Hutchins's*, much less that I enticed them to Mutiny. I knew nothing of their signing; I was not at the House all that Time. Mr. *Solicitor* had Mrs. *Hutchins* sworn, who said the same. None of 'em say, that in the said Address the Assembly was called *Unlawful*, but only, that the Speaker was an *Alien*; nor that the Lieut. Governor was bribed, but tempted; nor that the Government was in the Hands of *hot and ignorant Men*, but that *hot*

and ignorant Men were put in Offices; and that thereby the Government was like to be rendred *Cheap and Vile*. And as for the Address to the Lieut. Governor, it was only said, *We had received Advice from England, that the Lord Cornbury was to succeed the Earl of Bellamont as our Governor*; which by no Colour can be construed to be a casting off, or disowning of, the present Authority. And tho' all had been proved, as it is not, what your Honour, as above, has been pleased to say, I humbly conceive it cannot amount to a Misdemeanor, and much less to that heinous Crime of *High-Treason*.

Mr. *Atwood*. The Right of Petitioning the King is not in Dispute, but the Manner of doing it makes it *Criminal*; neither does that Liberty extend to the Parliament.

Mr. *Emot*. I humbly move, that we may have Liberty to offer other Reasons *Ore Tenus*. (*Which the Court granted*.)

Mr. *Atwood*. Adjourn the Court till Friday Morning, the 13th Instant. (*Adjourned accordingly*.)

On the 12th in the Morning, the Prisoner wrote a Letter to Col. *De Peyster*; some of the Contents whereof were by Mr. *Atwood* retorted upon the Prisoner in open Court, at the Time he passed Sentence against him; for which Reason the Prisoner has permitted it to be published; and it is as followeth:

Col. *De Peyster*; Sir,

I Take leave to acquaint you, That tho' it has pleased God to suffer your self, and some of your Relations to be the likely chief Instruments of the total Destruction both of my self and all my Family and Posterity; that yet, notwithstanding I have that Peace with my self (and I can but only thank God for his all-sufficient Grace in strengthening me in it) that I am reconciled to all Mankind whatsoever, and that I hope one of my last Prayers will be, That God, out of his infinite Mercy, will graciously pardon all those who have had a Hand to cut me off. Sir, Believe me, as you may give Credit to the Words of a dying Man (since I find the Jobb is to be done, and that it is now past your Power to stop the Current) that I shall also die with a clear and good Conscience, and as free of that horrid Crime laid to my Charge, as the Child yet unborn. And therefore hope God's merciful Hand, who has never left nor forsaken me, will continue to support me to the very last, and that I may look Death in the Face, as a good Christian ought to do; humbly submitting my All to his most Wise, most Just, and most Merciful Dispensations: For I am sensible there is no more than one Death for me, and that, in all Probability, considering my Age, it might have been very soon, tho' this Tribulation had not befallen me. I shall only add, That I hope in God's Mercy for the Pardon of all my manifold Sins and Transgressions, thro' the only Merits of my Saviour Jesus Christ; and that when I shall be no more, he will continue his Grace to my dear Wife, and my Posterity. And, lastly, That my Blood, which is struck at (by your Brother's own Expressions to my self, and your Brother-in-Law's to others, both not long since) may be the last to be spilt on Account of our dismal and unhappy Divisions; tho' I fear out of my Ashes such further Calamities may arise to this poor bleeding Province, that Posterity will have Cause long to lament: For it is not to be expected

‘ expected, that all the Plots, Contrivances and Intrigues used in this Matter (many of which I assure you are already discovered) will have their Exit with my self: It had been more pardonable to have stabb’d me in my Sleep, or with Job’s Hand, under a Pretence of Friendship, than to do it with Abab, under a Colour and Cloak of Justice; and of the Two, I leave others to consider, if this latter exceeds not the former; since it’s not to be suppos’d, that Abab’s was so much out of Malice; but the Vineyard being denied him on his offering the Worth of it in Money, occasioned the Innocent to be arraigned and slain for a pretended Crime of *Blasphemy* and *Highb-Treason*.

‘ Sir, These above Lines are the Sincerity of my Thoughts this Morning; assuring you, that I never had a Thought before late last Night to write to your self one Word about this Subject, so altogether unknown to all Mankind whatsoever, nor don’t intend them any further; wherefore I desire you’ll make such Use of them, for your own Consideration, as God may direct you. I am, Sir,

Your humble Servant,

N. BAYARD.

March 13. The Court being met according to Adjournment, the Prisoner being brought up, moved, That forasmuch as Mr. Nicholl was out of Town, by reason of the Indisposition of his Family, another Council might be assigned in his stead. Which was granted, and the Court adjourned till *Monday the 16th Instant, at Nine a-Clock.*

March 16. Before the sitting of the Court, the Prisoner sent a Petition to Mr. Atwood, and the rest of the Commissioners; *viz.*

To the Honourable William Atwood, Esq; Abraham De Peyser, Esq; and Robert Walters, Esq; Judges of this Special Court.

The Humble Petition of Nicholas Bayard, sheweth,

‘ THAT your Petitioner being altogether unacquainted what is practicable and allowable in Law to be offered in Arrest of Judgment; yet since your Petitioner’s Life, and all what is near and dear unto him is concerned, he humbly craves Leave (besides the Reasons already offer’d by your Petitioner’s Council in Arrest of Judgment) to lay before your Honours, and to pray your Honours favourable Consideration thereupon.

‘ First, That the Verdict of the Grand-Inquest was not sufficiently found by any Twelve of that Inquest, as in his former Petition is set forth.

‘ Secondly, That the Petty-Jury (in a manner forc’d upon your Petitioner) were all of them Parties concerned against your Petitioner in the very Matter he was tried for, on Account of the unhappy Divisions within this Province; all of ’em extream ignorant of the *English* Language, to that degree, that scarcely one of them is able to say the *Lord’s Prayer* in the *English Tongue*, and much less to comprehend the Matters of Law, and what has been offered in behalf of your Petitioner at his Trial.

‘ Thirdly, That all what has been sworn against your Petitioner, was, First, That the Petitioner’s Name was seen to the Address to the Lord

‘ *Cornbury*, but that they knew not whether it was his Hand-Writing. Secondly, That the Petitioner had been present at the Coffee-House, and at his own House, when the Addresses to the King, another to the Parliament, and another to the Lord *Cornbury*, were signed by several of the Freeholders, Freemen, and Inhabitants of this City; but that he had desired none of them to sign the same. Thirdly, That the Petitioner had brought some Papers, supposed to be the said Addresses, to the House of Alderman *Hutchins*. Fourthly, That the Addresses to the Lord *Cornbury* contain’d only a Congratulation at his safe Arrival, and a hearty Desire, that with it all our Divisions might be healed, and that the very Name of *Party* and *Faction* might vanish, and be extinguish’d; and that in the two former, or in one of them, either to the King or Parliament, some Complaints were made of Grievances, without remembering the Particulars: Only Mr. *Cloze* swore, That to his best Remembrance, in both, or in one, of the Addresses to the King or the Parliament, mention was made, That some of the *best* and *ignorantest* of the People were put in Offices: That the Speaker of the Assembly was challenged to be an Alien: That the said Assembly had given a Gift to the Lieutenant-Governor, to tempt him to pass their Acts, and another to the Judge; and that thereby his Majesty’s Government was like to be render’d *Vile* and *Contemptible* in the Eyes of the People: And swore further, That in none of them any Reflections were made (as he conceived) to the Prejudice of the Lieutenant-Governor; and that in none of them, the Words *Unlawful* or *Oppression* were mentioned.

‘ Fourthly, That all the rest of the Evidences swore nothing, against your Petitioner, but that they had signed the Addresses at Alderman *Hutchins*’s; that two or three of the Soldiers had a Glass of Wine given them, but not for signing, it being *Christmas-Time*; and that some of them expected to be made Free of the City, but not of the Garrison.

‘ May it please your Honours, Your Petitioner finds, by the Notes himself has taken at his Trial, that nothing more has been sworn against him: Whereupon the Jury, being ignorant People, found him guilty, because some Part of the Indictment was proved, as to the signing of the said Addresses, and what the Contents of them were, only by the Oath of one Witness.’

Your Petitioner therefore humbly prays, That your Honours will be pleased to take the Premises into your serious Consideration, Whether by the Laws of England, or this Province, it can amount to the Crime of High-Treason, what has been sworn against him, as above expressed? And if not, that your Honours will favourably order an Arrest of Judgment for the Reasons above-mentioned, &c. and what has been already offered to your Honour by the Petitioner’s Council. And as in Duty bound, &c.

N. BAYARD.

The Court being met, the Prisoner was brought to the Bar, and the Petition last mentioned read.

Mr. *Atwood*. Mr. *Emot*, we are ready to hear the Arguments you have to offer, for the last three Reasons you have assigned in Arrest of Judgment.

Mr. *Emot*. I am ready; 1st, *Andries Marshalle*, one of the Petty-Jury, is an Alien; we have two Evidences to prove the same. And—

Mr. *Atwood*.

Mr. Atwood. We cannot admit you any such Proof; for tho' this might have been a good Exception for Cause before he or they had been sworn, but now it's too late; therefore go on to the next.

Mr. Emot. This seems very hard; for we ought to have been tried by the King's lawful Liege People, and we apprehend these are not such; but we came not to the Knowledge of this till after the Trial.

Mr. Atwood. Pray, Mr. Emot, delay the Court no longer; but proceed to the second Reason assigned.

Mr. Emot. The 2d Reason is, That the *Visne*, or *Venue*, in the Precept to summon the Petty-Jury, is wrong awarded, or rather not awarded at all. Our happy Constitution of Government is, That all Trials of this Nature must be by the Verdict of Twelve Men, and that, as near as may be, of the Neighbourhood where the Fact ariseth, or is alledg'd to arise in the Indictment. Yet, nevertheless, the Precept to summon the Jury, we find is directed to the Sheriff, to return Eighty Men of his Bailiwick; whereas he is Sheriff as well of the County of *New-York*, as of the City; and at the same time, the Matters of Fact alledged in the Indictment are said to be committed in the *Dock*, and *Eastward* of this City. So that this is a Mis-Trial, upon which no Judgment can be given: And of this we have a multitude of Authorities in our Books: And first, in *Arundel's Case*, *Coke's Rep. Part 6. fol. 14. b.* It was for the Murder of one *Parker*; and the Case was thus: The Murder was alledged to be done at the City of *Westminster*, in a certain Street there, called *King-street*, in the Parish of *St. Margaret's*. For the Trial of the Issue a Jury was return'd, *De vicinitate Civitatis Westm.* *Arundel* being found guilty, moves in Arrest of Judgment; assigning for Cause, That the Jury ought to have been out of the Parish of *St. Margaret's*, and not in general out of the Neighbourhood of the City of *Westminster*; and it was adjudged a Mis-Trial, and the Verdict was set aside: And this I find was done upon a Special Consult of the Judges at *Serjeants-Inn*.

So that we see how cautious the Laws of *England* are, and the Judges thereof, that all Trials of this Nature shall follow the *Venue*, and that the Jury shall be summoned from the Neighbourhood where the Fact ariseth. And the Reason thereof is grounded upon this Supposition and Presumption, That the Neighbourhood are the best and most proper Judges of Matters of Fact; for indeed it's the Rule in the Law, That *Vicinus facta vicini presumitur scire*.

But let me observe to your Honours, That our Case at the Bar is much more uncertain, as to the awarding of the *Venire facias*, or Precept to summon the Jury; for the Fact is alledged to be done at the *Dock*, and *Eastward* of this City, and Issue joined thereupon: Yet the Precept is directed to the Sheriff, to summon the Jury of his Bailiwick, which, as I said before, contains both the City and County of *New-York*, and without mentioning any Neighbourhood, and therefore may come out of the County, as well as from the City; and therefore of Necessity must be esteemed a Mis-Trial.

To this it may be objected by such as are ignorant of our Laws, That notwithstanding the Jury was summoned from the Neighbourhood of the City of *New-York*, and not from the County, for that they know the Persons to be such. But this not appearing to be so upon Record, avails nothing; for the Rule of the Law is, *What appears not, is not: Existentiis & non apparentibus eadem est ratio*.

Crook's Rep. In *London*, the Parish and Ward is mentioned; and therefore it was adjudged, That it was not good to alledge any thing done generally in *London*; but it must be laid to be done in some Parish, from which a *Venue* may be awarded.

In *Crook's Fac.* p. 399. *Tycos* against *Westcome*. In this Case, a *Venire fac'* was awarded from *T.* and not *de Viceneto de T.* Resolved to be ill, and not amendable: Yet in this Precept the *Visne* is not so much as of a Ward of the City of *New-York*, nor of any other Neighbourhood whatsoever, but in general from his Bailiwick. So that I humbly pray, that for this Reason the Jury's Verdict may be set aside, this being a Mis-Trial, upon which no Judgment can be entered: And shall proceed to the *Third Reason* assigned.

3. That the Precept to summon the Jury is not returned by the Sheriff, or any Endorsement thereupon, and signed by him, against the known Laws of *England*, and more particularly the Stat. of 12 *Edw. II. c. 5.* This Statute enjoins, That the Sheriff shall put his Name to every Return made by him, so that the Court may know of whom they took such Return, if need be: And I shall endeavour to prove, from sundry adjudged Cases since the making of this Statute, that this Precept to summons the Jury not being endorsed by the Sheriff, the Trial is ill, and not amendable.

The Case of *Holdsworth* against *Sir Stephen Proctor*, in *Crook's Rep. Part 2. p. 188.* *Sir Stephen Proctor* moved in Arrest of Judgment, for that the Name of the Sheriff was not endorsed upon the Writ of *Distingas* with *Nisi prius*; and it was ruled, That the Trial was ill, and not amendable by any the Statutes of *Jeofails*: For, says the Judges, it's all one with the Case of a *Venire facias*, where the Name of the Sheriff is not thereto; which hath been frequently over-ruled, as being no Return, nor helped by any Statute of *Jeofails*. For the Statute of 18 *Eliz.* as I shall shew hereafter, from adjudged Cases, and from the best Authorities in Law, doth only help imperfect and insufficient Returns, and that only in Cases Civil, between Party and Party; but here is no Return at all.

In *Rowland's Case*, in *Lord Coke's Rep. Book 5. p. 41.* in Ejectment upon a Verdict for the Plaintiff, the Defendant moved in Arrest of Judgment; for the *Venire facias* was not returned or endorsed by the Sheriff, tho' the *Postea* made mention that the Jury was returned *per Mandatum Justiciorum*: Yet in this Case it was ruled, That that would not help it; for the Judges said, That where there is no Return, it cannot be help'd by the Statute of 18 *Eliz.* or any other of the Statutes of *Jeofails*; for that Statute only helps imperfect and insufficient Returns, and such as want Form, and not such as are not return'd at all.

Again, in *Sir Arthur Blackmore's Case*, in *Coke's 8th Rep. fol. 156.* in this Case it was adjudg'd, That the Statute of 18 *Eliz.* doth not help a Trial, where no Return is made upon the Writ of *Venire fac'*; as was formerly, say they, adjudged in *Rowland's Case* before-cited. And our Books are full of Authorities of this Nature, but shall not give you the Trouble to mention any more.

Mr. Solicitor. Mr. Emot, these Authorities, which you have here cited, it's true, are grounded upon the Statute which you have mentioned of 12 *Ed. II.* but this Statute has only relation to Writs; and in this Case the Sheriff summoned the Jury, not by Virtue of a Writ, but a Precept under the Hands of the Commissioners; which differs the Case.

Mr.

Mr. *Emot*. Mr. *Sollicitor*, then you say, that the Case at the Bar is not within the Words of this Statute of 12 *Edw.* II. for that this is a Precept to summon the Jury, and not a Writ, and so consequently the Sheriff not obliged to sign and return the same. A very wise Distinction!

However, I shall endeavour to shew, that this Precept is within the Reason and Equity of the Statute, and that the same ought to be returned and signed by the Sheriff. In order thereto, I shall put this Court in mind, how Statutes have from Time to Time been taken by Equity in divers Manners; that those Things which are alike in Reason, are alike in Law; and that where an Act of Parliament hath been made to remedy some Mischiefs, that the same hath been extended to other Things, in like Degree, and that even in Penal Laws. As for Example:

Stat. of Gloucest. c. 5. By this Statute, an Action of Waste is given against one who holds for Years; yet by the Equity of this Statute, a Man shall have an Action against him who holds but for half an Year, notwithstanding the Act be Penal.

Westm. 2. c. 3. This Statute gives an Action of *cui in Vita*, after the Coverture dissolved by Death: Yet if the Coverture be dissolved by Divorce, the Wife shall have, by the Equity of this Statute, a Writ of *cui ante Divortium*.

And lastly, the *Stat.* 25 *Edw.* 3. *de proditionibus*. This Statute expressly says, That no Case shall be taken by Equity, unless it be adjudged in Parliament; and yet by the Equity of the Words of that Statute, which are, *If the Servant kill the Master*, it is taken, *If the Maid kill the Mistress*, that this is Petit-Treason.

So that from hence I am humbly of Opinion, That we are fairly within the Equity of the *Stat.* 12 *Edw.* 2. Besides, a Writ and Precept in this Case are only synonymous Terms, and signify one and the same Thing.

These Reasons were over-ruled.

And the Court ordered the Sheriff to make a Return upon the Precept to summon the Jury, conform to the above *Stat.* 12 *Edw.* 2. which the Court said they had Power to do, and to help that Defect.

Mr. *Emot*. I find your Honour has over-ruled all the Reasons that we have offered in Arrest of Judgment, in Behalf of the Prisoner *Col. Bayard*, why Judgment ought not to pass against him, according to the Verdict of the Jury; but have not as yet observed, that either *Col. D' Peyster* or *Captain Walters* have given their Opinion to all, or any of the Reasons we have offered. I humbly therefore

pray, that we may have their Opinion, so that we may know by what Hands we fall.

Mr. *Atwood*. Mr. *Emot*, you which have been assigned Council for the Prisoner, have hitherto, in all the Course of the Trial, carried yourselves like Men of your own *Profession*; you must not now therefore begin to menace the Court. You shall have the Opinion of the rest of the Commissioners.

Whereupon Mr. *Atwood* turning himself to them, and whispering them, they severally did declare, That they were of Opinion with Justice *Atwood*, in that the Reasons offered were not sufficient to arrest the Judgment.

Mr. *Atwood*. *Col. Bayard*, have you any thing to say, why Sentence should not pass against you?

Prisoner. I have nothing more to offer, than what my Council have offered, and what is contained in my last Petition.

Mr. *Atwood*. I am sorry to find you so impenitent of your Crime, which is so heinous and abominable in the Sight of God and Man. You have lately made Reflections upon the Proceedings of this Court against you, as if it had been a Design to do the Job; comparing your Case to that of *Naboth's Vineyard*: But I hope God will open your Eyes, that you may be convinced, and repent of the Crime.

Then he pronounced Sentence in these Words:

It is considered by the Court here, that you be carried to the Place from whence you came; that from thence you be drawn upon a Hurdle to the Place of Execution; that there you be hanged by the Neck; and being alive you be cut down upon the Earth, and that your Bowels be taken out of your Belly, and your Privy-Members be cut off, and you being alive, they be burnt before your Face; and that your Head be cut off, and that your Body be divided into Four Quarters; and that your Head and Quarters be placed where our Lord the King shall assign. And the Lord have Mercy upon your Soul.

Prisoner. I desire to know, whether I may have leave to answer to your Honour's Speech made before Sentence.

Mr. *Atwood*. No.

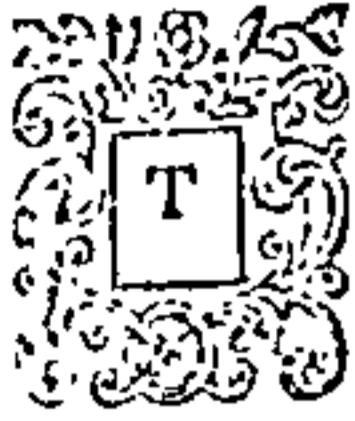
Prisoner. Then God's Will be done.

The Prisoner was remanded.

Alderman *Hutchins* of *New-York* was Tried, Convicted and Condemned of High-Treason, for the same Facts with which *Col. Bayard* was charg'd, and had the same Usage both before, in, and after his Trial.

CLXXIII. *The Trial of WILLIAM FULLER at the Guild-Hall of London, for a Cheat and Impostor, May 20. 1702. 1 Ann.*

Proclamation was made for all Persons concerned to attend.



THEN the Gentlemen that were of the Jury were Sworn.

<i>Peter White,</i>	}	<i>Acton,</i>
<i>Ab. Burnet,</i>		<i>Proctor,</i>
<i>John Cooper,</i>		<i>S. Stone,</i>
<i>Edw. Pinfold,</i>		<i>Troughton,</i>
<i>James Dod,</i>		<i>Jo. Watson,</i>
<i>Boden,</i>		<i>Dan. Carpenter,</i>

The Queen against *William Fuller*, upon an Information for Libels.

Mr. *Montague*. May it please your Lordship, and you Gentlemen of the Jury, The Information sets forth — “ That the Defendant being an Impostor, and a common Lyar, and a Person of an ill Name and Reputation, falsely, maliciously, wickedly and seditiously contriving, practising, and intending the late King *William* and his Subjects, falsely and unlawfully to delude and deceive, and Discords between the said late King and the Peers, and the Noblemen of this Kingdom, and the great Officers and Ministers intrusted by the said late King, in Business relating to the Government of this Kingdom of *England*, and other Subjects of the said Kingdom, to move, excite, and stir up; and also to bring the Noblemen and Peers, and the great Officers and Ministers aforesaid, and other faithful Subjects, into Hatred and Contempt with the said late King; and to get and obtain several great Sums of Money fraudulently and deceitfully from the said late King; He, the said *William Fuller*, the first Day of *January* last at *London*, &c. (to perfect and bring to effect his said wicked Practices and Intentions, and of and concerning a Correspondency between divers Officers and Subjects of the said late King and the late King *James*, while he resided at *St. Germain* in *France*, falsely pretended to be had, and of divers Sums of Money by the said late King *James* distributed amongst the Subjects of the late King *William*, falsely pretended to be sent here into *England*;) did falsely, wickedly, maliciously, and scandalously write and print, and cause to be printed, a false, scandalous, and defamatory Libel, entituled, ^a *Original Letters of the late King's* (meaning the late King *James*) *and others, to his greatest Friends in England, with the Depositions of Thomas Jones and Thomas Widdrington, Esqrs; proving the Corruption lately practised to ruin this Nation.* In which false, feigned, and scandalous Libel, among other Things, are contained as follows: [1st Page.]

Thomas Jones, Esq; deposes, That he being at *St. Germain*, the Court of the late King *James* in *France*, in *January*, 1692, the said late King being in his Closet, sent for this Deponent, and there commanded the said Deponent to begin his Journey for *England*, in Company with Colonel *Tho. Dallaval*, and Mr. *George Hayes*; and the said late King did then, and there deliver to this Deponent several Letters and Papers, to divers Noblemen and others in *England*, to whom this Deponent had several times before and since brought Letters from the late King and his Queen, and pretended Secretaries of State, delivered according to Order. This Deponent further saith, by the Oath he hath taken, That the late King *James*, at the time aforesaid, in his Closet at *St. Germain*, did deliver to this Deponent a Paper, being an Order for this Deponent to receive Six Thousand Pounds; which Sum this Deponent was to pay to several Persons in Places in Trust then in *England*, to engage them more firmly to endeavour the invalidating the Evidence of *William Fuller* (who, as the said late King expressed, had been by him, his Queen, and chief Servants, intrusted and employed in their most secret and weighty Concerns, for a considerable time after the late King and Queen's coming to *France*). [P. 7.] And this Deponent saith, He informed Mr. *Fuller* that *Dallaval* and *Hayes* were come to Town, and lodged at an Apothecary's in *Holborn*, which House *Hayes* formerly lodged at; but that *Dallaval* not being well, they could not come to him; therefore this Deponent said to *Fuller*, that they desired him to come to them; but he urged his Condition rendered him unfit, begging of the Deponent, to intreat them not to fail to attend the House of Commons at the time appointed. All which this Deponent imparted the same Day to Col. *Dallaval* and Mr. *Hayes*, and with them went the same Evening to three Gentlemen that were then Members of Parliament; and this Deponent had a Letter from one of those three Gentlemen, (that was a Member of Parliament) directed to one of the Secretaries to the then Secretary of State, which this Deponent was to carry to him the next Morning; which accordingly he did by Seven of the Clock. And this Deponent saith, He paid the said Under-Secretary 500 Guineas. And this Deponent saith, That when he left the Secretary, he went directly to the *Sun-Tavern* in *King-street Westminster*, where he found the three Members with *Dallaval* and *Hayes*, and an eminent Banker of the City of *London*: Then this Deponent desired the Banker to give his Bill to pay each of those three Gentlemen that had been Members, 1000 Pounds payable on Sight; which being done, the said Banker delivered also to one of them his Bill for 1500 *l.* to be paid on Demand, for the Use of a considerable Person, whose Station would not permit him to be present. And this Deponent saith,

^a See *State Trials*, Vol. 8. p. 78.

by the Oath he has taken, That the several Sums of Money beforementioned, with several lesser Parcels, were so disposed of by him, according to the late King's special Directions. And this Deponent saith, He has now by him the Receipts of each Person for the respective Bills and Moneys he disposed of, with the true Copies of his Original Bills, delivered to him by the late King's own Hand. This Deponent saith, He delivered to the late King a Letter he had for him, from the three Gentlemen that were Members, and also several others he brought from *England*. And forasmuch as this Deponent saith, As he hath formerly been employed to bring Letters, and Bills, and Orders, from the late King *James* and the *French King* and their Ministers; this Deponent saith, That he has kept a Journal of the same, and is ready to lay it before either or both Houses of Parliament when required. And this Deponent saith also, by the Oath he hath taken, That he can produce his original Orders, that he received from the late King's, and the *French King's* own Hands, for the distributing more than One Hundred Four-score Thousand Pounds *Sterling* for their Use, to Persons that were in Places of Trust. And this Deponent saith, He can produce the Receipt of each Person to whom the Money was paid, and also the Persons from whom this Deponent received the said Sum or Sums by the Order aforesaid.

Tho. Jones.

(2d Book.) "The Information further sets forth, That the Defendant, the Day and Year aforesaid, (to perfect and bring to effect his furthermost wicked Practices and Intentions against divers Officers, and other Subjects of the late King *William*, upon a feigned and pretended Correspondence between them and the late King *James*, whilst he resided in *France*, and of several Sums of Money sent by the said King *James* out of *France* into *England*, to be distributed amongst the Subjects of the late King *William*) another most false and scandalous Libel [Title Page] entitled, *Twenty Six Depositions of Persons of Quality and Worth*) falsely, wickedly, and most deceitfully, did write, print, and cause to be printed; in which said false and scandalous Libel, amongst other Things, are contained, viz. [5th Page.] "Mr. Jones has also made Oath, That he paid 5000 l. more, by the late King's Order, to several Persons in Places of Trust, that they might compleat my Ruin, and invalidate me for ever. Nor is this all; for the same Mr. Jones will prove, by undeniable Witness and Demonstration, that he has distributed more than One Hundred Four-score Thousand Pounds in Eight Years last past, by the French King's Order, to Persons in publick Trust in this Kingdom.

W. Fuller.

"And the said Defendant *Fuller* afterwards, the said Day, &c. falsely, unlawfully, and wickedly did publish, utter, and for Truth affirm, the said several false and scandalous Libels, without any lawful Authority. Whereas, in Truth, the said *Thomas Jones* did not depose upon his Oath, as is contained in the said false and scandalous Libel; but that the said scandalous Libels were and are false and feigned, and altogether contrary to Truth, to the great Scandal and Abuse of the late King *William*, and his great Officers and Ministers, and other the faithful Subjects of the said late King, to the evil Example of others,

"and against the Peace of the said late King, his Crown and Dignity.

He pleaded Not Guilty, and Issue joined thereupon.

The Case. "The Defendant *Fuller* is so notorious a Cheat, and his Practices so publickly known to all Men, that there need not much to be said here to aggravate his Offences; for in the Year 1691, he was censured by the House of Commons, prosecuted, convicted and punished for those very Crimes he now stands to be tried; and notwithstanding that Sentence and Punishment, he still persists in his villainous Practices and Designs.

"About two Years since, he applied himself to the chief Ministers at Court, and insinuated what Discoveries he could make relating to the Cheat of the Birth of the pretended Prince of *Wales*, and of great Sums of Money received by several Persons of Quality here, from the late King *James* and the *French King*, and of several Correspondences had between them, and the great Officers of State here in *England*; but not meeting with that Encouragement he expected, he then undertakes to write and publish the two scandalous Libels mentioned in the Information, and caused great Numbers of them to be printed and sold about the Town; and then petitions the House of Peers to be heard, to make out the Truth of what he wrote and published. The House of Peers, by his Importunity, appointed a Day for him to produce those Persons he mentioned, to make good his Accusations and Charge, which he undertook to do; but failing from time to time, their Lordships ordered him to be committed, and prosecuted for an Impostor; but the Defendant being an harden'd Rogue, was no way humbled at this Order, but immediately thereon applies himself by Letters to the Speaker of the House of Commons, alledging the same Matters, as he had done before to the House of Lords. The House of Commons ordered him to be brought to their Bar, where he only desired Ten Days Time to produce those Persons mention'd in his Libels; and that House, (to leave him no Excuse) granted him a Fortnight; but having trifled with the House of Commons, as he had done before with the House of Lords, they voted him an incorrigible Rogue, and ordered him to be prosecuted. What the Reasons were for this unparallel'd Impudence, whether for the sake of Gain, or Malice to those Gentlemen he hints at in his Libels, are yet Secrets.

*Mr. *Att. Gen.* My Lord, the Charge *Sir Edward* has been very fully opened, and I need not say much. His Crime is his publishing these two Books (mention'd in the Information.) He has been some Time sitting up for an Evidence, pretending to discover a secret Correspondence between the late King *James*, and several Persons here in *England*. He made an Offer of some such Discovery about Ten Years ago, and he then applied himself to the House of Commons, and they gave him Time to produce his Witnesses; but after all, he could produce none, and the House ordered him to be prosecuted as a Cheat and Impostor; and he was prosecuted accordingly, convicted —, and set in the Pillory. Now some Time last Winter, he did apply himself to some of the late King's Ministers, and pretended he would produce *Thomas Jones*, and *Tho. Witherington*, to make considerable

considerable

siderable Discoveries. They heard him, but he could never produce these Men before them. And afterwards having no Encouragement from them, he took on him to publish these two Books, mention'd in the Information, whereof he stands now accused. And after he was before the Parliament, he first applied himself to the House of Lords, and they heard what he had to say, and gave him Time to produce his Witnesses; but he could not do it, and thereupon the Lords were pleas'd to direct this Prosecution. Then he applied himself to the House of Commons, and they gave him Time likewise to produce his Witnesses; but he could produce none; whereupon they voted him a Cheat, a false Accuser, and an incorrigible Rogue. My Lord, these Books were published with a very malicious Design, and no doubt, he had other People, who do not now appear, to support him in it; and I doubt not but he would have set up Witnesses to have sworn whatever he would have them, if he had met with any Encouragement. He has the Impudence to put in the Frontispiece of his Books, *Published by Command*; but being asked in the House of Peers, by whose Command? He said, it was by his own Command. And he has publish'd in the Books, that he would produce Witnesses to prove the distributing of an Hundred and eighty thousand Pounds to Persons in Places of Trust, and to produce Receipts for the same, and he had an Opportunity now of doing it. We will prove the Charge upon him.

† Sir John Hawles. † Mr. Soll. Gen. My Lord, the Matter of the Information has been fully opened; but we are to consider the ill Consequences of it. This is a new Practice for a Man to publish Things of this Nature, and not be able to prove any thing: But he pretends to set up a second Witness to make out what he has said; that is, *Jones*, as if *Jones* were to relieve him. Now if that were true, it would be a great Thing to corroborate what he did say; but he has never produced this *Jones*, but only has printed something that he calls *Jones's*. If it were only what depended on his private Knowledge, the Case were otherwise; but when he pretends to bring *Jones* to prove it, and does not produce him, he makes himself guilty of the Scandal; and it is very necessary that this Man should be brought to Punishment. I will not trouble your Lordship further, but call our Witnesses.

Mr. Serj. Darnel. The Matter has been opened so fully, that there is no need for me to say any thing; we will now call our Witnesses.

Mr. Att. Gen. My Lord, we will prove that *Fuller* carried this Book to the Press, and not Mr. *Jones*, therefore we may well presume it was his own.

Mr. Coniers. He could never produce *Jones*, but he could frame Depositions for him.

Then Fuller's Book was produced.

Mr. Serj. Darnel. Call Mr. *Buck* [who appeared, and was sworn]. Mr. *Buck*, Who caused that Book to be published?

Mr. *Buck*. Mr. *Fuller*.

Mr. Serj. Darnel. How do you know that?

Mr. *Buck*. He brought it to me in Manuscript, and he said he took these Depositions out of the Secretaries-Office.

Mr. Serj. Darnel. But what did he desire you to do?

Mr. *Buck*. He desired me to print it: And he said, Because it was not done sooner, it had done the King Ten thousand Pounds Damage.

Mr. Coniers. Did he make any Alteration in them afterwards?

Mr. *Buck*. No, only alter'd the Mistakes of the Press.

Mr. Att. Gen. Was that Book printed by his Order?

Mr. *Buck*. Yes.

W. *Fuller*. My Lord, I will not give these Gentlemen the Trouble to prove it; I own it was writ by me.

Mr. Att. Gen. Do you own the other Book too? Mr. *Buck*, look on that Book [then the other Book was shewn him]. By whose Order was that printed?

Mr. *Buck*. By Mr. *Fuller's* Order.

Mr. *Fuller*. My Lord, if it be the Book I publish'd, I will own it. [Then it was shewn him.] Yes, my Lord, it was printed by my Order.

L. C. J. Holt. Read the Title.

Clerk. *Original Letters from the late King James, &c. Published by Command.*

L. C. J. Holt. By whose Command was it publish'd?

Mr. Att. Gen. By *Fuller's*.

L. C. J. Holt. His Order is a Command, it seems.

Then some Paragraphs were read.

Mr. Att. Gen. If Mr. *Fuller* will produce this *Jones*, to make good what he says, he will do a great Piece of Service; otherwise, he deserves to be severely censured.

L. C. J. Holt. Read the other Part.

Then the Clerk read the Title.

William *Fuller*. Pray read the whole Title.

L. C. J. Holt. He is in Love with it.

Clerk. [Reads the Title] *Twenty six Depositions of Persons of Quality and Worth, with Letters of the late Queen, Father Corker, and Mrs. Mary Grey, &c. Publish'd by Command.*

Mr. Att. Gen. Read the rest.

Clerk. *Mr. Fuller's Answer to the chief Objections made against him, &c. — Mr. Jones made Oath, that he has paid 5000 l. more to several Persons by the late King's Order, that he might compleat my Ruin, and invalidate my Evidence for ever, &c.*

Mr. Att. Gen. My Lord, we have proved his publishing of these Books. We will now hear what he can say for himself.

W. *Fuller*. My Lord, I humbly beg you will hear what I have to say.

L. C. J. Holt. Yes, yes, Have you any Council?

W. *Fuller*. No my Lord, I have none; I have no Money to procure Council. I have put my Thoughts in Writing, and I beg leave to read it.

L. C. J. Holt. But you must speak to the Purpose. What do you say concerning the publishing these Books?

W. *Fuller*. That is what I have to offer.

L. C. J. Holt. But can you make it appear that they are true?

W. *Fuller*. My Lord, I hope I shall.

L. C. J. Holt. Have you any Witnesses?

W. *Fuller*. I have none here at present. But if your Lordship will please to hear the Terms upon which

which the Witnesses would have come in, I can produce them: If your Lordship will grant your Warrant for *Jones*, I will forfeit my Life if he appear not.

L. C. J. Holt. You might have had *Subpœna's* for your Witnesses against this Day.

W. Fuller. My Lord, I did endeavour it; but I had not Money to bear their Charges.

L. C. J. Holt. You made the same Excuse before the House of Lords and Commons.

W. Fuller. If it can be made appear that I had any Assistance from the House of Lords, or the House of Commons, I own I am in the wrong.

L. C. J. Holt. What Assistance would you have had from them? Or what would you have from me?

W. Fuller. The House of Lords summoned me before them; and I desired—

L. C. J. Holt. If you take on you to write such Things as you are charged with, it lies upon you to prove it at your Peril.

Mr. Att. Gen. My Lord, he did appeal to the Lords: and they gave him from Time to Time to produce his Witnesses, and he could not do it.

L. C. J. Holt. If you have any Witnesses, I will hear them; but to hear you make a Speech, it is to no Purpose.

W. Fuller. My Lord, I hope you will believe it to be to the Purpose, if you please to hear me.

Mr. Coniers. What signifies your Belief?

W. Fuller. Why am I not to be believ'd?

L. C. J. Holt. What? Because you have stood in the Pillory for an Impostor heretofore.

Mr. Serj. Darnel. The whole Nation do not believe you; for the Lords and Commons did not, who represent the whole Nation.

W. Fuller. The Lords did not think fit to put it to the Trial. These Gentlemen charge me to have abused several Persons: I would be glad to know who these Persons are.

Mr. Att. Gen. I cannot tell who they are; your Book promises to make that appear.

W. Fuller. If a Man of an ill Character abuse the Nation, I hope I shall not suffer for that.

L. C. J. Holt. How came you to write these Books, that are not true?

W. Fuller. My Lord, I believe they are all true.

Mr. Att. Gen. Produce the Original Affidavits made by *Jones*, which you caused to be printed.

Mr. Serj. Darnel. Produce the Receipts for the Money, which you say you have; and then you will do something.

W. Fuller. Do I say it?

Mr. Serj. Darnel. Yes, if that Print be yours.

W. Fuller. I wonder a Man of your Gravity should assert such an Untruth in the Court.

L. C. J. Holt. If you have any Witnesses, produce them.

W. Fuller. My Lord, I presume you cannot but remember, that in *Crone's* Case I behaved myself honourably, and was owned to have done the Nation good Service.

L. C. J. Holt. That was formerly, and signifies nothing to what you do now.

W. Fuller. I ventur'd several times into *France*, and back again: Shew me a Man that ever did so besides?

Mr. Att. Gen. If you had made out the Discovery you pretended to make, I should have commended you.

W. Fuller. After I had made that Discovery, the Court at *St. Germain's* did what they could to

ruin me. There have been a great many Books lately printed, to prove the Legitimacy of the Prince of *Wales*, and none of them taken notice of.

L. C. J. Holt. You charge a great many Persons with corresponding with *France*, and cannot prove it.

W. Fuller. I charge none, my Lord.

L. C. J. Holt. You charge all that are intimated in the Books. The same *Mr. Jones* will prove by undeniable Demonstration, that he distributed more than 180000 *l.* by the *French* King's Order to several Persons employed under the Government. Now these Persons are scandalized; for you produce no Proof of what you charge them with: And you say, I had the Original of this from *Mr. Jones*, &c. Where are they?

W. Fuller. If your Lordship will please to grant me your Warrant, I will produce them.

L. C. J. Holt. If you take on you to make good these Things, you cannot in Justice require my Warrant to fetch in others to prove what you say; you must prove it.

W. Fuller. By his own Confession, he has been guilty of High-Treason; and therefore will not appear without a Warrant.

L. C. J. Holt. You cannot pretend to have a Right to any Warrant.

W. Fuller. If your Lordship please to give me Leave to say something in my Defence—

L. C. J. Holt. Yes, if it be to any Purpose.

W. Fuller. I am unacquainted with the Laws, and have not—

L. C. J. Holt. What is that to the Purpose; You are not to make Libels, nor traduce Ministers of State. What have you to say to that?

W. Fuller. When I had printed this Book, I was summoned before the Lords; and after that was committed to the *Fleet*. My Friends were all called before the Lords; and by my Lord *Jeffreys* and other Lords, there were such Questions asked, as I believe were never asked before—

L. C. J. Holt. This is not to be endured; you do but aggravate your Crime.

W. Fuller. This is not what I would offer.

L. C. J. Holt. If you can offer any Matter to prove what you have writ, let us hear it.

W. Fuller. *Mr. Jones* has confess'd himself guilty of High-Treason, and therefore cannot appear.

L. C. J. Holt. Where is he? Where did he make this Confession?

W. Fuller. In the Country.

L. C. J. Holt. Before whom?

W. Fuller. I do not know that; I was not with him when he did it.

L. C. J. Holt. Where is the Man?

W. Fuller. If your Lordship will please to give me your Warrant, I will produce him.

L. C. J. Holt. Shall I make a Bargain with you? Why have you not produc'd him all this while, before the House of Lords, and the House of Commons?

W. Fuller. *Mr. Attorney* did say I-appealed to the Lords. I was called before them; I made no Application to them, but was called by the Order of the House.

Mr. Att. Gen. But you was there.

W. Fuller. I was there; and there were Three Letters read of mine in the House, and I desire they may be read here.

L. C. J. Holt. What is that to the Purpose? Can you produce your Witnesses?

W. Fuller. *Mr. Jones* is now in *Hampshire*.

L. C. J.

L. C. J. Holt. Have you not had Time enough to procure him ?

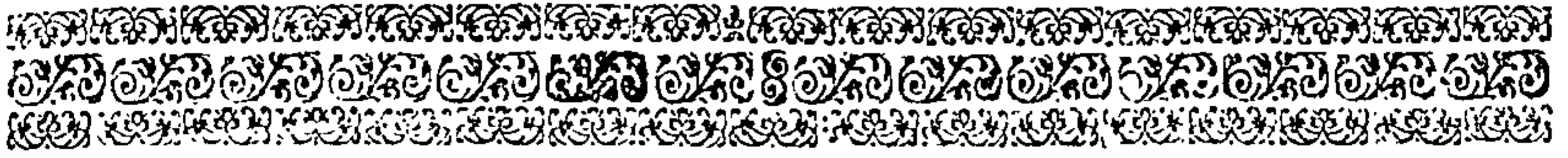
W. Fuller. My Lord, I cannot force him. I was with the Secretary of State, and told him, *Jones* will not come in voluntarily ; if the Lords will grant a Warrant, he may be brought. I offer'd this to the House of Commons too, but it was not granted. I could not force him.

Mr. Serj. Darnel. The Secretary of State sent one or two for him.

W. Fuller. He sent no body.

L. C. J. Holt. Gentlemen of the Jury, you hear what the Purpose of this Information is, and you hear how it is proved ; and you hear the Witnesses say, He brought these two scandalous Books to the Press, and that he corrected them ; and he owns, he was the Publisher of them : And if you believe he did so, you are to find him Guilty.

The Jury brought him in Guilty, without going from the Bar.



CLXXIV. *The Tryals of Colonel RICHARD KIRKBY, Captain JOHN CONSTABLE, Captain COOPER WADE, Captain SAMUEL VINCENT, and Captain CHRISTOPHER FOGG, at a Court-Martial in Jamaica, for Offences against the Articles of War, Octob. 8, 9, 10, 12. 1702. 1 Ann.*

AT a Court-Martial held on Board her Majesty's Ship the *Bredab*, in Port-Royal Harbour in Jamaica in America, the 8th, 9th, 10th and 12th, Days of October, 1702. Present,

The Honourable *William Whiston*, Esq; Rear-Admiral of Her Majesty's Ships for the *West-India* Squadron, President,

Samuel Vincent,
John Hartnoll,
Christopher Fogg,
John Smith,
John Redman,
George Walton,

William Ruffel,
Barrow Harris,
Hercules Mitchell,
Philip Boyce,
Charles Smith.

Arnold Broome, Esq; Judge-Advocate.

Who being all duly sworn, pursuant to the Act of Parliament, proceeded to the Trial of *John Arthur*, Gunner of the *Defiance*, on a Complaint exhibited by *Francis Knighton*, Third Lieutenant of the *Defiance*, and *George Foster*, Gunner of the said Ship, for hiding and concealing Forty three Barrels of Powder in the Wadding-Room, and covering them with Wadds and Coins, &c. when a Survey of Her Majesty's Stores of Ammunition after an Engagement was ordered ; and denying to the Surveyors, that there was any more Powder on Board, than was in the Powder-Room and Gun-Room, viz. One Hundred ; which, upon a second Survey, were discovered. It was proved also, That he had Two Keys to the Powder-Room ; and that having lost or mislaid his own, he, without making any Application to the Commanding Officer then on Board, who kept the other Key, prevailed with *William Baker*, Carpenter of the said Ship, to break open the Door.

In Mitigation of his Offence, he alledged, That examining into the Powder-Room, he found Three Barrels that had received wet, which caused his removal of the Forty Three Barrels ; but had little to say for his concealing them from the Surveyors. Whereupon the Court adjudged, That the said Of-

fence falling under the 33d Article of War, the said *John Arthur* should be carried from Ship to Ship in a Boat with a Halter about his Neck, the Provost-Marshal declaring his Crimes ; and all his Pay, as Gunner, to be mulct'd and forfeited to the Chest at *Chatham* ; and be render'd incapable of serving Her Majesty in any other Employment.

Colonel *Richard Kirkby*, Commander of the *Defiance*, was tried before the aforesaid Court, (except Captain *Samuel Vincent*, and Captain *Christopher Fogg*, who appeared as Witnesses for the Queen,) on a Complaint exhibited by the Judge-Advocate on the Behalf of Her Majesty, of Cowardice, Neglect of Duty, Breach of Orders, and other Crimes committed by him at a Fight at Sea, commenced the 19th of August, 1702, off *St. Martha*, in the Latitude of Ten Degrees North, near the main Land of *America*, between the Honourable *John Benbow*, Esq; Vice-Admiral of the Blue Squadron of Her Majesty's Fleet, and Admiral and Commander in Chief, &c. on Board Her Majesty's Ship *Bredab*, *Christopher Fogg*, Commander, and Six other of Her Majesty's Ships, viz. the *Defiance*, *Richard Kirkby* Commander ; the *Falmouth*, *Samuel Vincent* Commander ; *Windsor*, *John Constable*, Commander ; *Greenwich*, *Cooper Wade*, Commander ; *Ruby*, *George Walton*, Commander ; and the *Pendennis*, *Thomas Hudson*, Commander : And Monsieur *Du Casse* with Four French Ships of War : Which continued until the 24th of August inclusive.

The Witnesses that were sworn in Behalf of the Queen ; viz.

The Honourable John Benbow, Esq; Admiral.

2 Captains.

8 Lieutenants.

5 Masters.

5 Inferior Officers.

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Who deposed, That the said Colonel *Richard Kirkby*, the Van in the Line of Battle, the 19th of August,

August, about Three in the Afternoon, the Signal of Battle being out, the Admiral was forc'd to send his Boat on Board of *Kirkby*, and command his making more Sail, and get a-breast of the Enemy's Van, for that he was resolv'd to fight them. About Four the Fight began; but the said *Kirkby* did not fire above Three Broadfides, then luff'd up out of the Line, and out of Gunshot, leaving the Admiral engaged with Two *French* Ships till dark, and the said *Kirkby* receiving no Damage: That his Behaviour caused great Fear of his Desertion. At Night the said *Kirkby* fell a-stern, leaving the Admiral to pursue the Enemy.

That the 20th, at Day-light, the Admiral and *Ruby* were within Shot of all the Enemy's Ships; but Colonel *Kirkby* was near Three or Four Miles a-stern. The Admiral then made a new Line of Battle, and took the Van himself, and sent to each Ship, with a Command to the said *Kirkby* to keep his Line and Station; which he promised to do, but did not; keeping Two or Three Miles a-stern, tho' the Signal for Battle was out all Night. The *French* making a running Fight, the Admiral and *Ruby* plied the Enemy with their Chase-Guns till Night. That the 21st Day, at Light, the Admiral was on the Quarter of the Second Ship of the Enemy's Rear, and the *Ruby* on the Board-side, very near, who plied him warmly, and met the same Return; by which he was so much disabled, tho' the Admiral came in to his Assistance, that he was forc'd to be towed off: And this prevented the Admiral's Design of cutting off the Enemy's Sternmost Ship. This Action lasted Two Hours; during which Time the said *Kirkby* lay a Broadside of the Sternmost Ship; as did also the *Windsor*, *John Constable* Commander. The Admiral then commanded the said *Kirkby* to ply his Broadfides on him. But this having no Effect, the second Time he commanded the same; but he fir'd not a Gun: Nay, his own Boatswain and Seamen repeated the Admiral's Command to him; but were severely us'd, and threaten'd that he would run his Sword thro' the Boatswain. And had the said *Kirkby* done his Duty, and Captain *Constable* his, they must have taken or destroyed the said *French* Ships. The Admiral, tho' he receiv'd much Damage in his Sails, Rigging, Yards, &c. yet continued the Chase all Night. That the 22d in the Morning at Day-light, the *Greenwich* was Three Leagues a-stern; and the *Defiance*, Colonel *Kirkby*, with the rest of the Snips, Three or Four Miles, the *Falmouth* excepted, whose Station was in the Rear: That the said Captain *Samuel Vincent*, seeing the Behaviour of the said *Kirkby*, and the rest, came up with the Admiral, and sent his Lieutenant on Board, desiring Leave to assist him, which was accepted: The said *Kirkby* never coming up; and by his Example the rest did the same, as if they had a Design to sacrifice the Admiral and *Falmouth* to the Enemy, or desert. The Enemy were now about a Mile and an half a-head, standing into the Shore with a small Breeze at *W.* fetched within *Sambey*, the Admiral firing at the Sternmost till Night, and continued the Pursuit; and a *Flemish* Ship that was in Monsieur *Du Cassé's* Company, on Board of which was all the *French* and *Spanish* new Governors and other Officers, made her Escape. That the 23d, in the Morning, at Day-light, the Enemy bore *North-West*, distant about Four or Five Miles, the Admiral and *Falmouth* pursuing; but the said Colonel *Kirkby*, with the rest of the Ships, being Three or Four Miles a-stern; (tho' there

was not a Ship but, before and after the Battle, sail'd better than the Admiral.) About Seven in the Evening, it having been some time calm, a Gale of Wind sprung up, the Admiral and *Falmouth* were about Two Miles from the Enemy; and at Eight, the said *Kirkby* and his separate Squadron was fair up with the Admiral: And this Day the Admiral sent away the disabled *Ruby*, *George Walton* Commander, to *Port-Royal*; and under his Convoy the *Anna* Galley, retaken from the *French*.

That the 24th, in the Morning, about Two of the Clock, the Admiral came up with the Sternmost of the Enemy within Call, and the *Falmouth* pretty near; but the said Colonel *Kirkby*, with the rest of the Ships, according to Custom, were Three or Four Miles a-stern. The Admiral and *Falmouth* engaged the said Ship; and at Three the Admiral was wounded, his Right Leg being broke, but commanded the Fight to be vigorously maintained; and at Day-light the Enemy's Ship appeared like a Wreck, her Mizen-Mast shot by the Board, her Main-yard in Three or Four Pieces, her Foretop-sail-yard the same, her Stays and Rigging all shot to Pieces. Soon after Day, the said *Kirkby*, with the rest of the Ships, being to Windward of the said disabled Ship, he the said *Kirkby*, with the rest of his separate Squadron, fired about Twelve Guns at the said Ship; and fearing a smart Return from her, he lower'd his Mizen-Yard, his Topsails on the Caps, set his Spritsail, Spritsail Top-sail, and Foretop-sail Stay-sail, and having waired his Ship, set his Sail, and run away before the Wind from the poor disabled Ship, the rest following his said Example; tho' they had but Eight Men kill'd on Board them all (except the Admiral). The other Three *French* Men of War were at this Time of Action about Four Miles distant from their maimed Ship; whereupon the Enemy seeing the Cowardice of the said Colonel *Kirkby*, and the rest of the *English* Ships, in a Squale bore down upon the Admiral, who lay close by the disabled Ship; and having got in their Spritsail Yard, gave him all their Fire; and running between him and the disabled Ship, remann'd her and took her in. The Admiral's Rigging being very much shatter'd, was oblig'd to lie and refit till Ten a-Clock, and then continued the Pursuit; and the rest of the Fleet following in the greatest Disorder imaginable, the Admiral commanded Capt. *Fogg* to stand a-breast of the Enemies Van, and then to attack him, and having then a fine steady Gale, the like not happening during the whole Engagement; and further ordered that he should send to all the Captains to keep the Line of Battle, and behave themselves like *Englishmen*; and this Message was sent by Captain *Wade* then on Board the *Bredab*. That the said Colonel *Kirkby* on the Receipt of this Message, and seeing the Admiral's Resolution to engage, came on Board him, who then lay wounded in a Cradle; and without common Respect of enquiring after his Health, he the said *Kirkby* expressed these Words following, *That he wonder'd that the Admiral should offer to engage the French again, it being not necessary, safe, nor convenient, having had Six Days Trial of their Strength; and then magnified that of the French, and lessened that of the English.* But the Admiral being surprized at his Speech, said it was but one Man's Opinion, and that he would have the rest of the Captains; and accordingly ordered the Signal to be made for all the Captains to come on Board; and at this Time the Admiral and the rest of the Ships

Ships were to Windward, and within Shot of the Enemy, and had the fairest Opportunity that in six Days presented, to chase, engage, and destroy the Enemy.

That the said Colonel *Kirkby* had endeavoured to poison the rest of the Captains; forming a Writing under his own Hand, which was cowardly and erroneous: The Substance of which was, Not to engage the Enemy any more. He the said Colonel *Kirkby* brought it to the Admiral, who reprobred him for it, saying it would be the Ruin of all: Upon which he the said Colonel *Kirkby* went away, but writ another in the following Words.

At a Consultation held on board her Majesty's Ship Breddah, the 24th of August, 1702. off of Carthagena, on the main Continent of America.

It is the Opinion of us whose Names are underwritten.

1. Of the great Want of Men in Number, Quality, and the Weaknesses of those they have.

2. The general Want of Ammunition of most sorts.

3. Each Ship's Masts, Yards, Sails and Rigging, being all in a great Measure disabled.

4. The Winds are so small and variable, that the Ships can't be governed by any Strength: Each Ship

5. Having experienced the Enemy in Six Days Battle, following the Squadron consisting of Five Men of War and a Fireship, under the Command of Monsieur *Du Casse*; their Equipage consisting in Guns from 60 to 80, and having a great Number of Seamen and Soldiers on Board for the Service of *Spain*.

For which Reasons above-mentioned, we think it not fit to engage the Enemy at this Time, but to keep them Company this Night, and observe their Motion; and if a fair Opportunity shall happen of Wind and Weather, once more to try our Strength with them.

Richard Kirkby, Samuel Vincent, John Constable, Christopher Fogg, Cooper Wade, and Thomas Hudson.

That during the Six Days Engagement, he never encouraged his Men; but by his own Example of dodging behind the Mizen-Mast, and falling down upon the Deck on the Noise of Shot, and denying them the Provisions of the Ship, the said Men were under great Discouragement. That he amended the Master of the Ship's Journal of the Transactions of the Fight, according to his own Inclination.

All which being proved aforesaid:

The said Colonel *Richard Kirkby* denied the whole, excepting the pretended written Consultation: Which being shewn to him, he own'd his own Hand and Name too. He brought several of his Men to give an Account of his Behaviour during the Fight; but their Testimonies were insignificant; and his Behaviour to the Court and Witnesses most unbecoming a Gentleman. And being particularly ask'd by the Court, why he did not fire at the Enemies Sternmost Ship, which lay point-blank with him the 21st of *August*? He replied, Because they did not fire at him, for that they had a Respect for him: Which Words upon several Occasions, during the Trial, he repeated Three several Times.

Where, upon due Consideration of the Premises, of great Advantages the *English* had in Number, being Seven to Four, of Guns 122 more than the other; with his Acts and Behaviour as aforesaid, and more particularly his ill-timed Paper or Consultation as afore-recited, which obliged the Admiral for the Preservation of her Majesty's Fleet, to give over the Chase and Fight, to the irreparable Dishonour of the Queen, her Crown and Dignity, and come to *Port-Royal, Jamaica*: For which Reasons the Court was of Opinion, That he fell under the 11th, 12th, 14th, and 20th Articles of War; and adjudged accordingly, That he be shot to Death: But further decreed, That the Execution of Col. *Kirkby* be deferred till Her Majesty's Pleasure be known therein; but be continued a close Prisoner till that Time.

Captain *John Constable*, Commander of the *Windsor*, was Tried before the aforesaid Court, on a Complaint exhibited by the Judge Advocate on the Behalf of the Queen, for Breach of Orders, Neglect of Duty, and other ill Practices committed during a Fight commenced the 19th of *August*, 1702, as aforesaid. (*Refer to Colonel Kirkby's Trial.*)

The Witnesses sworn on the Behalf of the Queen were,

2 Captains,

7 Lieutenants,

5 Masters,

2 Other Officers.

The Honourable *John Benbow, Esq;*
Admiral.

17 Witnesses.

Who deposed, That Captain *John Constable* never kept his first nor second Line of Battle, but acted in all Things as Colonel *Kirkby* had done. That the Admiral had fired Two Guns to command him into the second Line of Battle. That he did set more sail in order to come into the Line, and his Station; but upon Colonel *Kirkby's* calling to him to keep his Line, he accordingly did. That the Admiral sent his Lieutenant *Landgridge* to command him the said *Constable* to keep his Line of Battle within half a Cables Length of the Ship before him, which was twice verbally delivered. And that he signed the Paper, *Consultation*, as is in Colonel *Kirkby's* Trial aforesaid; tending to the Hindrance and Disservice of Her Majesty, &c. and was drunk during the Fight, &c.

All which being fully proved as aforesaid; the said Captain *John Constable*, denied his Breach of Orders, or Neglect of Duty; but owned the signing the Paper, or Consultation prepared by Colonel *Kirkby*, and did it at his Request, and for that he had received Damage in his Masts and Rigging; and own'd no other Article to be true, but that he had sign'd to. He called several Witnesses to his Behaviour during the Fight; who all declared he kept the Quarter-Deck during the Engagement, and encouraged his Men to fight; and that sometimes he gave them Drams of Rum; and that Verbal Message delivered by Lieutenant *Landgridge*, was delivered him in some Heat and Passion, and was understood to be, to keep the Line within half a Cable's Length, and to follow *Kirkby*, which he did. That he so understood it him-