tinuance in that Caſe, cannot be objected before Judgment, *&c.* And in 2 *Buls*, 35. an Indictment is ſaid to be amended even after Verdict.

Now there is great Reaſon, that ſuch Miſpriſions in Writs at the Queen's Suit ſhall be amended by the Common Law. And in *Fitzherbert's Abridgment*, *Tit. Amendment*, *Placita* 22. if the King bring any Writ which wants Form, *&c.* it ſhall be amended. But it is otherwiſe in the Caſe of the Subject. So ſays 8 *Coke* expreſly, *fol.* 156. An Original Writ is not amendable in the Caſe of a common Perſon, but it is amendable in the Caſe of the King.

Now it has been the conſtant Practice, that theſe Privileges have been preſerved to the Crown. The Queen may at any time amend her Information after Trial, but a Subject cannot.

Theſe Privileges have been preſerved to the Crown, even at the Day of Trial: And many Miſtakes of Clerks, in Informations and Indictments, have been ſo amended. This is a Right of the Crown by the Common Law.

In the next Place, my Lord, I would obſerve, what is the Matter we are going to amend. It is not what alters the Party's Defence. It alters not the Iſſue, or Trial; nor is it any thing that tends to his Prejudice: And by the Common Law, that may be amended, which is not a Prejudice to the Party.

The Defendant has a Day given by the Roll; and the ſame Day the *Diſtringas* is awarded, he appeared: Every one muſt own, there was no Prejudice to him, whether the *Diſtringas* be of one *Teſte* or another. 'Tis true, there is the Year-Book, 20 *Hen.* VI. *fol.* 18. which is alſo in *Brook's Abridgment*, *Tit. Amendment*, *Placit.* 4. There was a *Miſnomer* in the *Capias* and ſubſequent Proceſs, and in the *Exigent:* And the Court held, that the *Capias*, &c. might be amended, but not the *Exigent*; becauſe of the Prejudice, if one might be outlaw'd on ſuch Proceſs, to which he never appear'd; and therefore it might not be amended for that Reaſon. But this Caſe ſtands clear of all Objections of that kind. He had a Day to appear, and make his Defence: He came in, and did appear accordingly; and no Prejudice happen'd to him.

Now, my Lord, as to the Exception they make, I muſt beg Leave to ſay, it can be of no Weight. I agree, the Award of the *Diſtringas* muſt be according to the Writ of *Venire:* But, with Submiſſion, I obſerve not the Neceſſity that the *Diſtringas* ſhould be *Teſte'd* the ſame Day. No Authority of Law requires it, and by reaſon it ſhould be otherwiſe. For ſuppoſe the Award is made by the Court the firſt of *January*, the Clerk has all that Day at leaſt to make it. For after the Court has made the Award, the Award is to be drawn up and delivered to the Clerk to make the Writ, and it cannot be ſuppoſed to be made at the ſame Time as the Award is. The Court awards one Day, and the *Diſtringas* is made the next Day, which is as proper and convenient a Time as can be; I ſee nothing in the Reaſon of the Thing againſt it.

My Lord, the Authorities they cite, that where Proceſs iſſues another Day, and not the ſame 'tis awarded, do not prove it a Diſcontinuance; and many Caſes are otherwiſe; as an Award to give Notice of Trial, *&c.* Alſo there is a Book of *Fitzherbert's Natura Brevium* 20 *G. & Brook Title Diſcontinuance* 59. which ſays, if the Plaintiff does not aſſign Error the ſame Term, then it is a Diſcontinuance. Now tho' a Writ of Error is returnable at a Day certain, yet he has all that Term to aſſign Error; but if he omits it a whole Term, it is a Diſcontinuance.

My Lord, I do not ſee but this is a regular Proſecution on a Writ not liable to Exception. There is another Book, 21 *Ed.* IV. that ſays, There ſhall be the ſame Day given to the Jury by the *Diſtringas:* but I ſee not the Neceſſity that the *Teſte* ſhould be that Day, *Brook Diſcontinuance*, 53. At the Return of the *Venire Facias* the Defendant was eſſoyn'd, and the *Eſſoyn* adjourn'd: Now the *Habeas Corpus* ſhall have the ſame Day as the *Eſſoyn* had by Adjournment, and ſo not the ſame Day with the Return of the *Venire*; for, ſays the Book, you ſhall continue the *Venire* to the ſame Day of Adjournment; but that does not ſhew that the Proceſs ſhall be iſſued that Day, but rather the contrary. Now in this Caſe there is all done that is neceſſary, the Proceſs is continued, the Jury is adjourn'd to that Day that it is by the Roll, the Parties are continued to that Day. I know no Caſe that ſhews a Neceſſity of the Writ bearing Date the ſame Day but one, and that I think is againſt them: 'Tis the Caſe of *Bradley* and *Banks*, in *Yelverton* 204. and that was in an Appeal, and that it was ſo, there was a Diſcontinuance in an Appeal, if there be any Time between the Return and the *Capias*, tho' the Defendant hath appear'd, yet all the Proceſs are diſcontinued; for in that Caſe the *Teſte* ought to be the ſame Day as the Proceſs was. Now if that were a general Rule, it would be againſt us; but that was founded on a ſpecial Reaſon, and does them no Service. For all Appeals are to be without Intermiſſion, and if they are intermitted any Time, the Appeal is loſt; for the Common Law is not alter'd by the Statute of *Glouceſter*, therefore there can be no Imparlance after Appeal; for if an Imparlance be thereon, it is a Diſcontinuance, and therefore that Caſe will be of no Authority to them.

But there is a Caſe in *Crook. Eliz.* (*N. B.* The Caſe intended ſeems that of *Rogers* verſ. *Bird. Cro. Eliz.* 572. *ſed vide ib.* 433. *contra.*) where this Proceſs is taken notice of as good, and that is, that the Proceſs is very next Day. There a *Venire Facias* was awarded *Craſt. Trin.* the *Diſtringas* was iſſued the Day after, and by that it ought to be ſo; and the Return was amended, and the Proceſs was the next Day after the Return. Now that being ſo particularly ſtated, ſeems to be an Authority that it may be ſo.

L. C. J. Holt. How does it appear to be a Day after?

Mr. *Att. Gen.* The *Venire Facias* was *Craſt Trin.* the *Diſtringas* was *Die Veneris*, &c. which was the Day after. (*Quære* Cro. El. 433.)

Mr. *Broderick.* In a Criminal Caſe it is not allow'd.

Mr. *Att. Gen.* I do not tell you whether it was a Criminal or a Civil Caſe, but the Exception was taken notice of, and it was amended; but this I only premiſe. Now, my Lord, with great Submiſſion, I don't know that there is any Neceſſity (it being a Proceſs at the Suit of the Crown) to have it *Teſted* on any Day certain; for it ſeems to be well on any Day. If it be in the ſame Term, and Notice having been given to the Jury, and they and the Party appearing thereon, I cannot ſee why it may not be well. In Criminal Caſes the Courſe of the Court is to amend Errors (of Form) in Indictments and Informations the very Day of the Trial, and that has always had its Weight in Criminal Proſecutions; but, with Submiſſion, if it be not right, it is to be made right; if it be a Miſtake of the Clerk, it may be amended. If you award a Writ, it is the Clerk's Duty to make it out; and if he miſtakes in Form, or

varies

varies from his Inſtructions, &c. all theſe Matters are amendable by the common Law, and therefore need not the Aid of any Statute. But I cannot give up that neither; for the Crown has certainly the Benefit of the Statutes of Amendments, and I think *Coke* is of that Opinion too, on the Statute of 14 *E.* III. That Statute is general, and to ſay it comes only to Cauſes between Party and Party, and not to Cauſes of the Crown, I cannot underſtand, for there is nothing in it that leads that way. And yet becauſe it ſpeaks of Cauſes between Party and Party, this Rule has been laid down, that it extends not to the Crown; this Rule has indeed prevailed: But where a Statute is in general, and the end of it is to ſuppreſs Fraud, according to all the Rules laid down for expounding Statutes, the Crown ought to have the Benefit of it. It is to take off the Scandal of the Law, and the Miniſters thereof, as the Statute 32 *H.* VIII. ſays. Now the Stat. of 14 *E.* III. is general, that by the Miſpriſion of a Clerk no Proceſs ſhall be annulled or diſcontinued by miſtaking a Letter or Syllable, but as ſoon as it is perceived it ſhall be amended. Now I think there is no Reaſon to be given why it ſhould not extend to Proceſſes of the Crown as well as of the Subject, unleſs they thought the Subject only wanted it. I do not underſtand why a general Law may not extend to the King, as well as the Subject. Now as this Statute is general, I mean the Statute of *E.* III. ſo there is the Statute 16, 17 *Car.* II. *Cap.* 8. which is likewiſe general, and yet it has been always taken to concern the Crown, as well as the Subject. And why not one Statute as well as the other I cannot conceive. Now, my Lord, we are not without good Opinion that the Benefit of the Statute 16 and 17 *Car.* II. does belong to the Crown. 'Twas the Opinion of the Lord Chief Juſtice *Hales* in the Caſe of the Lord *Fitzwater*, there the *Venire* was directed to one Place, when it ſhould have been to two; and the Queſtion was, whether this could be help'd by the Statute of 14 *Car.* II. He adher'd to that Opinion, and the Jury thereupon gave their Verdict. It was indeed ſet aſide; but Judge *Hales* always abode by that Opinion. And ſo is firſt *Syderfin* 148. The King againſt *Wright*. There it is ſaid the Statute of *Jeofail* does extend to it; and even by the Rule in *Blackmore*'s Caſe the Statute does extend to it; For there, ſays my Lord *Coke*, that Statute does not extend to Appeals, or Indictments, Pleas of the Crown or any Proceedings thereon, for they are excepted. That is his Opinion, where they are excepted, it does not extend to them. Now all Pleas of the Crown are not excepted, but only Appeals, Indictments, &c. and therefore Informations on particular Statutes are not excepted. Now on the reading of the Act, no Pleas of the Crown are excepted, but only Appeals and Indictments; therefore my Lord *Coke*'s Opinion muſt be, that that Act extends to all Things that are not excepted therein, and conſequently to this *Caſe*. In *Dyer f.* 153. there is indeed another Queſtion, whether it be a Diſcontinuance in the King's Caſe on the Statute of 32 *H.* VIII. (*Vide* Dyer 353.)

Now if he make a Quæry on that Statue, I cannot imagine why he ſhould not have doubted in other like Caſes. But when he came after to *Fol.* 346, 347. in an Information on the Statute of Uſury, the Book ſays the miſconveying of Proceſs and the miſjoining of Iſſues, are amendable by the Statute of *Jeofails*, and accordingly Judgment was given againſt the Defendant, notwithſtanding divers Errors in the Proceedings; ſo that the Judges were of Opinion in that Caſe, that the Statute did extend to Caſes of the Crown.

L. C. J. Holt. The Judges there did not directly conſider the Statute of *Jeofails*, 'twas but an Opinion *obiter*.

Mr. *Att. Gen.* Theſe are the Words of the Book, *Tandem propter Statutum de* Jeofails *que parle de miſconveying de Proceſs*, &c. Judgment was given againſt the Defendant. But I ſhall have Occaſion afterwards to take notice, that a great deal of the Practice of the Courts goes on the amending of the Returns. That Statute is for amending of Returns, and I think we are within the Statute, or if not, That the Common Law will help us: But be that as it will, we are now on the firſt Point; and I think it is amendable by the Common Law; and I think I can give you an Account of much greater Amendments made by the Court at Common Law, than this which we now aſk. Now for *Blackmore*'s Caſe, if we had left it there, we might have done it by that Caſe; for it appears by the 8th *Rep.* 156. *b.* without doubt there were Amendments by Common Law; and my Lord *Coke* gives Inſtances of it. Now I yield it was there in a civil Caſe; but I think no Man can pretend that at the Common Law there were any Rules to diſtinguiſh between Caſes of the Crown and Caſes of the Subject, unleſs the Crown had a much greater Power to amend than the Subject had; and that ſo it was, appears by many of our ancient Books. And there are Authorities in the Statute Law likewiſe that the Crown could amend further than the Subject. For *Coke* in *Blackmore*'s Caſe ſays, That Variance of the Writ from the Original was amendable by the Common Law, and any part of the Record in the ſame Term; for that during the Term it is in the Breaſt of the Judges, but Miſpriſions of Clerks in another Term in Proceſſes were not amendable by the Court. But I ſhall plainly ſhew, that Miſpriſions of Clerks were amendable at Common Law in Caſes of the Crown; and this is prov'd by all the old Authorities. The old Books ſay, they ſhall be amendable in the ſame Term, and we are now within the ſame Term, and ſo hope we ſhall be deliver'd from that Queſtion. Now that Rule of my Lord *Coke*, and the Reaſon of it, extends to criminal Caſes as well as civil, and both Caſes are within the Power of the Court to amend. For if a Fine be ſet within the Term, the Court may in the ſame Term amend it or diſcharge it. This is allow'd to be in the Power of the Court by the Common Law in the Caſe of the Crown. In *Trinity* Term, *vide* 4 *Mod.* 395. between the King and *Walcot*, there was an Error in the Writ of Attainder, and an Exception was taken, and it was amended in the ſame Term. For the Court finding the Form of Entry to be erroneous, they did the ſame Term order the Record to be razed, and made a Rule for the next Term; and this was done by the Power of the Court at Common Law. For while the Proceſs and the Record is in the Breaſt of the Court, they have a Power by the Common Law to make a new Judgment.

My Lord, the next Matter I would obſerve is, That all Miſpriſions of Clerks, or their Aſſiſtants in the Caption of the Judgment, may be amended in the ſame Term. For that there is *Saunders Reports f.* 209. *Faulkners Caſe*. If an Indictment be miſtaken in the Stile of the Court, &c. the Court may amend any Thing to make the Caption right, firſt *Syderfin* 259. King againſt *Glover*, and this was to amend a material Point. There is the like Caſe in 2d *Croke*. Theſe are criminal Caſes. It was an Inquiſition taken *apud* —— it was not ſaid *in Portibus* Londini. The Clerk of the Peace was order'd to amend it. And in *Jones*'s *Rep. Stafford*'s Caſe, firſt Abridgment 196, there

there was an Error in the Reverſion of an Attainder. The Certificate was, that he was arraign'd the 18th of *March*, and convicted the 20th of — In that Caſe Judge *Barclay* was of Opinion it might be amended by Common Law, and the Lord *Coke* agreed; but Judge *Jones* was of another Opinion, and he gave it for a Reaſon, eſpecially where the King had ſignified his Pleaſure of deſiring it; and afterwards it was not amended: But two Judges were of Opinion it might be amended. In *Palmers Rep.* 480. in *Plums* Caſe, there was an Indictment in *Eſſex*, and it is *Exactus eſt ad Comitatum*, without *meum*, and a *Certiorari* was awarded to the Coroners, to certify whether it was exact *ad Com. meum*, and amended accordingly. So 7 *E.* IV. 15. The *Niſi Prius* was *Menſ. Mich.* and the Roll was *Quinden. Mich.* and that was amended. Now this ſeems likewiſe to be warranted by the Statute of *E.* III. and whether that Statute extend to it or not, yet the other Statutes extend to all.

For the old Books, I would only trouble you with ſome Caſes that were before the Statutes of Amendments; and there 'tis plain, both as to civil and criminal Actions, it was the ſame thing. For in both Caſes it was frequently amended; ſo in 5 *E.* III. 25. an Entry of a Continuance was miſtaken, and it was amended by the Court: So in the Caſe of *Chambers* againſt *Barrow* — 430. there was a *Scire Facias* obtained, and it was returnable *Sexto* and the Entry is *Septimo*. This upon a Demurrer was objected, and that all was thereby diſcontinu'd; it was anſwer'd, the Court might do it at all Times by the Common Law, and this may be amended by the Common Law.

My Lord, this is an expreſs Authority for us, that the Proceſs is amendable at any Time before the End of the Term, and the Judgment is in the ſame Term. In the Book 9 *Ed.* III. *Placita* 3. The Default in Proceſs may be amended at any Time before Judgment; wherever the Roll is contrary to the Writ, it ſhall be amended by it. After Iſſue join'd, the *Diſtringas* was awarded, where no *Tales* was awarded the Clerk found the Award of the *Venire Facias*; and there it is ſaid it is amendable, being in the Breaſt of the Court.

Sir *Bro. Title Amendm. Placita*, 62. The Original was in *Suſſex*, and the Proſecution in *Eſſex*; yet 'twas held amendable, and no Diſcontinuance. Theſe are all by Common Law. So 40 *E.* III. *Placita* 13. and *Brook's Amend. Placita* 17. There was a Writ iſſued againſt three: Two appear'd; and one made Default; againſt whom Proceſs iſſued, and the next Day he appear'd; and this was amended becauſe it was amendable by Common Law. Likewiſe *Fitzherberts Amend.* 6. There was a Variance by the Default of the Defendant, and it was amended, and it was after a Default. So 39 *E.* III. In the Record it was — and in the *Niſi Prius* it was — and it was amended. Now there is a modern Caſe, *Croke Eliz.* 222, 256, &c. in the *Venire* one of the Jurors was called *Samuel Sutton*, and in the *Diſtringas Saul*: But it appearing to be the Miſpriſion of the Clerk, and that the Writ was right, they held it was amendable by Common Law. And *Brook's Amend. Placita* 27. the Count or Declaration was *ad damnum* an hundred Pounds, the *Niſi Prius* was to the Damage only of an hundred Shillings, and the Court ordered the *Niſi Prius* to be amended, as being only the Miſpriſion of the Clerk. Now that goes a great Way, for the *Teſte* there had no Writ to try it; but yet that is adjudged to be amendable. And ſo in that Book *Placita* 24. and in divers other Places. So that it hath been always obſerved in common Practice as amendable, as being *Vitium Clerici*, *Brook's Placita* 26 and 29. *Fitzherbert* 16, 17 and 29. Theſe are all Caſes at Common Law, and ſo far will juſtify the Amendment in our Caſe. And in *Fitz. Amend.* 43. There is a Caſe to ſhew, that where there is a Prejudice of the Party an Error may be amended, a *Diſtringas* is return'd, where there was a Default in the *Teſte* and the Jurors Names. The *Teſte*, &c. was amended, for they took it before the Roll was made up. There is another Caſe the 40th of *E.* III. the Proceſs was diſcontinued after the Appearance of the Defendant, and it was amended. There is likewiſe 44 *E.* III. (For I meddle not with thoſe ſince the Statutes of Amendments). There was a Writ awarded againſt *M.* and *G.* the Proceſs was againſt *M.* only; and afterwards it was amended; and there it is ſaid both the Roll and the Writ may afterwards be amended, and they were amended accordingly.

My Lord, I cite theſe Caſes to ſhew that Amendments were made by the Common Law, and the Statutes cannot make any Alteration, tho' they ſhould not extend to the Crown. I believe there are not in the old Books many Inſtances of Proceedings by Information; but that ſeems a great Argument to me, that this Nicety that hath crept into theſe Proceedings are not by Common Law; in our old Books they are very little taken notice of; but it ſeems theſe Exceptions were not taken then, if they had we ſhould have found them; but the Books are quite otherwiſe. Now if the Amendments were allowed at Common Law, I believe none can diſtinguiſh and ſay, That it ſhall not be amended in our Caſe, for I think they cannot be diſtinguiſhed.

There are ſome other modern Caſes wherein greater Things have been done. Firſt the Caſe of Sir *John Aſhby*, that has been cited (*ante* 677.) that it is an Amendment of a Judgment that was entered by Diſclaimer. In the *Niſi Prius* it was right, but all was left out in the Judgment. And it was objected that it was not amendable, becauſe it was not in the ſame Term, and that none of the Statutes of Amendments extended to ſuch Caſes; yet upon Examination it was amended, becauſe it was only a Miſpriſion of the Clerk by miſtaking his Book, there it was thought to be in the Power of the Court by Common Law to do right. Then in the Reverſal of the Attainder of the Lord *Stafford*, there were Proceedings in Court fourteen or fifteen Years; but by Neglect of the Clerk there were no Foot-ſteps of any Thing appear'd, and yet there was a Rule for a Record to be made, whereby there was a Judgment of Reverſal enter'd. Now this Court did think they had a Power to ſet the Records right, and they gave them leave to make a Record, in order to make a Reverſal of that Attainder: And if it may be done againſt the Crown, no doubt it may be done for the Crown, for that it is but ſetting Things right. There have been other Caſes cited, as *Harris's* Caſe in *Cro. Jac.* 502. *poſt.* 704. and that was a very extraordinary Amendment. It was an Indictment for a Nuſance. Not Guilty was pleaded indeed, but the Clerk who entred it join'd not Iſſue, and the Verdict was againſt the Defendant, and no Iſſue join'd; that was omitted; but the Return was allow'd. Now if we had done ſo, we ſhould have had a great Noiſe about it. But here the Court allow'd Amendment to be made; and it was amended, as being done by the Clerk's Negligence, and this in the Time of another Clerk: And theſe Words were inſerted for it.

And it was ſaid, if ſuch Faults ſhould not be amended, many Courts would be deprived of their Juriſdiction. And I am ſure, if the Courts will

not

not amend theſe Matters, it will overturn many Trials.

There is another Caſe: 'Tis in *Crooke James*, 529. *Parker verſ.* Sir *John Curſon & Ux.* And that was a Trial at Bar. The Iſſue was enter'd, *Et prædict. Johannes Curſon & Magdalena veniunt, & predicta Magdalena dicit, quod non eſt inde culpabilis; & de hoc ponit ſe ſuper Patriam, & Attornatus Domini Regis ſimiliter.* After the Trial at Bar, it was amended by the Docket; and there it was only, *Quod J. Curſon, Mil. & Magdalena Ux. ejus, placitant non Cul.* which was only a ſhort *Memorandum:* Which, I think, goes a great way further than what we labour for.

There is that Caſe too, 1 *Siderfin.* 243. between the King and *Godfrey*. There the Award was *Vicecomitibus*, when it ſhould have been *Vicecomiti*; for there was but one Sheriff: But upon Examination, they found it was the Miſpriſion of the Clerk; and they ſet it right.

L. C. J. Holt. They indeed ſet it right; but how? Not by Amendment: But it was inſerted as a *Memorandum* on the Roll, and there was but one Sheriff.

Mr. *Att. Gen.* My Lord, with Submiſſion, that's as well: For we do not do ſo much; for that was done after the Trial.

L. C. J. Holt. There was no altering the Writ.

Mr. *Att. Gen.* If we ſhould aſk the Court to alter what we did before the Trial, it would be ſaid we ſhould have mov'd it before, and not after. Now to enter that after the Trial, was much more than we aſk.

There is another Caſe which had the Opinion of the Court, the Caſe of the Warden of the *Fleet*; where you were of Opinion to amend, *&c.*

L. C. J. Holt. It is not amended yet.

Mr. *Att. Gen.* My Lord, I cite it as an Authority, that you would have amended it, if you had any thing to amend it by.

L. C. J. Holt. I did not tell you what I would have done.

Mr. *Att. Gen.* My Lord I was not in Court, but I heard it was ſo. If it was not, I was miſinformed. There was a Commiſſion taken out againſt him, as being guilty of ſeveral voluntary Eſcapes, and a Day was given to appear at the *King's Bench* the 8th of *January*. The Appearance was the 20th of *January*; but the Record was not enter'd itſelf till the 3d of *February* following; ſo that there was a perfect Diſcontinuance.

This was not ſeen at firſt; but on Conſideration of the Court, they found it out; and the Council moved the Court to ſee it right. The Court made a Doubt of their Power; but they enquired when it came in, whether in time or not; and what Minutes were for it. It ſeems the proper Minutes were not to be found. Now that being ſo, it would be ſtrange for the Court to make any Amendments, without any Copy to amend by. If the Clerk's Man had come in, and produced the Minutes, I take it, the Senſe of the Court was, that they would amend it; tho' that was agreed to be a Diſcontinuance.

Now I cite that Caſe, not that you did amend it; but would have done it, if you had any thing to amend it by: And there was a Diſcontinuance of the Party. Now if they could have amended that, this may be done here for a much better Reaſon. There was a Diſcontinuance, both before and after the Trial. I think we have much ſtronger Reaſon for Amendment, than was in that Caſe: Tho' I muſt ſay, as to that Caſe, the Bar were of Opinion, that the Clerk might have enter'd it as on that Day, and ought to have done it; and therefore they thought it was amendable. And if that were true, no queſtion it was amendable. But however the Opinion of that Caſe was, it is an Argument to me, that the Court would have amended it, had they any thing to amend it by: For it was the Opinion of this Court it is amendable. But I think that Caſe is no Authority for them: And whether that be done by the Help of the Statute or no, is not material: And the Court would have amended it, if it had been the firſt Day of the Term.

This I take to be the Opinion of the Court; and that they did not amend it, becauſe they had no Authority to amend it by.

There is one Matter more, which is, That this Slip is the Fault of the Clerk: For that the Miſteſting of the Writ is the plain Act of the Clerk; and in all the Caſes it has been held, Acts of the Clerk to be amendable by the Common Law: And for that there are a thouſand Caſes. This is in Point of Law.

I would beg Leave to cite a few Authorities in *Crooke's Eliz.* 'Twas agreed, a *Venire Teſte'd* out of Term, is a Miſpriſion of the Clerk.

L. C. J. Holt. There are abundance of the like Caſes.

Mr. *Att. Gen.* I believe a Thouſand, therefore I will not cite them.

We ſubmit to your Lordſhip, whether it be right, and wants no Amendment: Or if it be not right, whether it be not amendable by Statute or Common Law. And I hope we ſhall have the Benefit of the Verdict.

Mr. *Serj. Darnel.* My Lord, There has been ſo much ſaid already, that I ſhall ſay very little. I ſhall only cite two or three Caſes. The Queſtion is only this: Whether a Miſpriſion of the Clerk, is not amendable in the ſame Term? For that we have 10 *Ed.* III. 20. there was an Error amended of 63 for 59. I think all the other Caſes have been mentioned already. The 5th of *Ed.* III. has been cited, and it is ſtrong. I have thought it always ſufficient, without any Statute of Amendments: And thoſe that have been amended by Common Law, will be Authorities in this Caſe. Now that the Court have always taken on them, as their Duty to amend the Faults of the Clerks in any Entry, or Proceſs, or Continuance, the Books are full in it; and I hope it will be amended here.

Mr. *Broderick.* I pray your Lordſhip's Favour, to ſpare me a few Words on the other Side. I ſee ſo much Warmth in this Caſe, that I muſt beg Leave to preface ſomething, before I ſpeak to the Point of Law.

Mr. *Att. Gen.* You might have wav'd that.

Mr. *Broderick.* The Occaſion of my ſaying that, was, That Mr. *Attorney* ſaid, There had been a Noiſe about the Town concerning this Exception. And that a whole *Party*——

Mr. *Att. Gen.* There has been ſo——

Mr. *Broderick.* I would not be believ'd to concern myſelf any otherwiſe for this Man, more or leſs, than for any other Client. Nay, what I am concern'd in, and have to ſay at preſent, doth concern every Subject in *England*, as well as Mr. *Tutchin.*

But

But when 'twas ſaid, That there was a Diſcontinuance in the Caſe of the Warden of the *Fleet*, which, after the long Tranſaction of that Cauſe, was not obſerved by the Council for him; and that they were clearer-ſighted for the *Obſervator*; I could not take that otherwiſe, than as meant to myſelf, who was Council for the Warden of the *Fleet*, and am now for this Defendant. I confeſs, I did not obſerve that Fault in the Caſe of the Warden of the *Fleet* (nor ever had a perfect Copy of that Record, to enable me to do it): And I muſt own at the ſame time, that I had not the Fortune to make the Diſcovery in the preſent Caſe. The Exception was taken before I was any ways concern'd in the Cauſe: And when 'twas made, I thought it a good Exception; and made no Difficulty of accepting my Fee to ſpeak to it.

Mr. *Att. Gen.* I had another Meaning in it. I knew not that Mr. *Broderick* was Council for the Warden of the *Fleet*.

Mr. *Mountague.* My Lord, I believe Mr. *Broderick* is afraid of my Fate in this Caſe: I have been very much reflected upon for being Council in this Caſe; and it has been ſpread about all the Counties in *England*, by *Dyer* the News-writer, That I broach'd ſeditious Principles at the Trial, and was reprimanded by your Lordſhip for it: And I believe Mr. *Broderick* is afraid of the like Scandal.

L. C. J. Holt. You muſt not be afraid of Scandals. *Dyer* is very familiar with me too ſometimes: But you need not fear ſuch a little ſcandalous Paper of ſuch a ſcandalous Author.

Mr. *Mountague.* My Lord, I am not much concerned at it, ſeeing it comes from him.

Mr. *Broderick.* I muſt agree, That this is a Point of great Concern to the Crown; becauſe all Proſecutions for the Crown may be affected by it, as Mr. *Attorney General* ſaid: But on the other Side, I beg Leave to ſay, That (whatever the Perſon now before the Court may be) it is of great Concern to the Subject too: For the Rule in this Caſe, will be a Rule in the Caſe of every other Subject of *England*; ſo that the Concern is great on both Sides.

I muſt beg Pardon of the Court, if, in anſwering off-hand to very learned and elaborate Arguments, from the ſhort Notes which I have been able to take of them, I happen to be diſorder'd in Method: I muſt take Leave to offer ſuch ſhort Obſervations upon them, and give ſuch Anſwers to them, as I can at preſent; as my Memory ſuggeſts the Objections to me, tho' not in the ſame Order in which they were deliver'd. But I will uſe my Endeavour, not to omit the taking ſome ſhort Notice of the general Heads, under which I apprehend all the Objections will fall.

I would obſerve (which I think would be an Anſwer to a great deal that has been ſaid on the other Side) That our Law-Books make a very great Difference between the King's Proſecutions in his own Name, as a Civil Right, and Proſecutions wholly in his Capacity of King, as he is Head of the Commonwealth; and in the Exerciſe of his Royal Office, to affect the Subject with, or puniſh him for Crimes thereby charged upon him. I agree, the Caſes cited by Sir *Thomas Powis* and Mr. *Attorney General*, of Amendment of the King's Writ of *Qu. Impedit*, and ſome others; and that the Common Law gave greater Indulgences to the Crown, in the Proſecution of its Civil Rights, than to any Subject. The King was known to be employ'd in the Concerns of the whole Kingdom; to have the Care of all his People upon him: Whereas the Subject had only his perſonal and private Affairs to look after. And 'tis no wonder that the Law ſhould adjudge, that great Allowances were to be made to the Crown, as to its own particular Rights; That it ſhould not be tied up to ſo ſtrict Rules as the Subject, who was ſuppoſed to attend his own Affairs only. This is the Reaſon generally given, why the Crown had ſuch a Prerogative, that greater and more favourable Allowances ſhould be made in its Suits, than in thoſe of its Subject.

But it has hitherto (as far as I have been able to obſerve) been taken, That the Law was very nice and tender in all Proſecutions, that aim at the charging the Subject with Crimes and Penalties. It ſeems to be a new Light, ſprung up of late, which has diſcover'd, that there is a greater Neceſſity for that Privilege in Criminal Proſecutions, than in Civil. The Opinion of the ſucceſſive Ages, which have made favourable Acts for amending and curing of particular Defects in Legal Proceedings, ſeems to have been much otherwiſe. In many of theſe, all Criminal Proſecutions, of all kinds, are expreſly excepted: And where they are not, I muſt ſay I have not heard yet quoted; nor can find any Caſe of Authority, where thoſe Statutes were interpreted to extend to Proſecutions for Crimes. I perceive, the Council for her Majeſty in this Cauſe, have in their Arguments relied very much upon Amendments made by the Common Law. I can't pretend to be now prepared to run through each particular Caſe: In general, it cannot be denied, that ſeveral Amendments were made, by a Power that the Court had at Common Law; but we think there never was any which came up to this Caſe. And indeed, if all the Amendments in the Multitude of Caſes that have been cited in theſe elaborate Arguments, are allowed as good at Common Law; it would make one wonder, where the Neceſſity was of making an expreſs Statute, for the Amendment of a Letter or Syllable (and of the nice Doubts upon that) or of the other ſubſequent Statutes of *Jeofails* and Amendments. The Court, to me, by theſe Authorities, would ſeem to be arm'd with a ſufficient Power to have done the Buſineſs, without the Help of any Statute.

Tho' her Majeſty's Council rely principally upon the Statute of 8 *Hen.* VI. yet in regard they do not wave, or give up the Aid of the Statute 32 *Hen.* VIII. (For Mr. *Attorney* takes notice, that there is a *Quære* in my Lord *Dyer* (*Dyer* 353) Whether the King, in an *Information* of *Intruſion*, ſhould not have the Advantage of that Act? And he has cited Lord *Dyer*, 346. of an *Information Qui tam*, &c. to be within the Act: And that Lord *Hales*, in Lord *Fitzwater*'s Caſe, held, That 'twas reaſonable, that Criminal Proſecutions ſhould be aided) I think it will be very proper to conſider how the Law has been taken upon that Statute: And to ſee whether the Reaſon of thoſe Caſes, won't go as far backwards as to the Statute, 8 *Hen.* VI. The Words of the Statute, 32 *Hen.* VIII. *C.* 30, are not expreſly reſtrain'd to Actions or Suits *between Party and Party*; though the Word *Party* be mentioned in the Statute, both as to the Plaintiffs or Demandants, as to the Tenants or Defendants. And the enacting Clauſe is, *That from thenceforth, after Iſſue try'd for the Party Plaintiff or Demandant, or for the Party Tenant or Defendant, in any Manner of Action or Suit at the Common Law; the Judges ſhould proceed to give Judgment in the ſame, notwithſtanding any of the Miſtakes*

Miſtakes therein mentioned, in like Form as if no ſuch Default or Negligence had been. It is true, as Mr. *Attorney* has cited it, that 'tis left a *Quære*, as it ſtands printed in my Lord *Dyer*, which was in the 18th Year of Queen *Elizabeth:* But even in that very Caſe, 'twas held, 22 *Eliz.* that the Statute did not extend to it: As appears in 1 *Rolls Reports*, fol. 447. as well as by *Blackmore*'s Caſe 8. *Cro.* 163. where 'tis expreſly ſaid, That the Statute 32 *H.* VIII. extends not to *Pleas of the Crown.* And this Point is expreſly agreed by the whole Court, in *Sherington Talbot*'s Caſe, 1 *Cro.* 312.

A *Venire Facias* bearing *Teſte* out of the Term, and an Iſſue tried upon it, is *a Miſconveyance of Proceſs*, ſalved after Verdict, by thoſe Words in the Statute of 32 *H.* VIII.

So a *Venire* awarded, which bears *Teſte* on a *Sunday*, is adjudg'd to be aided within thoſe Words.

Yet in *Theobald* and *Newton*'s Caſe, *Style* 307, there was a Suit upon the *Statute* of *Inmates*; and the *Diſtringas* bore *Teſte* on a *Sunday*, and out of Term. Exception was taken to this after Verdict, and held not to be aided by the *Statutes* of *Jeofails.* I thought it neceſſary, by mentioning the two former Caſes, to ſtate which of the Statutes it was, which would have remedied the Fault, if the Statute had extended to the *Suit itſelf*; becauſe the Reporter (which is no Wonder in him) ſo far miſtook the Senſe of the Court, as to omit the material Statute, and to mention the 18th of *Eliz.* and 21. *Jac.* in neither of which Laws there are any Words which reach the Caſe; tho' in this Act of 32 *H.* VIII. there are.

And in Lord *Fitzwater*'s Caſe, cited by Mr. *Attorney*, tho' my Lord *Hales* does ſay, *The Caſe of the King will often ſtand in need of the Amendment of a wrong* Venire; and therefore he was of Opinion, to bring him within the Statute of 16 and 17 *Car.* II. which has very extenſive Words; yet he allows the Diſtinction between his *Criminal* Proſecution, and *Civil* Action; as appears in 3 *Keb.* 485, 519.

In *Percy*'s Caſe, 21 *Car.* II. 1 *Vent.* 17, 35. an Information of *Forgery* at Common Law, laid the Forging to be of a Releaſe at *Sherborn*; and the giving it in Evidence, to be at *Dorcheſter.* The Defendant was convicted by a Jury *de Vicineto* of *Dorcheſter* only: 'Twas adjudg'd to be a Miſ-trial; and a new *Venire* was awarded. For the King, 'twas laboured to ſupport the Trial by the Word *Suit:* For, ſay they, the Information is *Secta Domini Regis*; ſo that the Word is extenſive enough to reach this Proſecution: *And 'tis plainly out of the Exception*, which excepts no Information, but thoſe upon Penal Statutes. But the Court held, *Any Information, tho' at Common Law, was not remedied by the Words or Intent of the Act.*

In the principal Caſe of *Sherington Talbot*, 1 *Cro.* 311. *Jones*, 320. 2. *Ro. Ab.* 619. Information, in nature of a *Quo Warranto*, for claiming Liberty of free Warren in three Vills, in the *Foreſt* of *D.* Defendant diſclaims in the *Foreſt*, and in all but one Vill; and ſays, That that Vill is Parcel of the *Manor* of *S.* and preſcribes for free Warren in his Manor; Iſſue on that Preſcription, and the *Viſne* is from the Vill, not from the *Manor*; held to be miſtried, and not aided by any of the Statutes of *Jeofails: Tho' not within the Exception; becauſe the Statutes do not extend to the King's Caſe. He not being named.* The then Judges thought this a Reaſon; which will equally extend to the King's Caſe, upon the former Statutes of Amendments. And Mr. *Noy*, a very learned Predeceſſor of Mr. *Attorney General*'s, did not venture to carry the Point further for his Maſter, than to a *Peradventure* he might have the Advantage of thoſe Acts, in caſe of a *Quare Impedit*, or the *Civil* Right, where the Suit is in the King's proper Name, and not by his Stile of King only.

Nothing is more plain, than the Difference which the Law makes between Caſes where the King proſecutes his Right in his own Name, as for a *Civil* Right, and where the Proſecution is in his Capacity of King, and in the Exerciſe of the Royal Authority. If the King (*Henricus Rex*) brings a *Quare Impedit*, and dies before Judgment, the very Writ abates; becauſe *Henricus Rex*, who was named by his proper Name, ceaſes to be. But if the Proſecution be *pro Domino Rege*, tho' the King *in individuo* be dead, yet *Dominus Rex in genere* not being dead, the Information or Indictment ſhall ſtand, to be proſecuted by the Succeſſor. Yet all Proceſs upon them, wherein his own Name is uſed, and not his Name of Kingly Office only, ſhall fall; becauſe the particular Perſon is dead.

According to this Diſtinction, I do agree, That where the King ſues in his own Name for a *Civil* Right, his Suit has more Favour allow'd to it than that of a common Perſon. And ſo far goes the Caſe in *Blackmore*'s Caſe, 8 *Cro.* 156. before-mentioned, cited by Sir *Thomas Powis*; That a Writ of *Quare Impedit*, which was *preſentere* for *preſentare*, was amended; *being the King's Caſe.* Tho' had it been the Caſe of a common Perſon, it could not have been amended: For no original Writ was at Common Law amendable in the Caſe of a common Perſon. But that an Information or Indictment ever found Favour beyond, or equal with a *Civil* Action, I never heard before; nor find any Authority quoted to warrant it now. I would take Leave to mention the Caſe, 13 *Car.* II. in *Scac. Hardreſs*, 217. (9) *Pitoher* and *Jones:* 'Twas an *Information* upon the Act of *Navigation* for importing Spices, being the Growth of *Aſia*, *Africa*, or *America*, from *Holland* beyond the Seas, not being the Place where ſuch Goods were firſt and moſt uſually ſhipp'd for Tranſportation, *contra Formam Statuti.* The Defendant pleaded, he did not import them *contra Formam Statuti*, and Iſſue upon it; and Verdict againſt the Defendant. He moved in Arreſt of Judgment, That 'twas not laid, that theſe Commodities were not of the Growth of *Holland.* To this 'twas ſaid, That the Verdict would help that, it neceſſarily implying it: For that they were laid to be of the Growth of *Aſia*, *Africa*, or *America*, and imported from *Holland*; which ſhews thoſe were diſtinct Places: And the Defendant could not elſe have been found guilty, *contra Formam Statuti.* Yet, after long Debate, the Exception was held to be a good one, and the Judgment was arreſted.

I muſt obſerve, That the Council for the Informer in this Caſe, had not the Courage ſo much as to hope for Aid from, or mention the Statutes of *Jeofails* in this Caſe. They cite there *Johnſon*'s Caſe, 2. *Cro.* 609. and *Cholmley*'s, *P.* 1. *Cro.* 464. where in *Criminal* Proſecutions reaſonable Intendments after a Verdict, are allowed at Common Law. But tho' nothing was wanting in this Caſe, but an Averment that *Holland* was not within *Aſia*, *Africa*, or *America* (which muſt neceſſarily be proved at the Trial, elſe the Defendant could not have been convicted) they either did not know, that the want of an Averment of a thing neceſſary to be averred, if Iſſue be taken upon another Point, is aided

as a *Miſpleading*, by the Statute 32 *Henry* VIII. (tho' the Caſes of it are numberleſs); or they did not think there was any Colour for offering to extend that *Statute* to a *Penal* Law, with regard to the Intereſt the King has in the Proſecution, tho' a common Perſon was the Informer; and tho' there is no Exception of Informations on *Penal* Laws.

As to the Caſes cited on the other Side, of Amendments at the Common Law by the King's Prerogative; I muſt rely upon the Difference I have already taken between *Criminal* and *Civil* Caſes; and that there are not any Inſtances of Amendments in *Criminal* Proſecutions. As to ſeveral other Caſes, which have been cited by the other Side, of Amendments upon Returns to *Certiorari's*, Returns upon *Writs* of *Error*, &c. Thoſe, with Submiſſion, will not come up at all to the preſent Caſe. When a Record is certified upon a *Certiorari*, &c. the Parchment annexed to the Writ, is ſuppoſed to be the real original Record; and that remains in the Court here, and is become by the Return a Record of this Court. Where, by the Courſe of the Court, 'tis enter'd upon a Roll here, if in the Entry it varies from that that is the true Record, it is the Duty of the Court to take Care, that the Mis-Entry be rectified; and the Record, which is tranſcribed here, made agreeable to the Original. The rectifying ſuch Mis-Entries, or Mis-Copyings, are not Amendments of Faults in a Record (for that faulty miſtaken Entry is not really the Record) but making true Entries of the Record. And upon the like Reaſon was the Miſtake rectified in Sir *H. Tuſton's* Caſe, 1. *Cro.* 144. where there was a Conſent of the Parties for entring a Judgment by Diſclaimer, by *Virtue or Pretence of Letters Patents, bearing Date* 7 Jac. which Words were inſerted in the Paper-Book, by the Attorney General's own Hand; yet omitted by the Clerk, in the entring it upon the Roll: There, upon great Examination, and Conſideration of the Circumſtances, *all Parties conſenting*, that Mis-Entry was corrected; being, as the Book ſays, no more *than when a Special Verdict is mis-enter'd; which is rectified by the Notes of the Clerk of the Aſſize.* But it is very much inſiſted on, That the Statute 8 *H.* VI. *C.* 12. ſhall extend to this Caſe, becauſe there are particular *Criminal* Proſecutions excepted therein, of which this is not one. I do not find that there has been one Authority cited, when it was ever held, that that Law extended to any *Pleas of the Crown.* And I take the uniform Opinion of near three Centuries, ſince that Statute, to be againſt it.

Mr. *Attorney* relies much upon the Caſe of the King againſt *Percival* and *Godfrey*, and others, *Sid.* 244. where the *Venire* for the trying the Defendants, upon an Indictment for a Riot, was directed *Vicecomitibus de Canterbury*, and returned by *R. S. Vicecomes*; the City having in truth but one Sheriff: There, upon Examination of the Sheriff himſelf upon Oath, in Court (who ſwore that City had but one Sheriff) there was an Amendment. But what was that? Not of any thing that was the Act of the Court: But the Sheriff adds to his Endorſement upon the Writ (when he had anſwered ſingle) There that was not any other Sheriff; as it appears in the ſame Book, and in 1 *Keb.* 900 (17) 901 (75): And this the Court held to be well, upon the Authority of the Book of 39 *H.* VI. *f.* 40. where a Writ was directed *Coronatoribus*, and returned by one Coroner only, yet held to be well: For, ſay the Court, we won't take notice there are more Coroners than one. And ſo Juſt. *Wyndham* ſaid, in this Caſe, We ſhall intend but one Sheriff, unleſs more appear; 1 *Keb.* 901.

A good Part of Mr. *Attorney's* Argument ſeems to tend to the making it not neceſſary, or at leaſt diſputable whether it be neceſſary, that the *Diſtringas* ſhould be *Teſte'd* on the ſame Day that the *Award* is. Won't that Argument turn another way than 'tis intended? If it be a doubtful thing, whether it be right or not; I doubt it will be an Error in Judgment, like the making out an improper Writ in the *Debet* and *Detinet*, where it ſhould be in the *Detinet* only: And then, tho' it is a Default of the Clerk, 'twill not be ſuch a Default as will be within the Aid of the Statute, if that ſhould be held to extend to the Caſe. If it were a doubtful thing, it can't be ſaid he had a certain Rule to walk by: But he ventur'd upon his own Judgment, in which if he has chanced to miſtake, 'tis not amendable as a thing of courſe. But in truth, if it were to be enquir'd into, I believe 'twould be found not to be an Error in Judgment in the Clerk, but a Miſtake of a Matter of Fact, in taking *Sunday* to be the firſt Day of the Term.

Mr. *Att. Gen.* That will not alter it.

Mr. *Broderick.* There has been another Caſe cited; the King and *Walcot*; where a Reverſal of an *Attainder* was pronounced, and the Judgment of Reverſal actually enter'd up; yet being done by Surprize, the Entry of the Reverſal was ſet aſide, and razed out of the Record. Surely that cannot be an Authority for any. There the Entry was wholly irregular, contrary to the Rules of the Court: For the Judgment of the Court is not complete, till the End of the Term.

L. C. J. Holt. 'Tis in the Breaſt of the Court during the whole Term.

Mr. *Broderick.* And if any one within the Term, without the Direction of the Court, will enter a Thing as the Act of the Court; ſhall not the Court have a Power to reform that Irregularity, and do themſelves right? This is not an Amendment of a Record, but a Reforming of an ill Practice; a preventing of an Attempt to make that an Act and Record of the Court, which really is not ſo. Neither does my Lord *Macclesfield's* Caſe bear any Proportion to this.

There is no Queſtion but that a Court, which is intruſted with the Cuſtody and Preſervation of the Records wherein other Perſons are concerned, may take care upon any Miſchance; and that they have a Power to put things into their right State: As in caſe of Fire, or any inevitable Accidents, the Court, incident to their Truſt of the Cuſtody of the Records, and by the Authority they have to do Right and Juſtice to all Perſons, muſt have a Power to ſupply ſuch Loſſes.

As to the Caſe of the *Warden* of the *Fleet*, there was no Amendment made: But if there had, it would not have come up to this Caſe. I may, I am ſure, ſafely affirm, that the Court did declare, That was not to be eſteem'd a *Criminal* Proſecution; in regard there was not to be a Judgment to puniſh the Party, but the Proceeding was only to tranſfer the Eſtate to the Crown by way of Forfeiture.

The Council who have argued for the Queen, have not cited any one Authority, of an Amendment in a *Criminal* Caſe, within the Statute of 14 *E.* III. or 8 *H.* VI. *C.* 12. or proving, that thoſe Statutes extend to Caſes of that kind: But they call upon us, ſince the Words ſeem to be large enough to reach both (eſpecially thoſe of 8 *H.* VI. where there

there are ſome particular Criminal Proſecutions mention'd and excepted) to produce ſome Authority, to eſtabliſh the Diſtinction between *Criminal* and *Civil* Caſes. We think *the daily Practice in Civil* Caſes, and *the want of a ſingle Inſtance in a Criminal one*, carries a ſtrong Argument, if we could go no further: But I think we do not want an expreſs Authority in this Point too. *Orde* and *Morton*, *Trin.* 11. *Jac.* I. *Ro. Ab.* 201. There a Writ of *Venire Facias* out of the *B. R.* was *Venire Fac. duodecim*, &c. *coram Nobis apud Weſtmonaſterium, ubicunque fuerimus in Anglia:* But the Roll was well, omitting the Words *apud Weſtmonaſterium*. 'Twas adjudg'd the Writ might be amended by the Roll; for 'tis but Matter of Form. This was a Default in the Body of the Writ, and amended by the Statute of 8 *H.* VI. as a Default of the Clerk.

Yet *Brigs* and *Thompſon*'s, &c. *Yel.* 60. 111. In an *Information* upon the Statute 21 *H.* VIII. *againſt Spiritual Perſons taking Farms*, the Award of the *Venire Facias* upon the Roll was right, returnable *ubicunque*, but the Writ itſelf was returnable *coram nobis*, omitting *ubicunque*, and ſo it did not anſwer the Award upon the Roll. This certainly had been amendable in a *Civil* Plea; but the Report tells us, that Judgment was ſtaid upon it. And, my Lord, I will beg the Liberty to make this Obſervation upon the Caſe of the *King* againſt *Percival* and *Godfry* (which is ſo much relied on). There are ſome Caſes of ſo odious a Nature, and move ſuch Indignation, that there is a Danger of Things being paſſed over unobſerved, which would not have been admitted in another Caſe. That was the Caſe of one of the King's Meſſengers, employed in His Majeſty's immediate Service, barbarouſly inſulted and abuſed in his Inn at *Canterbury*, by the Defendants and a great Rabble of People: As the Offence was very flaming, the Reſentment of the Court ran high; and they thought it reaſonable to do in that Caſe, what perhaps in an ordinary one they might not *eaſily* have done: Yet what was then done, is now to be cited for a Precedent in every Criminal Caſe whatſoever. I muſt ſay the ſame in this Caſe; whatever my Client is charged with, the Rule given in his Caſe may affect every Man in *England*, who ſhall hereafter be charged criminally: And therefore I doubt not your Lordſhip will very well conſider of it.

I hope, my Lord, I have given ſome Anſwer to moſt of the Things that have been inſiſted on; and that upon the whole Matter, this Miſtake will not be accounted a Thing amendable by Law.

Mr. *Mountague*. My Lord, in Anſwer to what has been ſaid, I ſhall not preface what I have to ſay with any Apology for being of Council with Mr. *Tutchin*, tho' I have been egregiouſly miſrepreſented in what I did, as Council for him at *Guild-Hall*. I know your Lordſhip is no Reſpecter of Perſons, but will have the ſame Regard to one Defendant as another.

Mr. *Att. Gen.* I am not concern'd at any Thing that has been written or printed about that Trial.

L. C. J. Holt. We will take no notice of that.

Mr. *Mountague*. My Lord, as to what Mr. *Attorney-General* and Sir *Thomas Powis* have ſaid, I beg Leave in the firſt Place to take notice wherein it is we agree, and in what we ſhall differ. Firſt, we agree that this Cauſe is a Cauſe of the greateſt Conſequence. Mr. *Attorney* tells your Lordſhip, it concerns all the Proceedings of the Crown; and I hope I may be pardoned if I ſay, it is of no leſs Concern to the Defendant and the Subjects of *England*. I would therefore pay that Reſpect to the Court, not haſtily to ſpeak to a Point of this Moment, but ſhall deſire to have Time to look on thoſe Caſes that have been mentioned.

L. C. J. Holt. If you will do this, you may conſider the Statute of *H.* VI. for thoſe Words are general, and not relative either to Civil or Criminal Caſes in particular. It remedies the Miſchief between Plaintiff and Defendant generally.

Mr. *J. Powel.* Mr. *Broderick* has not taken notice of that Objection that my Lord *Coke* takes notice of, Becauſe they are not excepted, therefore they are included.

L. C. J. Holt. I would have you conſider why it is not within the Words of the Statute. It is as plain that it is the Fault of the Clerk as can be; he had the Roll before him, therefore it muſt be the Miſtake of the Clerk. The Award of the Writ is the Act of the Court, and that was the 23d; now this Writ did bear Date the 24th, and I believe we did not award the Writ the 24th, therefore it is to be judged they miſtook the Time of the *Teſte*. For the Record ſays the 23d, and this Writ ſays not till the 24th. Now why ſhould not this be within the Statute of *H.* VI. for it is the Miſpriſion of the Clerk? And then the Queſtion is, whether that Statute does not extend to this Matter.

Mr. *J. Powel.* I do indeed queſtion whether any Statute of *Jeofails* extends to it; but this Statute does not, as appears by 8 *Coke*, becauſe they are excepted. There are Indictments of Felony and Treaſon that are excepted. Now that this is a Miſpriſion of the Clerk, is plain, becauſe he had the Award of the Court.

Sir *T. Powis.* I think all agree it was perfectly a Miſtake, and that makes it a diſputable Caſe; I do not ſtand on it as if it were right, but grant it was a perfect Miſtake; and then that Objection is clear, that Criminal Matters are not within the Statutes of *Jeofails*, and it is certain moſt of them are excepted, *viz.* Indictments, in this Statute of *H.* VI. where it is ſaid what are excepted, &c. 'Tis true you cannot amend what are excepted, where the Party was in Danger of Life; but it leaves out in inferior Matters; therefore it ſeems, that whatever was ſaid of Criminal Matters, was intended of the greater Criminal Matters, and ſo was the Opinion in the Caſe of ——

L. C. J. Holt. That was a Civil Cauſe, but we thought we could not amend it: For it would be contrary to our Duty as Judges, to alter a Record. And therefore we refuſed even in Point of Scandal in that Caſe; alſo on Examination we found that we could not amend it, contrary to Truth.

Sir *T. Powis.* My Lord, we had not in that Caſe any thing to amend by; but here we have a Roll to direct us.

Mr. *Att. Gen.* If your Lordſhip indulge them from Time to Time to put it off, we ſhall never have done.

Mr. *Mountague.* My Lord, I am not prepared to anſwer what has been ſaid, for I did not expect this Motion would have been made.

Mr. *Att. Gen.* That we may be once at an End, I would fain hear what they have to ſay, and whether they have any more Exceptions.

L. C. J. Holt. Have you any more Exceptions to make?

Mr. *Mountague.* My Lord, we have no more Exceptions to the Matter we are now upon, which

is ſetting aſide the Trial. You know, Mr. *Attorney*, there are two Things incumbent on a Defendant's Council. One is, to ſet aſide the Trial if he can, and that is the Thing we are now upon: The other is, to move in Arreſt of Judgment. Now Mr. *Attorney* well knows 'twill be a Waver of our Motion for a new Trial, to ſtir any thing in Arreſt of Judgment.

Mr. *Att. Gen.* He that makes Exceptions, ſhould be prepared to give all his Exceptions together.

Mr. *J. Powel.* This is not a Motion to ſet aſide the Trial.

Mr. *Mountague.* Yes, my Lord, it is to ſet aſide the Trial; not to arreſt Judgment being given upon the Verdict.

Sir *T. Powis.* My Lord, if they have any more Exceptions to offer, I deſire they may let us have them now.

Mr. *J. Powel.* If there be an Error in the Writ there muſt be a *Diſtringas de novo*, there muſt be a new *Diſtringas* only iſſued, you cannot make it a Diſcontinuance of the whole Proceedings; but there muſt be a new Award of a *Diſtringas*, the Error wherein is the Cauſe of Exception; if we ſhould give our Opinion that it is not amendable, we ſhould try him next Week.

Mr. *Att. Gen.* My Lord, they ſhould lay down all their Exceptions together.

Mr. *Mountague.* My Lord, I know you do not expect in this Caſe any thing ſhould be done otherwiſe than what is uſual in all other Caſes. Now I appeal to Mr. *Attorney*, if it be not the conſtant Courſe here, to move firſt for a new Trial; and if you object any thing in Arreſt of Judgment, it is generally ſaid, you have waved your Motion for a new Trial.

L. C. J. Holt. No, that is not ſo.

Mr. *Mountague.* My Lord, we are now in your Judgment, whether this Man ſhall be tried again, or not? And if we ſhall happen to prevail for a new Trial, then it will be a Diſadvantage to our Client to have told our Exceptions to the Information, for then Mr. *Attorney* will pray to amend.

L. C. J. Holt. You are ſo far in the right, if indeed here were a Verdict —— —— —— —— that is unqueſtionable, that is your proper Time to move in Arreſt of Judgment; but if this Verdict be not right, it is too ſoon to make Exceptions to the Information. Then we ſhall tell you what we have to do.

Mr. *Att. Gen.* I am content they ſhould keep their Learning to themſelves; but, my Lord, if they will not do that, I hope you will not give them further Time.

L. C. J. Holt. We ſhall give them but till To-morrow.

Mr. *J. Powel.* Mr. *Mountague*, it is a ſtrange Thing that you ſhall make an Exception, and not be ready to maintain it; at this rate any Proſecution whatever may be hung up and delayed. If this be the way, we muſt give you the leſs Time.

Mr. *Mountague.* My Lord, I ſhall entirely ſubmit to what the Court ſhall think fit to order; but 'tis now pretty late in the Day, and your Lordſhip knows 'tis a Sitting this Afternoon in *Middleſex*, and To-morrow is another Sitting in *London*, where I am already retained to be, and I know not how late your Lordſhip may keep us in both Places: Your Lordſhip ſeldom diſcharges us till late at Night, and it will be impoſſible for me to look into the Authorities which have been quoted, much leſs to conſider of any thing that will be fit to offer in Anſwer to both theſe learned Arguments, in a Matter which I muſt profeſs is altogether new to me.

Mr. *J. Powel.* There are Amendments made every Day.

Mr. *Mountague.* My Lord, I hope I ſhall ſhew you it has not been done yet, in any ſuch Caſe as this, neither can it be done, with Submiſſion.

L. C. J. Holt. You ſhould have prepared for it. I will tell you a Caſe at *Hicks's-Hall*, where I myſelf took the like Exception, but it was over-ruled by Sir *William Smith*, the then Chairman of the Seſſions. In an Indictment againſt ——, for a wrongful Entry, *&c.* there was a Miſtake in the Time of the Entry alledged, *&c.* And they amended the Fault by the Statute of *E.* VI.

Mr. *Att. Gen.* My Lord, I hope you will give them but till To-morrow.

Mr. *Mountague.* I hope you will not preſs that, Mr. *Attorney*, who have been ſo lately a *Niſi Prius* Practicer.

Mr. *J. Powel.* You are not preſs'd in it; none can imagine you came here in this Caſe, and that you were not provided to defend it. I hope you are as ready as Mr. *Broderick*; he is but your Aſſiſtant, and yet he was ready.

Mr. *Mountague.* It will be impoſſible for me to be more ready To-morrow. I will rather go on with it now, than do it To-morrow. This is a new Motion, and I did not in the leaſt expect it.

Mr. *Att. Gen.* This is no new Motion, I believe none would believe but it would be made.

Mr. *J. Powel.* Why can't you be as ready as Mr. *Broderick* is?

Mr. *Mountague.* I do not pretend to ſet myſelf upon the ſame Level with Mr. *Broderick*: Tho' he be ready to give an Anſwer *extempore* to the Arguments that have been made, I hope your Lordſhip will indulge me with a Day or two more to conſider of what has been ſaid, ſince the Queſtion now before the Court is of that Concern to all the Subjects of *England*. My Lord, I deſire we may have but till *Thurſday* next, and by that Time I will undertake to be ready.

Mr. *J. Powel.* When you make an Exception, you ought to be ready to defend it.

Mr. *Mountague.* It was impoſſible for me to foreſee what Courſe the *Attorney General* would take to obviate the Objections I have made. I muſt own, I did not expect this Motion for an Amendment; I thought of that the leaſt of any thing, becauſe I never knew the like Attempt in a Criminal Proſecution. And ſince Mr. *Attorney General* has been pleaſed to countenance the Exception I have taken, with a Week's Conſideration of it; I ought in Civility to pay as much Reſpect to the Arguments he has made in Anſwer to it. And therefore I muſt beg a little Time of your Lordſhip, as well to ſhew my Reſpect to Mr. *Attorney General*, as to diſcharge my Duty to my Client.

Mr. *Att. Gen.* I deſire none of your Reſpect

Mr. *Mountague.* I hope, Mr. *Attorney*, you are not angry becauſe I would pay Reſpect to you.

Cur'. Well, take Time till *Thurſday*.

November 23. 1704.

L. C. J. Holt. Mr. *Attorney*, have you any thing to move?

Mr. *Att. Gen.* My Lord, I attend here only upon the Account of Mr. *Tutchin*.

L. C. J. Holt.

L. C. J. Holt. Who is for Mr. *Tutchin?*

Mr. *Mountague.* My Lord, I am of Council for Mr. *Tutchin*, and I am To-day to ſhew your Lordſhip Cauſe why the Motion made the other Day by the Council for the Queen to amend the *Teſte* of the Writ of *Diſtringas* cannot be allow'd. And ſince the Court hath been pleaſed to indulge me with a little Time to think of the learned Arguments that have been made both by Sir *Thomas Powis*, and Mr. *Attorney General*; and to look into the Authorities which have been cited, I hope I ſhall take up leſs of your Lordſhip's Time than if I had been put to anſwer *extempore* to the ſeveral Matters that have been inſiſted upon. For I muſt beg Leave to ſay, that upon Conſideration of what was then offer'd, I do find that a great many things that were then ſaid, do not carry that Weight along with them as I did then apprehend. And tho' I do not queſtion but every thing that can be thought of has been ſaid for the obtaining ſuch an Amendment, yet I have the Satisfaction at laſt to find that there is but one Caſe, and that is what your Lordſhip was pleaſed to mention, of the Judgment of Sir *William Smith*, that looks like a Precedent for this Amendment. My Lord, in ſpeaking to this Matter, I ſhall not trouble the Court with many new Citations out of *Fitzherbert* and *Brook*'s Abridgment, Title *Amendment*; for I perceive the Gentlemen on the other Side have looked over the Bed-Roll of Caſes which are to be met with there, and find that they have taken notice of every thing that will make to their Purpoſe; my Buſineſs therefore ſhall be, cloſely to apply myſelf to the Conſideration of what they on the other Side did inſiſt on; and I hope I ſhall be able to ſhew to your Lordſhip that nothing they have ſaid will warrant this Amendment.

But before I enter upon the Argumentative Part, I muſt beg Leave ſhortly to ſtate the Caſe itſelf, and ſhew how it now ſtands before the Court; and if I miſtake in giving an Account of the leaſt Matter of Fact, I deſire Mr. *Attorney General* would interrupt me ſo far as to ſet me right; for if we do not agree in the State of the Caſe, our arguing will be to very little Purpoſe.

Mr. *Att. Gen.* It is the Record that is in Diſpute, it is not Matter of Fact.

Mr. *Mountague.* Mr. *Attorney*, there is ſomething of Fact beſides the Record, which is now before the Court. This Information was exhibited in *Eaſter* Term laſt, and the Defendant pleaded to it in *Trinity* Term; and Iſſue being then joined, a *Venire Facias* was awarded, and made returnable the firſt Day of this *Michaelmas* Term. On that Day (the Roll ſays) all the Parties did appear; but none of the Jury came, and thereupon the Court did order, that a *Diſtringas* ſhould iſſue, and be returned hither, *Die Jovis proxime poſt Craſt. Animarum:* On the Return of the Writ of *Diſtringas*, which is now before the Court, the Defendant appear'd in Court, and by his Council took Exception to the *Teſte* of this Writ, becauſe it was not iſſued as the Roll hath awarded, on the Day he was preſent in Court, which was the 23d Day of *October*; but on the next Day, which was the 24th Day of *October*, when he is ſuppoſed to be out of Court; ſo that the Award has plainly not been complied with, and therefore the Writ which is now before the Court was taken without any Authority from the Court, and the Trial cannot be ſupported, becauſe the Day and Place mentioned in the *Diſtringas*, was not appointed *per formam Statuti*, in the Preſence of the Parties. For theſe and other Reaſons, it was prayed in his Behalf, that all the Proceedings upon this *Diſtringas* ſhould be vacated.

Mr. *Att. Gen.* The Day is right when the Perſons are to appear, and the Award of the *Niſi Prius* is as it ſhould be.

Mr. *Mountague.* The Return is *Die Jovis prox. poſt Craſtin. Animarum*, as it is in the Roll, but the *Teſte* of the Writ is the Day after it was awarded.

L. C. J. Holt. The Award is right.

Mr. *Mountague.* My Lord, we own the Award is right on the Roll.

L. C. J. Holt. But the Queſtion is, whether the *Teſte* of the Writ be as it ſhould be?

Mr. *Mountague.* My Lord, the Writ that is now before you being *Teſte'd* on the 24th of *October*, cannot be ſaid to be taken out upon any other Day than the 24th of *October*, and in that it is not purſuant to the Roll. Upon the taking of this Exception, Mr. *Attorney* was ſurprized, and could not then ſay much to it; but deſired time to enquire how it came to be ſo.

Mr. *Att. Gen.* I could have ſaid as much to it then, as after four Days; it became you to have been as ready.

Mr. *Mountague.* My Lord, Mr. *Attorney* is a little too haſty for me in this Matter. I intend to do him right, if he'll have Patience to hear me out.

L. C. J. Holt. Come to the Point.

Mr. *Att. Gen.* This is a popular Argument, and ſpoken *ad captandum Populum.*

Mr. *Mountague.* Mr. *Attorney* did aſk ſome time to have this Matter enquired into, and that Requeſt was agreed to: And upon Examination it appears that this Writ was actually taken out after the firſt Day of the Term; and the Clerk being doubtful with himſelf how to make the *Teſte*, aſk'd the Maſter how to *Teſte* it, and he directed it to be *Teſte'd* the 24th of *October*; and upon this ariſes this Motion. The Gentlemen that are of the Queen's Council pray that it may be amended, and the Queſtion is, whether it can be ſet right; and with Submiſſion, I think it cannot, and that no ſuch Obliteration ought to be made, though the Defendant were found guilty of ſix times as many Crimes as he ſtands now charged with. I muſt agree with Mr. *Attorney*, in what he ſays with relation to the Conſequence of the Determination of this Point, that it will be a Precedent that will affect all the Proceedings of the Crown in all ſuch Caſes. And this it is that makes it to be a Matter of wonderful Conſequence to the People, as well as to the Crown; for tho' under the preſent Adminiſtration of Affairs innocent Men may think themſelves very ſafe, yet no body can be ſure in after-ages that they ſhall not fall under violent Proſecutions; and then Slips and Miſtakes may be of Service. My Lord, hitherto I may ſay, all Advantages of this kind have been allowed to Defendants in Criminal Caſes; and upon this Occaſion it may be obſerved, that even Actions *Qui tam* upon Penal Statutes, have always been excepted out of the Statutes of *Jeofails*; and from hence, I think, ariſes an Argument *a Fortiori*, that the *Jeofails* of Clerks in Proſecutions more penal, are not to be amended. Sir *Thomas Powis*, in his Argument, did, as I remember, inſiſt upon theſe two Propoſitions, and as I take it, he was ſeconded in them by Mr. *Attorney*; Firſt, That the *Teſte* of this Writ is amendable by the Common Law: and if not that, Secondly,

It

It is to be amended by the Statutes of Amendments, either by that of 14 *E.* III. or that of 8 *H.* VI. And two Reasons were given for this Opinion; First, Because it appears to be a plain Mistake in the Clerk; and Secondly. because they come to move for the Amendment in the same Term wherein the Writ was sued forth and returned.

Now, my Lord, in Answer to both these Reasons and Assertions, I hope I shall make it appear in the first Place, that this *Teste* cannot be altered, either by the Common Law, or by the Statute Law: And in the next Place, I hope to shew your Lordship that the making the *Teste* of this Writ to be upon *October* 24, is not purely a Slip in the Clerk, but does proceed from the Nescience of him that was advised with about it. And altho' this Motion for an Amendment be made the same Term the Error has been committed in; yet it is not in the Power of the Court to set it right.

As to the first of these Particulars, I shall readily agree with Sir *Thomas Powis* and Mr. *Attorney General*, That by the Common Law many Things were to be amended without the Help of any Act of Parliament; but the Thing that I deny, and which, with Submission, hath not yet been proved by any Authority that has been quoted, is, That no Error in the *Teste* of any Process that does issue out of the Court and is returned back again by the Sheriff, can be alter'd by the Rules of the Common Law, and I hope by and by to make it appear, not by any Act of Parliament neither. My Lord *Coke* in *Blackmore*'s Case, *Lib.* 8. *Fol.* 156. *b.* 157 *a.* does say, as has been observed, that the Judges by the Common Law may amend the Entry of their own Judgment, or any other Part of the Record, the same Term; but he does not there say, that they may amend any Writ made out and returned by any Officer or Minister of the Court. And the Reason given why they may amend their own Judgments and the Continuance enter'd upon the Roll is, because such things as they themselves do, are said to remain in their own Breasts till the End of the Term: But surely the Actions of another Person, his Disobedience to the Order of the Court, can never be look'd upon as an Act of the Judges. And I cannot see how a Writ taken out *in Pais* which is never in Court till it be brought thither by the Hands of the Sheriff, can be said to remain in the Breasts of the Judges. The Instances of Amendments by the Common Law which are given by my Lord *Coke*, are in the Entries of Essoigns and Continuances, and such like Misprisions *del Court Mesme*: As for Instance in 5 *E.* III. *Fol.* 25. *W.* brought a *Præcipe* against *B.* who vouches *C.* to warranty, and he enters into the Warranty and pleads to Issue, and a *Venire facias* is awarded, and the Jury is afterward put in respite, and the Entry of that upon the Roll was in this Manner, *jurata inter B.* and *C.* that is between the Tenant, and the Vouchee *poniter in Respectum*, and so it appears on the Roll, whereas it should have been *inter W.* the Demandant, and *C. quem B. vocavit ad Warrantum.* Now this was look'd on as the Clerk's Mistake in the Entry of the Order of the Court, and so it was amended, *Coke*'s 8th *Report*, *f.* 157. *b.*

Now, my Lord, with Submission, this Case and all the rest of the Cases that have been mentioned for Amendments at the Common Law will only justify an Amendment of the Roll. And indeed had there been an Error in the Entry of the Award of the *Distringas*, I should rather think that amendable than this; for 'tis certainly more reasonable that the Court should intermeddle with their own Acts than with the Acts of another. Till this Writ was return'd, annex'd to the *Nisi prius* Roll, the Court had nothing to do with it. And now this Writ is before the Court, your Lordship is only to judge, whether it be pursuant to your Award or not; if it be not made right, it must be imputed to the Fault of the Person that made it out; and the Court can never be said to be in Fault, if the Clerk employ'd makes out a Writ contrary to Direction; and if the Party concern'd suffer by such Mistake, he may thank himself for employing such an Agent. But Sir *Thomas Powis* says, that this Amendment is pray'd on Behalf of the Queen, whose Prerogative it is to have many Advantages in Pleading, which the Subject shall not have. My Lord, with Submission to better Judgments, I conceive that for this very Reason the Queen's Council have the less Reason to pray an Amendment. For since they have other Prerogatives to have recourse to, they ought not to ask this besides. Your Lordships will often hearken to us when we move for new Trials in Actions of Debt upon a Bond where the Verdict and Judgment are concluſive: When you will not give Ear to such a Motion in Ejectment, where the losing Side may have fresh Actions if they will. But, my Lord, not to rely altogether on this Answer, I shall add this one Word further, that according to my small Observation these Advantages in Pleading do not belong to the Throne in the Pleas of the Crown, but in such Actions as *Quare impedits*, and the like. As to the particular Instances that have been mentioned, I conceive they do not come up to the Case in the Question. The first Case which I have taken down as cited by Sir *Thomas Powis*, is *Brook's Abridgments*, *Title Amendments*, *f.* 32. and that is, That if Judgment be enter'd otherwise than the Truth is, it shall be amended in the same Term, because the Record is, *in les Cores des Justices mesme le term & nemy in le Roll.* This Case is one of the Authorities taken notice of in the 8th Report, to warrant the Amendments of the Acts of the Court, but does not in the least relate to the Amendment of Writs and Process which are sued out and executed *in Pais.*

The next Case was 4 *H.* VI. *f.* 16. which is only, whether he that casts an Essoign for a Tenant in a *Formedon* shall be permitted to take Exception to the Writ which appears to be vicious. The Demandant there was the Ward of the Crown, and he that cast the Essoign for the Tenant, took Exception to the Writ. The Exception was this; That in the Style of the King he is said to be *Dux Hiberniæ* instead of *Dominus*, and he would have had the Writ for that Reason to be quash'd. And there *Martin* demands whether the Writ shall not be amended *sicome le Roy mesme soit parte*, and the Case concludes with *quære Legen.*

As to the Case of *Fitzherbert*, *Title Amendment* *f.* 19. that is what my Lord *Coke* takes notice of in *Blackmore*'s Case, when he says, that in a *quare impedit* brought for the King, the Word *presentere* was put instead of *presentare*, and it was held that it should be amended, but how does the Book say it was amended? Why the Writ itself was brought into Chancery, *& la fuit Amend.* Now I take that to be *tantamount* to the issuing of a new Writ. Most of the other Cases mention'd out of the old Year Books, are relating to Amendments in Civil Cases, and therefore I shall spend no more Time in taking notice of them particularly.

My

My Lord, the next Thing to be conſidered is, Whether any Statutes do direct ſuch an Amendment as this; and I hold they do not. Indeed the firſt of theſe, which is 14 *E.* 3. *Chap.* 6. is pretty home; the Words are, that by the Miſpriſion of a Clerk in *any Place whereſoever* it be, no Proceſs ſhall be annull'd, or diſcontinued, by Miſtake in writing one Letter, or one Syllable, too much, or too little; but as ſoon as it ſhall be perceived by Challenge of the Party, or in any other Manner, it ſhall inſtantly be amended in due Form. Now here are as large Words to fit the Purpoſe, as Mr. *Attorney* can deſire, and if he were now to frame an Act of Parliament, I don't know how Mr. *Attorney* could make it fuller; and I muſt confeſs, if I were to argue this Point within a Year after the making of ſuch an Act of Parliament, I ſhould reckon my ſelf to have a difficult Province to maintain, that this Miſpriſion does not come within the Purview of ſuch an Act: All therefore that I ſhall ſay to it is, that it is now a great many Years ſince this and all Statutes of Amendments have been made, and no one adjudged Caſe as I know of, does ſay, that criminal Proceedings are within the Purview of this Statute. Mr. *Attorney General*, as I remember, did, in his Argument admit that this Statute of 14 *E.* III. *Chap.* 6. did not extend to criminal Caſes.

Mr. *Att. Gen.* I deny that; I did enforce it.

L. C. J. Holt. I do not remember he did admit that.

Mr. *Mountague.* Then I acquit him of it, and to ſhew him that I meant him no wrong by ſuppoſing he ſaid ſo, I will mention ſome Authorities that are expreſs in this Point.

Mr. *Att. Gen.* I did enforce that Statute by ſubſequent Statutes, particularly by the Statute of 8 *Hen.* VI. *Chap.* 12. for there the Word Proceſs is included.

Mr. *Mountague.* Perhaps Mr. *Attorney General* did ſo; but if he had admitted it, he would not have been in the wrong, if my Lord *Coke* be in the right in what he ſays. For in the ſame Caſe of *Blackmore*, *fol.* 157. ſpeaking of the Extent of the Word *Proceſs*, he ſays, "This Statute muſt be underſtood to mean Proceſs in all Actions, Real, "Perſonal, and Mix'd; and not Proceſs in Pleas "of the Crown." And my Lord *Coke* does not here aſſign it for a Reaſon, becauſe they are excepted; for in this Statute of 14 *E.* III. *C.* 6. there is no Exception: And therefore ſpeaking of this Statute, he could not ſay, Pleas of the Crown are there excepted; yet he is poſitive this Statute does not extend to any other Proceſs, than what iſſues in Actions, real, perſonal, and mix'd. Now what can be the Reaſon, that Proceſs in all criminal Caſes ſhould be excepted out of this Statute, by the Interpretation of the Judges in all Ages; when the Words are ſo full, that no Proceſs whatſoever ſhall be annull'd by any Miſpriſion, whereſoever it be? Truly, I can't conceive otherwiſe, but that the Judges in all Ages have thought it reaſonable, all Advantages ſhould be allow'd to People under ſuch Proſecutions.

Mr. *Attorney General* did ſeem to give another Reaſon, That the Crown not being named, was a great Argument that it did not want the Aid of ſuch an Act of Parliament; but that the King had a Right by the Common Law to make Amendments. And for this he cited *Hardreſs*, *fol.* 504. That before Judgment, there can be no Diſcontinuance in the Caſe of the King; and 2 *Cro. fol.* 211. *Beecher's* Caſe. Now if this be ſo, as he would have it, that all Proceſs in the King's Caſe is amendable by the Common Law, and all other Proceſs by this Statute; how comes there to be any Occaſion for my Lord *Coke* to caution us about the Extent of this Act of Parliament, by ſaying, it extends to Proceſs in Pleas real, perſonal, and mix'd; but not in Pleas of the Crown? What does it ſignify, whether this Proceſs be amendable at Common Law, or by the Statute, if it be amendable? But on the other Side, one may ſtrongly infer, that if no Proceſs were amendable before the Statute 14 *E.* III. and that Statute ſays, all Proceſs hereafter ſhall be amended; it was then fit for my Lord *Coke* to tell us, That tho' theſe Words in the Statute ſeem very extenſive, yet it has been the Opinion of all Ages ſince, that no Proceſs, but what iſſues in Actions real, perſonal, and mix'd, are meant by it.

I do take it therefore, with great Submiſſion to Mr. *Attorney*, that the right Inference to be made from this *Notamen* of my Lord *Coke*, is to caution the Reader not to conclude over-haſtily, from the Comprehenſiveneſs of the Words of the Statute, that Proceſs may be amended in criminal Caſes. That way his Admonition may be of Service: But the other way with great Reſpect to his Memory I ſpeak it; it will ſignify little. As to the Caſe of *Beecher*, and the other Quotation out of *Hardreſs*, nothing more can be inferr'd from them than what already has been taken notice of; that after the Term they may enter Continuances before Judgments. This appears by the Caſe in 3d *Levin.* 430. where all the Caſes cited by Mr. *Attorney* to this Purpoſe are taken Notice of.

Now we come to the next Act of 8 *H.* VI. The Words of which Statute, as I apprehend, Mr. *Attorney* did ſtrongly rely on: For there, ſays he, are Exceptions of Appeals, Indictments of Treaſon, and of Felonies, and of Outlawries for the ſame; and nothing is ſaid of Informations; and the King's Judges have thereby Power to amend all that they think the Miſpriſion of any Clerk, in any Writ, Warrant of Attorney or Panel in Affirmance of Judgments. Now the Anſwer that I would offer to this Statute, is, That the Words in the enacting Part, are not larger than the Words are in the 14th of *Edw.* III. that is, they are not larger as to this Purpoſe. The Words indeed of this Act are, That all Miſpriſions of Clerks, in all Writs, ſhall be amended. The Words in the Act of *Edw.* III. are, That all Miſpriſions, in all Proceſſes whatſoever, ſhall be amended. And I take the Words, *all Proceſs whatſoever*, to be as extenſive to the preſent Caſe, as to ſay, All Writs ſhall be amended. Therefore I cannot ſee, from the enacting Part, why one Act, to wit, that of *Henry* VI. ſhould include criminal Proceedings, when that of *Edw.* III. does not include them. Thus much for the enacting Part.

Now I ſhall take Notice of the Exceptions. There are indeed ſome Things mention'd to be excepted out of the Purview of this Act of *Henry* VI. which are not excepted out of the former in *Edward* III's Time; as Appeals and Indictments: But I think they were put in *ex abundanti Cautela*, to ſhew, that the Law-Makers did not intend to include criminal Proceedings. And tho' ſome Particulars are only mention'd; yet I hope the Rule of *Expreſſio unius*, ſha'n't hold in the Expoſition of

Acts

Acts of Parliament, to exclude every Thing elſe that is not named.

By *Littleton*, Sect. 21. it appears, there are many *Eſtate Tails*, beſides thoſe that are particularly mention'd by the Statute of *Weſt.* 2. *de Donis Conditionalibus*. And there are many Offices not within the Purview of the Statute of 5 and 6 *Edw.* VI. *Chap.* 16. that are of more Conſideration than the Park-Keeper's Place, which are not mentioned in the Exceptions of that Statute, againſt the buying and ſelling Offices. And therefore I can't think any great Weight is to be laid upon the Statutes mentioning Appeals and Indictments; eſpecially ſince the Opinion of all Ages, ſince the making the Statutes of Amendments, ſeems to concur againſt extending the Power of amending to criminal Caſes.

My Lord, It would be an endleſs Thing to enumerate the ſeveral Indictments and Informations, that have been quaſh'd within the Compaſs of my Memory, by reaſon of Clerks Miſtakes. I ſhall inſtance but in one, and that is the Caſe of the Queen and *Frankling*; where no longer ago than the Beginning of this Term, your Lordſhip and the whole Court quaſh'd an Indictment, becauſe the Clerk had writ in the Caption, *Præſentant Exiſtit*, inſtead of *Præſentat Exiſtit*. Here was but a Letter to amend: And this muſt plainly be the Clerk's Miſtake, not his Fault in wanting Skill in ſuch Caſe. But I take it, the Caſe now before the Court is of a different Nature. The *Teſteing* of this Writ the 24th of *October*, cannot be accounted a Slip of the Clerk, but did proceed from wrong Advice. And this is the third Thing I propos'd to ſpeak to: If this Writ with the *Teſte* had been entered upon the Roll, and tranſcribed only thence to deliver to the Sheriff; perhaps the varying from the Day mentioned in the Roll, might be accounted a Slip of the Clerk: But when this Writ was made out, it was certainly a Day after the Time it ought to have iſſued; and upon Advice aſk'd, it was directed ſo to be *Teſte'd*. So this is not a Slip.

If it be inſiſted upon, That this Miſtake happen'd thro' Forgetfulneſs of the Day the Term did begin on; to that I muſt anſwer, That all Knowledge is ſaid to be nothing but *Reminiſcentia*. If a Man forget any Thing that he has read or heard of, he may be ſaid to be as ignorant of that, as if he had never known it. Now it plainly appears, that they who were adviſed with about the *Teſte* of this Writ, did not then know on what Day the Term did begin, and therefore *Teſte'd* the Writ the 24th, inſtead of the 23d. I muſt therefore, in Behalf of my Client, inſiſt upon it, that this Error proceeds from the Neſcience of the Adviſer, and not from the Slip of the Writer. And this Point will ſet us clear of all the Statutes of Amendments, if they did extend to criminal Caſes.

As to the grand Caſe of *Harris*, reported in *Crooke James*, fol. 502. that has been ſo very much relied on, I hope, upon Conſideration, it will not appear to be ſo great a *Goliah* as it was repreſented to be. There was an Indictment for a Nuſance remov'd hither by *Certiorari*; and the Record that was tranſmitted, was found imperfect, in a Point which was inconſiſtent with the Verdict: For in Truth the Plea of Not Guilty was omitted. And what did the Court do hereupon? Why, they ſent for the Clerk of Aſſize, in whoſe Time the Record was filed below; and he was order'd to amend that which was come hither by the *Certiorari*, and ſet it right: I ſuppoſe, by making it agree with the original Proceedings, which remain'd upon the File below. Now, does Mr. *Attorney* think this is like the Amendment he would make, ſuppoſing all in *Harris*'s Caſe were rightly done? Does Mr. *Attorney* think, that this will juſtify the Amendment now propos'd? Which is, indeed, making this Writ to be another Writ than it is: For a Writ that is *Teſte'd* on the *Monday*, does as much differ from a Writ *Teſte'd* on a *Tueſday*, as one Day differs from another. And I take it, with Submiſſion, that the Amendment now pray'd, will alter this Writ, as much as the Amendment that is ſo much taken notice of by Juſtice *Ingham*, 2 *Rich.* III. fol. 10. did the Amercement in that Caſe. There was an Amercement recorded of Thirteen Shillings and Four-pence; and becauſe it was a poor Man's Caſe, it was afterwards agreed to make it Six Shillings and Eight-pence. There was a Diminution in the Sum. And here Mr. *Attorney* would have a Diminution of a Day.

L. C. J. Holt. Was that done judiciouſly, or clandeſtinely?

Mr. *Mountague*. My Lord, How it was done, does not appear: But it is ſaid to have been done out of Pity and Commiſeration to the Poverty of the Defendant. And yet that Amendment was look'd upon to be illegal.

Mr. *J. Powel*. That was not done by the Court.

Mr. *Mountague*. It comes to be mentioned in King *Richard* III's Days, upon a Queſtion that was put to the Judges by the King, when they were together in the *Star-Chamber*: "What if a Juſtice "of Peace ſhall procure an Indictment, not found "by the Jury, to be filed among other Indict-"ments, as if it really had been found by the "Grand Jury; what Puniſhment ought to be in-"flicted upon him hereupon?" They take notice of that Obliteration that had been made in a Record by Juſtice *Ingham*, and of the Puniſhment he underwent for it.

But to come to the preſent Caſe. Suppoſe it were *Teſte'd* the 14th Day of *October*, inſtead of the 4th; would Mr. *Attorney* then ſay it were to be amended? Suppoſe the Return was out before the *Teſte* of this *Diſtringas*, that would come nearer to *Gage*'s Caſe in the fifth Report. There was a Writ of Covenant, *Teſte* the 24th of *April*, and made returnable the 15th of *April*. The Lord *Coke* indeed ſays in his *Reports*, It is a Miſpriſion in the Clerk, that is amendable. But your Lordſhip knows, in his own Book of *Entries*, *Fol.* 250. *Part* 9. the contrary to that appears; and that it was not permitted to be amended.

Another Thing they have ſaid, is, That this Writ ſhall be amended by the Award of the Roll in Court. But, with Submiſſion, there is nothing there to amend the *Teſte* by. We know there is a right Order of a *Diſtringas* on the Roll; but that will not help an Error in the *Teſte* of the Writ iſſued forth: And for that I will cite a Caſe out of *Crooke*'s *Eliz.* fol. 825. *Carew.* v. *Marler*; and another Caſe was tried before your Lordſhip in *Michaelmas* Term, in the 11th of King *William*, between *Child* and *Harvey*. There the *Diſtringas* was made returnable *Die Jovis prox. poſt tres Septimanas Sanctæ Trin.* inſtead of *Sancti Michaelis*: So the Day of the Return happen'd to be the ſame Day that the Cauſe was to be tried upon, before your Lordſhip, at the *Niſi Prius*.

L. C. J. Holt.

L. C. J. Holt. It was actually tried at another Day.

Mr. *Mountague.* We came afterwards to the Court, and pray'd the *Diſtringas* might be amended by the Award on the Roll, which was right *Die Jovis prox. poſt tres Septimanas Sancti Michaelis:* But the Court denied our Motion; and we were forc'd to take out a new *Venire Facias*, and try the Cauſe again.

The next great Caſe is that of *Curſon*, which is in *Crooke James*'s Reports, *fol.* 529. There is an Information upon the Statute of *Recuſancy*, againſt *Baron* and *Feme*; and the Declaration demands 220*l.* for ten Months Recuſancy. But the Wife was charged for being abſent thirteen Months from Church. There the Wife only pleaded Not Guilty; and after a Verdict, this Miſ-joining of the Iſſue was amended by the Docket. How agreeable to Law this Caſe is, muſt be left to your Lordſhip's Conſideration. There leſs is demanded, than (of the Plaintiff's own ſhewing) appears to be due: For 'tis laid, that ſhe had been abſent thirteen Months, yet 220*l.* is only demanded; ſo it does not appear how the reſt was ſatisfy'd. And beſides this, it may be obſerved, that Mr. *Hughes*, who has abridg'd the three *Crookes*, in his Abridgment of this Caſe, has not thought this Reſolution worthy his taking Notice of.

L. C. J. Holt. A good Authority indeed! Did you know him?

Mr. *Mountague.* I did not know him; but I have heard him accounted a learned Man: And he did not, belike, think this Point worth his remembring. Whether he had any Scruple in the Caſe, I know not; but he omits it.

Then there is the Caſe of Sir *Humph. Tuſton*, in *Crooke Charles*, 144. There was a *Quo Warranto* brought by Sir *Humph. Tuſton* againſt the Corporation of *Maidſtone*; and there a Judgment is enter'd by Diſclaimer, with Conſent of Parties, ſays the Book. And that Diſclaimer is afterwards amended, and made of leſs Conſequence than it was before. But how was that Amendment made? Why, upon the Certificate of the Attorney General, that he with his own Hands had inſerted in the Paper-Book from which the Record was tranſcrib'd, the Words which the Clerk had omitted. Now upon this Caſe I may obſerve, That the Judgment had been enter'd by Conſent, though the Amendment pray'd was to the Diſadvantage of the Crown: Tho' that Amendment was pray'd in the Caſe of a *Quo Warranto*, which is in Nature of a Civil Action. Tho' Mr. *Attorney General* did conſent, yet a Difficulty was made in doing it. For all which Reaſons, I do humbly conceive, that that Caſe is for me, rather than againſt me: Eſpecially ſince ſo great a Man as Mr. *Noy* does there aſſert, That none of the Statutes of Amendments extend to Caſes of *Quo Warranto*, or Suits where the King is Party. Now tho' this Saying of Mr. *Noy*'s were only as he was of Council for thoſe that oppos'd the Amendment; yet this muſt have been look'd upon as a ſtrange Aſſertion, by the Judges at that Time, if they had been as clear of Opinion as Mr. *Attorney* is, that the Statute of *Hen.* VI. did extend to criminal Proſecutions. And the learned Judge that reports that Saying of Mr. *Noy*, would hardly have let it paſs, without taking ſome Notice that the Law was otherwiſe, if he had thought ſo.

As to the Caſe of 1 *Siderfin*, fol. 244. it was anſwered by your Lordſhip the other Day: For tho' the Writ is *Vicecomitibus*, where there was but one Sheriff: Yet the Return is help'd by a Suggeſtion that was enter'd, that there is but one Sheriff.

The Caſes out of *Dyer*, 353, 346. have been taken notice of by Mr. *Broderick*; and the Quæry is, Whether any Diſcontinuance *in Caſu Reginæ* be aided by any of the Statutes of *Jeofails?* Now I cannot but think, that the Makers of thoſe Laws would have taken as much care to except *Criminal Informations*, as well as Actions *Qui tam*, if there had been Occaſion. And to ſhew your Lordſhip, that none of theſe Statutes do extend to Informations at the Common Law, I would mention a Caſe out of 1 *Vent. f.* 17. It is *Perry*'s Caſe. There in an Information for a Forgery: There happen'd a Miſ-trial; and it was adjudg'd that it could not be help'd by any of thoſe Statutes. The Error was, That the Defendant is charg'd to have forg'd a Leaſe in *Sherborn*, and to have given it in Evidence at *Dorſet:* And the *Venire* was awarded only to *Dorſet.* And this Caſe puts me in mind of the late Caſe of *Paul Tracey*; where the Trial was ſet aſide, becauſe the Defendant himſelf had ſued out a wrong *Venire*; tho' the Proſecutor there, at the ſame Time, had ſued out a right one, in order to have try'd him thereupon, if he had not put in his wrong Writ.

L. C. J. Holt. How was that Writ?

Mr. *Mountague.* The *Venire* was to the Pariſh of St. *Clement's Danes* only; whereas it ſhould have been to the Pariſh of St. *Giles's in the Fields* as well.

L. C. J. Holt. Was it try'd on that Writ?

Mr. *Mountague.* The Trial was had upon the Writ the Defendant had taken out, and for that Reaſon ſet aſide.

As to the other Caſe, in 1 *Siderfin*, *fol.* 259. the Caſe of the King againſt *Glover*, an Amendment was made of an Inquiſition *poſt Mortem*; but that is of no Conſequence. For in all theſe Caſes, that Inquiſition is to be travers'd afterwards: And the Jury, when they deliver ſuch Inquiſitions in, are aſk'd, Whether the Clerk ſhall not have leave to amend any Defect in Form, or falſe *Latin*; and it is always allow'd, provided nothing in Subſtance be alter'd. And in this Caſe of *Glover*, the Amendment was of a Matter of Form: For the Inquiſition ſaid, the Deceaſed *ſeipſum ſubmerſus fuit*; but did not ſay he threw him himſelf into the Water.

The Caſe of *Sampſon*, in 1 *Jones* 420. tho' it has been cited on the other Side, yet I take it to be a ſtrong Caſe on our Side. That Caſe plainly ſhews, that it was the Opinion of the Judges, that there was no ſuch Thing as an Amendment of Indictments by Common Law. Both *Jones*, and *Keeling*, who (I ſuppoſe) was Clerk of the Crown, do affirm, no Precedent can be ſhewn of any ſuch Amendment made. And therefore I may queſtion the Authority of *Harris*'s Caſe, which is ſaid to be adjudg'd *Mich.* 16. of K. *James*'s; and this Caſe of *Sampſon* was in the 14th of K. *Charles* I. And there *Jones* ſays expreſly, That if a Record be certify'd by the Clerk of Aſſize that is faulty, it cannot be amended, either by the Common Law, or by the Statute Law.

My Lord, I doubt I have taken up too much of your Time. There are other Caſes that have been mentioned out of *Brook* and *Fitzherbert*; but I hope none of them will any ways affect the preſent Caſe. I have taken notice of thoſe which I think the moſt material; and I hope I have made it appear, that the Error in the *Teſte* of this Writ can neither be amended by Common Law, nor by

the Statute Law. And that this Miſtake of a Day is not only a Slip of the Clerk, but an Error in Judgment: And I humbly pray, there may be no Rule made for an Amendment.

Mr. *Parker*. My Lord, Mr. *Mountague* has ſpoken fully to the particular Caſes that have been offered on the other Side: Therefore I will not go thro' them again: But I beg Leave to take notice of ſome general Heads, from which they have argued, and to which moſt of their Caſes are reducible; and to diſtinguiſh them ſhortly from the preſent Caſe.

1. In the firſt Place, I take it, that the Caſes of Captions of Indictments, removed hither by *Certiorari*, and amended the ſame Term they are brought in, come not up to the preſent Caſe. For the *Certiorari* commands the Return, not of a Copy of the Indictment, but the very Record it ſelf; And the Indictment return'd, is, in Judgment of Law, the individual Parchment that was in the Court below. And ſo it is in Writs of Error: Except Writs of Error to the Court of *King's-Bench* in *Ireland*; and in that Caſe, the Books take notice, that only a Tranſcript is to be ſent, by reaſon of the Hazard of loſing the Original by the Danger of the Seas: And in caſe the Tranſcript arrive here ſafe, it is then ſaid to become, in Conſideration of Law, the very Record. And tho' it be found expedient, for the Convenience of keeping the Records, and is now become the general Practice in other Caſes, to make a Tranſcript in another Parchment, and file that; yet if in tranſcribing there be a Miſtake made, your Lordſhip will amend it, if it be diſcover'd in the ſame Term: For, in truth, that's not amending the real Indictment, but only amending the Return of the Juſtices to whom the *Certiorari* was directed; and providing that a falſe Indictment be not foiſted in amongſt the Records, inſtead of the true. Which cannot juſtify the mending the very Writ it ſelf; the Thing prayed in the preſent Caſe.

2. Their Caſes of Amendments of Judgments in the ſame Term they are given, and ſo of other Inrolments of what's done in Court, will not make any Thing in this Caſe. The Reaſons given in thoſe Caſes, are, That the whole Term is, in Judgment of Law, but one Day: And the Judgments and Determinations of the Court are, that whole Day, in the Breaſt of the Court. And theſe being only Amendments of what themſelves do in Court, which is not compleat till the Term be ended; they are not ſo ty'd up by the Clerk's haſty Entry of it, but that the Thing may be alter'd as they ſee Cauſe. But this is not applicable to a Writ which has paſs'd the Seal of the Court, and thereby receiv'd all the Sanction it can have, and has then iſſued out to a proper Officer, and is by him return'd back to the Court. The Term is, in the Judgment of Law, but one Day, with reſpect of what is the Act of the Court and paſſes perfectly in the Court. But it is impoſſible to ſay, without manifeſt Abſurdity, that the Term is to be conſider'd as but one Day, in reſpect of a Writ that is iſſued out one Day in the Term, to command Jurors to appear at another; or that the Day when the Officer comes into Court, to give an Account of his Obedience to a Writ, is the very Day of iſſuing it. And therefore a Diſtinction is to be made between Things done in Court, which are incompleat during the Term: And the Court's giving Directions to an Officer out of Court by Writ, which is perfect, and gone out from them in order to be obeyed.

3. I ſhould think likewiſe, that the Caſes they have mention'd, of the Favour allow'd the Crown, do not come up to this Caſe; becauſe, tho' in Suits for the Recovery of Right, there be great Favour allow'd to the Crown; and by the Statutes of Amendments and *Jeofails*, much Indulgence is given to the Subject, *for the Recovery of Right*; yet it is not ſo in Proſecution of Criminals, which is a Matter *ſtricti Juris*: And no Argument can be drawn from the Favour ſhewn in one Caſe, to infer, that the like Favour is to be allowed in the other; for they ſtand on quite different Grounds.

4. I think, with Submiſſion, in the next Place, that the Inſtances of Amendments of Proceſs, where nothing is done upon it, but barely to entitle the Party to ſome Proceſs farther; as of a *Capias*, in order to an *Exigent*, &c. will not come up to this Caſe, where the Writ is executed and returned, and the Trial had upon it.

In the Caſe of *Rogers* and *Bird*, that was cited on the other Side, 3 *Cro.* 572. there was a *Venire Facias* returnable *Die Sab. prox. poſt Octab. Trin.* but on the Roll, it was awarded returnable *Cro. Trin.* And becauſe that was the Authority for making it out, it was amended in the Return; becauſe the Trial was not had upon it, only it was return'd in order to the *Diſtringas*. But *Popham* there expreſly ſays, that if the Trial had been upon the *Venire Facias*, it were erroneous, and would not have been amendable.

Mr. *J. Powel*. Where is that, Sir?

Mr. *Parker*. 3 *Cro.* 572. There is likewiſe the Caſe of 34 *H.* VI. 20 *Brook*'s Amendments, *Placit.* 10. There were twenty four Jurors returned upon the *Venire Facias*, and in the *Habeas Corpus* one of them omitted: And there the Opinion of the Court was, That they ſhould make out a new *Habeas Corpus*. And tho' there it was plainly the Miſtake of the Clerk, that mentioned only twenty three, inſtead of twenty four; yet the Court was of Opinion that it could not be amended, but they muſt begin again where the Fault was made. 19 *H.* VI. 39. A Juror was return'd upon the *Venire Facias*, by the Name of *J. Hod*; and in the *Diſtringas* he is named *J. Hord*; and upon him the Sheriff return'd *Nihil*, &c. And there was a new *Habeas Corpus* awarded. Which Caſes ſeem to prove, that where there is ſomething done upon the Proceſs, more than a mere formal Return, that it is not amendable within the Statutes of *Edw.* III. and *Hen.* VI. which were both of them made before theſe Caſes.

5. In the next Place, I beg leave to obſerve, That there is a Difference between ſuch Caſes as have been cited, where the Thing was really done right, but by Miſtake enter'd wrong; and this Caſe, where really it was not done right. As where upon a *Diſtringas* a right Juryman is really ſworn, but ſet down by a wrong Name, the Name ſhall there be amended; becauſe the Thing done was really right, only the Mention of it wrong. But in this Caſe it cannot be ſaid, that the *Diſtringas* was really taken out right. The Writ was awarded the 23d of *October*, on which Day they would have it bear *Teſte*: But it is not pretended that it was really taken out till the next Day, when it

it now bears *Teſte*.——And as to what has been already offer'd, that the *Niſi Prius* ought to be awarded *in Præſentia Partium*; and therefore not upon any other Day than the 23d, when the *Venire Facias* was returnable, and the Parties in Court: I might here, I hope not improperly, add this farther; That that muſt be underſtood, that the making of the Writ ſhould be in the Preſence of the Parties: For the Entry upon the Roll, tho' commonly called an Award of the Writ, is really an Entry of a Writ ſuppoſed to be then actually made; it is not ſo properly a Direction to the Clerk to make a Writ, as an Entry or *Memorandum* upon the Roll, or a Recording that there is a Command to the Sheriff, to diſtrain the Jurors to appear at a certain Day, *&c.* And therefore if the *Niſi Prius* is to be awarded in the Preſence of the Parties, the Writ is to be made in their Preſence.

Mr. *J. Powel.* Do you mean, that they ſhould be in the *Crown-Office?*

Mr. *Parker.* The Writ is in Judgment of Law iſſued in Court, tho' actually wrote and ſealed in the Office; and if *Teſte'd* of that Day, is underſtood to be made in Court that Day; which is in Preſence of the Parties; that being the Day given 'em in Court, and their Appearance then enter'd. And we apprehend, that the Court does not command, by the Entry of the *præceptum eſt* in the Roll, but by the Writ. The Sheriff, who is abſent, cannot be commanded by the Roll, but by the Writ which is ſent to him: Therefore the Court then commands, when the Writ is made: And therefore the Entry upon the Roll, *præceptum eſt Vic.* is an Entry that there is ſuch a Command, which this Writ, on which this Trial was had, cannot be, becauſe it bears *Teſte* after. But this is only by the by: For however taking the Entry as an Award of the Writ, yet the Writ muſt be taken out as the Court awards it, and when the Court awards it; or elſe it is without Warrant, and void. Indeed if it ſhould in Fact be made at a ſubſequent Day, and not actually wrote and ſealed the ſame Day it is awarded, yet if it bear *Teſte* upon that Day, your Lordſhip will not enquire into that Matter: But finding ſuch a Writ was awarded, and that it appears by the *Teſte* to iſſue the ſame Day; will preſume it did really iſſue that Day, and that it is right. But the Writ being here awarded the 23d, and bearing *Teſte* the 24th; if it did not iſſue the 23d Day, to alter the *Teſte*, ſo as to make it appear to iſſue that Day, were to make it contrary to the Truth.

This we take to have ſome Reſemblance to the late Caſe of the Warden of the *Fleet*; where your Lordſhip was againſt altering the Day of bringing in the Record, when the Alteration would have been againſt the Truth of the Fact. And to make the Amendment here deſired, would be to make the Writ appear to have iſſued the 23d of *October*; when the Writ it ſelf imports it was the 24th; and this was the Truth of the Fact.

Mr. *Whitaker.* My Lord, I beg the Favour of a Word or two on the ſame Side: After ſo much has been ſaid for the Defendant, I ſhall only mention a Caſe or two, to ſhew that ſuch an Amendment as this has not been allow'd by the Statute of 8 *Henry* VI. *Cap.* 12. in any Civil Action between Party and Party.

28 *Hen.* VI. 3. There was an Action of Debt, and the Parties were at Iſſue: The *Venire* was return'd; upon which the Plaintiff had a *Habeas Corpora* with a *Niſi Prius*: And inſtead of ſaying in the *Habeas Corpora*, *in Placito Debiti*, it was made *in Placito Compoti*, &c. on Motion in Arreſt of Judgment. The Council for the Plaintiff deſir'd to amend this, after Verdict for the Plaintiff: The Court did indeed not give any Rule, as appears by that Book, only that they would conſider of it; but nothing was done further, as appears by that Book juſt after.

In the Caſe 34 *Hen.* VI. 20. In an Action of Debt brought by the Prior of St. *Bartholomew's*, the Parties were at Iſſue, and a *Venire* return'd; and on the Return of the *Venire*, there were twenty four Perſons return'd: But in making out the *Habeas Corpora*, the Clerk omits one of the Names of the twenty four. This appear'd to be the Miſpriſion of the Clerk. He had the *Venire* and the Return before him; as the Clerk had here in the Caſe now before your Lordſhip. He had the Roll and the *Venire*; but this was held not to be amendable: And this was in few Years after the Statute of *Henry* VI.

I ſhall mention another Caſe in 2 *Siderfin* 7. 12. A Writ of *Capias ad faciend.* for a Debt, was made returnable a Day after the Term. It appeared to the Court, the Attorney for the Plaintiff had given the Clerk that made the Writ, true and right Directions to make it returnable the laſt Day of the Term; but though it was his Miſpriſion, yet the Court would not amend it: So it is adjudged in that Caſe.

I ſhall not mention any more Caſes; but anſwer the Caſe of *Plume*, in *Palmer* 480. cited by the Queen's Council. I have had particular Occaſion to look into that Caſe this Term, in a Cauſe which hath been in the Paper this Term. We did ſearch for that Rule expreſs'd in *Palmer's* Reports, in order to amend an Outlawry after Judgment, in an Action of Debt in the *Common Pleas*; but on producing that Rule, the Court of *Common Pleas* did not take it as an Authority to amend our Outlawry, which wanted an Amendment in the Return of the Exigent.

L. C. J. Holt. What was that Amendment?

Mr. *Whitaker.* *Ad. Com. meum*, the Book ſays: And upon this, ſays the Book, they did grant a Rule, to award a *Certiorari* to the Coroner. The Rule mention'd in *Palmer* was ſearch'd for; and, as I am inform'd, my Client did produce it in the *Common Pleas*; and yet they would not let us amend our Outlawry: And my Client, for want of an Amendment of the Return of the Exigent, is likely to loſe an honeſt Debt by the Reverſal thereof.

The Council for the Queen have relied on the Statute of the 8th of *Henry* VI. that this Fault of the Clerk is amendable within that Statute. By the Books I have cited, the Miſpriſions of the Clerks, tho' in Civil Actions, have not been allow'd to be amendable. Above two hundred Years are paſt, before any Thing of this kind was done, to amend ſuch a Miſpriſion of a Clerk as this is, in criminal Caſes.

How far the Queen's Council would go on with Amendments, I cannot tell: But in the Caſe cited by the Queen's Council, *Sampſon's* Caſe, 1 *Rolls* 196. there was the ſame Miſtake of a want of Continuance; as in this Caſe. No Man can believe, the Clerk of Aſſize knew not what Days the Commiſſioners of *Oyer* and *Terminer*, and Goal-Delivery did ſit, and continue their Seſſions on ſuch

Commiſſions. And yet, on a Writ of Error to reverſe that Judgment (in *Sampſon*'s Caſe) being brought, the Court of *King's-Bench* would not amend this apparent Miſpriſion of the Clerk of Aſſize's want of Adjournment from Day to Day.

This Matter of amending in criminal Proceedings ſuch a Miſpriſion of a Clerk as this is that is now deſired, has not been thought of ſince the Time of the 8th of *Henry* VI. until now. And if the Queen's Council can ſhew no Preſident in all this Time, wherein ſuch an Amendment, even in a civil Cauſe, by virtue of the 8th of *Hen.* VI. hath been, much leſs in a criminal Caſe. I humbly hope, your Lordſhips will not let them amend this Writ of *Diſtringas*.

SIR *T. Powis.* My Lord, having heard what has been ſaid on the other Side, I beg Leave to trouble you a little by way of Reply.

Mr. *Broderick* and Mr. *Mountague* make a Diſtinction, which they think will govern this Caſe. They ſay, that the Crown has a great many Privileges, beyond what the Subjects hath, where the Caſe concerns Civil Rights: But they will not allow the ſame Privileges to the Crown, where there is a criminal Proſecution. I know of no ſuch Diſtinction. For if this Privilege belongs to the Crown, in the Caſe of the Revenue; ſurely the reſtraining of Crimes is much more for the publick Benefit: And by Conſequence, the ſame Reaſon that gives the Crown a Privilege in a leſſer Matter, ought to carry it further in a greater Thing.

In the next Place, they do admit, that all the Acts of the Court may be amended; as being in the Breaſt of the Court, during the ſame Term. And they deny not, but that the Judgment of the Court, which is the higheſt Act of the Court, may be revers'd, or any way alter'd or chang'd in the ſame Term, without any Danger of building Clock-Houſes. And can any one ſay, that if theſe higheſt Acts of the Court may be alter'd, that the Acts of their Clerks may not be alter'd? That the greater Things may be done, but not the inferior, when there is a pure Miſtake?

No Man can but think it ſtrange, that a Miſtake of a Clerk may not be alter'd; but a Miſtake even in the Judgment of the Court may.

We come next to another Diſtinction. They ſay, an original Writ may be amended in the Caſe of the Crown; as in the *Quare impedit*, in *Blackmore*'s Caſe. For which they aſſign two Reaſons: Firſt, It was a Writ of the Crown, for Recovery of a civil Right; for it was a *Quare impedit*, And ſecondly, The Judges obſerving the Fault in the Writ, did (as it ſeems) carry it to the Court of *Chancery*, and there it was amended. From whence they would infer, as if it were a new Writ. But that cannot be ſuppoſed; for it was agreed, that it was the ſame Writ amended, and not a new Writ.

Now ſee if that will not come to our Caſe. For if the Court of *Chancery* could amend a *Quare impedit*, as coming from thence; cannot this Court amend a Writ that comes from hence? Here we are in the Caſe of a judicial Writ that comes from hence; and therefore it may be amended here, as well as that could be amended in the Court of *Chancery*.

But the great Matters endeavour'd to be avoided, are the two Acts of Parliament of *Edw.* III. and *Hen.* VI. for the Caſes cited: I will not go over them again. And I do believe it is very true, what theſe Gentlemen inſiſt on: That it has been the common Opinion, that theſe Acts, or other Acts of Amendments, do not extend to Caſes of the Crown. And, generally ſpeaking, it is right; becauſe all the later Acts of Amendments except Proſecutions on Penal Laws: And the Statute of *Henry* VI. has ſo many Exceptions in criminal Matters, that a Miſtake might from thence ariſe, that all are excepted.

It is certainly true what my Lord Chief Juſtice *Vaughan* ſays, *fol.* 169, 170, 419. That upon doubtful Words of an Act of Parliament, that are dark and dubious, an ancient Interpretation, ſubmitted to for a long Time, is fit and reaſonable to be relied on in a doubtful Caſe. But a thouſand Reſolutions, againſt a plain Act of Parliament, cannot prevail. Tho' it would be good Reaſon, well to conſider ſuch a Law, and to weigh it well; but no ſuch Reſolutions can alter the Act.

Here are two Acts of Parliament: That of *Edward* III. is in general Words of All: And how can any one ſay then, that it ſhall mean and extend only to Some?

As to the Act in the 8th of *Henry* VI. to ſay that the Words ſhall not go to every Thing that is not excepted, is to overthrow all Rules of Conſtruction. They have offer'd nothing againſt that Statute; but that it has been thought it did not extend to theſe Caſes.

The Caſe of *Siderfin*, ſhews, that we do not advance a mere new Notion, with reſpect to that Act. Therefore, I ſay, we have the Acts of Parliament on our Side; We have the Privilege of the Crown on our Side: The Award of the Roll is right, and with us; and the Error was purely the Miſtake of the Clerk: For no Man can think it otherwiſe.

We have this likewiſe on our Side, That we deſire it may be amended in the ſame Term. For as the Court can ſet right their own Judgment in the ſame Term, much more what is the Act and Miſtake of the Clerk.

Therefore we inſiſt upon it, That our Caſes we have cited, are of good Authority for us; and we hope we ſhall have an Amendment, if it be neceſſary.

Mr. *Att. Gen.* My Lord, we humbly hope, that notwithſtanding what theſe learned Gentlemen have urged, our Aſſertions by Law and Authority will prevail; and that this Miſtake is amendable.

What has been ſaid before by Mr. *Broderick* and Mr. *Mountague*, they have laid it down for a Rule, That there is a great Difference between the Privileges belonging to the Crown in Matters of a civil Nature upon the Statute, and criminal Proſecutions: And that all thoſe Favours for the Crown, were only for Matters relating to the Right of the Crown in civil Caſes, and not what belongs to the Crown in its politick Capacity. Tho' Mr. *Broderick* did not conſider: For ſure, by the Common Law, there was a greater Latitude for the Crown in criminal Proſecutions, than for the Subject.

In Caſes of Treaſon, they had no Benefit of Council; and that was far more to their Diſadvantage, than in civil Caſes. It's true, that Inconvenience has been regulated by the late Statute, That in the Caſes of Treaſon, the Party may have a Copy of the Pannel and Indictment. But you ſee what

what the Difficulties were formerly in criminal Proſecutions for the People: All they had to do, was merely to plead Guilty or Not Guilty. I think that anſwers their Objection as to that.

Now there is in the next Place to be conſider'd, what Mr. *Mountague* ſays, That no Error in Proceſs was amendable by Common Law; and cites Lord *Coke* for it. He ſhould have gone on with that Citation; for it is certainly otherwiſe. 8 *Coke* 156, ſays, Their own Acts are amendable by the Common Law, in the ſame Term; but at the Common Law, the Miſpriſions of Clerks in another Term, were not amendable. But we are in the ſame Term; and ſure they are amendable before Judgment. And Lord *Coke* tells you, they are amendable in the ſame Term.

Now Mr. *Mountague* has gone a great way. He agrees, if it were a Miſaward of the Roll, you would amend it, but not the Writ. Now for that the Law is quite contrary: If you are wrong in the Roll, you cannot ſet it right; but if it be in the Writ or Proceſs, you may amend it by the Roll. Now here the Roll is right; and we deſire the Writ may be amended by it.

If it had been in the Roll, I cannot tell whether we ſhould have applied to amend that. For if you have any thing amiſs, you cannot amend it, but by ſomething to amend it by. But it may be amended in Caſe of the Crown, better than in that of the Subject. And tho' Mr. *Mountague* ſays, you may make uſe of them in Civil Caſes, but not in Criminal; yet we make uſe of this Argument, that the Crown has a Privilege more than the People. We rely on that; tho' Mr. *Mountague* ſays, That is not to be relied on.

In the next Place, Mr. *Mountague* ſays, This is within none of the Statutes of Amendments, either of *Edward* III. or of *Henry* VI. And that my Lord *Coke* ſays, *fol.* 157. *b.* That the Statute of *Edw.* III. does not extend to the Pleas of the Crown. And therefore Mr. *Mountague's* Opinion is, to go quite through, and exclude this Caſe from all the Statutes of Amendments.

Now I can give an Argument, why it ſhould not be amended by the Statute of *Hen.* VI. tho' by the Statute of *Edw.* III. it is amendable. But why is it not amendable by the Statute of *Henry* VI. *Cap.* 12, and 15, which go further than the Statute of 14 *Edw.* III. does?

I do agree, there is an Objection againſt the Statute of *Edw.* III. For there is the Word *Party*, which ſeems to imply civil Caſes only. But even by that Statute, ſo ſoon as the Slip appears by Challenge, or any other way, it ſhall be amended. The Lord *Coke* might well on theſe Words make a Doubt, whether the 14th of *Edw.* III. did extend to amend Caſes relating to the Crown: But the Opinion of *Coke* in the Statute of 14 *Edw.* III. is abſolute; but the other of 8 *Hen.* VI. is with a Reaſon. And why is it? Becauſe it is excepted. Now they ſhould have ſhewn us ſome Reaſon, why the Statute of *Henry* VI. *Cap.* 12. ſhould not extend to Amendments in Caſes of the Crown.

And there is not that Objection to the Statute of *Hen.* VI. *Cap.* 15. For it follows the Words of the Statute of *Edw.* III. and ſays, *That no Man ſhall have*, &c.

Now Mr. *Mountague* ſays, the Exception was put in *ex abundanti*; and it may be intended they were but Inſtances of like Caſes. Now I have hardly ever heard, that Inſtances of Treaſon and Felony ſhould extend to other Caſes of an inferior Nature: There is no Reaſon to carry it further than what is expreſs'd. So that we think theſe Statutes ſtand for us; and are applicable to all Records, as well for the Crown, as any elſe.

Mr. *Mountague* ſays, They have the Opinion of all Ages againſt it. But, my Lord, I deny that; becauſe there were Exceptions in many Statutes before and after the Statutes of *Jeofails*, that were not conſider'd: But when they come to be conſider'd, this muſt be determined by conſidering the Words of the Statute; and not by general Opinions, taken up without Conſideration.

There was in *Cro. Car.* 25. a Caſe on the Statute 32 *Hen.* VIII. where the Queſtion was, If Aſſignees of Copyhold Lands were within that Statute? And till a little before the *Revolution*, it was a received Opinion, that the Aſſignee of a Copyholder was not within the Statute of *Henry* VIII. And there is a Caſe in *Yelverton*, 223, wherein it was ſo reſolved: But when that that Statute came afterwards to be conſidered, it was ſettled here, and has prevail'd ever ſince, that the Statute did extend to it; tho' before it was the prevailing Opinion that it did not. And accordingly the Practice has ſince been. So that Opinions that paſs *ſub Silentio*, that is, without Conſideration, may be alter'd when they come to be ſtated and conſider'd. And therefore I hope this Point will not prevail.

My Lord, I agree that this Thing is of very great Conſquence: For if their Plea be allow'd, it will follow, that Criminals will eſcape for little Slips in all Caſes. And I know that even in Perjury, and other Crimes, few that have been convicted, but have got off, by Reaſon of Errors in the Proceedings, tho' I have ſeen a great many convicted thereof. This is a great Inconvenience and Miſchief: And ſure Criminals are not to be the Favourites of the Law.

But as to theſe Proſecutions, there is another Conſideration: That it is more for the Honour of Juſtice to have the Advantage to lay aſide this Slip, than to ſuffer a Criminal to eſcape. But however, every one muſt have Juſtice: And if we rely on the Statute of *Henry* VI. no Conſtruction can avoid it.

Then Mr. *Broderick* cites the Caſe of ——— Where it is ſaid, that the Statutes of *Jeofails* do not extend to Caſes of the Crown. Now ſure that is not a Reaſon: It is contrary to all the Reaſons of Statutes. Where Statutes are to promote Juſtice, the Crown is bound as well as the Subject; it is for the publick Good. Now Mr. *Broderick* has cited a Caſe againſt that; and that is in *Styles*, *fol.* 107. (*Vid.* Fol. 307) the Caſe of *Theobalds* and *Newton*. There that Caſe was on the Statutes of 18 *Eliz.* and of 21 *Jac.* Now it's plain they had no Conſideration of any thing elſe: And why? Becauſe in Proſecutions on Penal Statutes, the Court often rely on Exceptions: But however the Authority goes no farther, but they rely on the Exceptions. Now if they had ſaid it was excepted by the Statute of *Henry* VI. and that all the Books go on it as excepted by that Statute; if they ſay it is excepted by the Statute of *Hen.* VI. would that be taken as an Objection to the Statutes of 18 *Eliz.* and 21 *Jac.*? No; it is a Miſtake.

He has alſo cited *Yelverton*, *fol.* 60. *Brigg's* and *Thomſon's* Caſe. Now there was an Information on the Statute of 21 *Hen.* VIII. againſt a Clergyman, for farming Lands; and a *Venire* was awarded returnable *ubicunque*: But the *Venire* itſelf, and

and the *Diſtringas*, were made returnable *coram nobis*, &c. which was ſaid to be erroneous. An Exception was taken, and *per Cur'* Let it ſtay. But it appears not that it was conſidered.

Theſe Authorities are no Authorities. The firſt is not within either of thoſe Statutes we are now upon: And the other was never determined by any thing, as appears in the Caſe. And there is a great Difference between the Statutes on which they were founded, and our Caſe.

Mr. *Mountague* has gone a new Way. He would have this to be not a Miſpriſion of the Clerk; becauſe he is afraid that a Miſpriſion is amendable: For the Clerk had enquired, whether the Writ ſhould be *Teſte'd* the 24th of *October*; ſo that he ſays it is a Forgetfulneſs, or Negligence, but not a Miſpriſion.

Now I would fain know what he means by that? Whether all Forgetfulneſs of the Clerks, is not a Miſpriſion of the Clerk? That is, any Negligence, whatever it be, it is the Miſpriſion of the Clerk. *Coke* ſays, It is a Miſpriſion of the Clerk, under the Word *Negligence*: And Negligence and Miſpriſion are by him frequently put for the ſame thing. See 8 *Co.* 159. *b.* 160. *b.*

So upon one Part of it; that is, ſuppoſe the Clerk ſteal it away; he ſays, that is under the Word *Miſpriſion*; and an involuntary Negligence of the Clerk, is a Miſpriſion. So this Clerk's Negligence is a Miſpriſion, becauſe he did not look on the Almanack and the Roll. Theſe are Miſpriſions by the Statute of *Henry* VI.

As to the Caſes that have been cited, Mr. *Mountague* has anſwered but ſome of them.

As to that of *Percival* and *Godfrey*, *Siderfin*, *fol.* 43. he ſays that was not ſuch an Amendment, but a Suggeſtion of the Roll. But if the Roll could amend that which is a ſtronger Amendment, to preſent a Verdict; the rectifying of that makes it ſtronger for us, than it would be otherwiſe.

He ſays, as to *Harvey*'s Caſe, he denies it to be Law: But I believe the Authority of the Judges is to be preferr'd before his Opinion.

And then for the next Caſe, *Parker* and *Curſon*, he queſtions that Opinion, becauſe not taken notice of by *Hughs*. Now I believe the Judges that reported it, did underſtand it better than he that abridg'd it. But whether he underſtood it or no, it alters not the Caſe.

And then for *Tuſton*'s Caſe, he ſays it is a Civil Caſe. But my Lord, it is a Criminal Caſe. A *Quo Warranto* is brought: They muſt plead Not Guilty to the Uſurpation. So that theſe Caſes are under the ſame Conſideration as this is.

Then there is the Caſe of *King* and *Glover*: That was, where a Coroner was to amend an Inquiſition of Murder: But it was not proved that he did murder himſelf, *&c.*

Mr. *Mountague* admits, the Jury may amend Matters of Form: But in that Caſe, when it is brought into Court, it is not the ſame Verdict as before.

He cited the Caſe of —— and *Harvey*: But your Lordſhip gave him another Reaſon for that Caſe.

And for the Caſe of *Paul Tracy*, that Point was never determined.

L. C. J. Holt. The *Venire Facias* never mentions the Time of, *&c.*

Mr. *Att. Gen.* Now that is not within the Statute of *Henry* VI. So that we have nothing to do with it.

And as to the Caſe of *Dyer*, *fol.*——that does not concern the Statutes of *Feofails*. And in *Fitzherbert*'s Caſe, the Court was of Opinion, they could not amend, by reaſon of the Exception. Whereby they ſhew plainly, they thought the Statutes would have extended to that Caſe, had it not been particularly excepted.

I do not obſerve any other Matter, but that of the *Niſi Prius*. If the Writ muſt be made out in the Preſence of the Parties; they ſay, that immediately when the Perſons appear, the Writ is to be iſſued. But that is impoſſible, and contrary to Reaſon and Authority.

We think, on theſe Reaſons we have troubled you with, we have the Law on our Side. Only one thing I muſt beg Leave to anſwer to what Mr. *Broderick* ſays as to *Percival*'s Caſe: It was a crying Thing, and it might be an extraordinary Judgment. Where Judgments are given, they are to go according to the Courſe of Law: Juſtice is to be done to all. And as no extraordinary Method is to be made uſe of againſt a Criminal, ſo none is to be uſed to ſave him.

My Lord, we think the Statute of *Henry* VI. does allow ſuch an Amendment as we deſire; and that no Statute does reſtrain it: And therefore, I hope we ſhall be allowed to amend this Error.

There is one Matter more. Lord *Coke*, in his 8th Report, 163. *a.* ſays, The Statutes of *Henry* VIII. and that of 41 *Eliz.* do not extend to Pleas of the Crown; becauſe they are excepted in the Act *Eliz.* and that of *Henry* VIII. does not extend to 'em.

We agree with the Lord *Coke* in every Thing, that the King can't amend by that of *Henry* VIII. tho' there is no Exception: And the Reaſon is, becauſe it ſpeaks only of Suits between Party and Party. And the other Statute of 18 *Eliz.* is not large enough, extending only to Treaſon or Felony, becauſe they only are excepted.

My Lord, We think we have my Lord *Coke*'s Authority with us, and even the very Words of the Act of 8 *Hen.* VI. And tho' this Caſe has not been ſo fully conſider'd before; yet we hope it will be conſider'd now; and that we ſhall be allow'd this Amendment.

Mr. *Broderick*. I thought not to have ſaid any thing more: But becauſe I have been named two or three times by Mr. *Attorney*, I deſire ——

Mr. *Att. Gen.* The Reply is ours.

Mr. *Broderick*. My Lord, I beg Leave to explain myſelf in ſomething that has been miſunderſtood. I think I did not ſay what I am charged with. Mr. *Attorney* tells you I ſaid, that none of the Queen's Prerogatives extend to criminal Proſecutions.

Mr. *Att. Gen.* I ſay, you ſaid, there is great Difference between civil and criminal Caſes: And that the Queen's Prerogative is intended only of Amendments in civil Caſes, but not applicable to criminal Proſecutions.

L. C. J. Holt. Mr. *Broderick* ſaid it did extend to Amendments in Civil Caſes, but not in Criminal.

Mr. *Broderick*. And I do make a Difference between 'em. For in criminal Proſecutions by the Crown, an Amendment can't be: But in the Caſe of a *Quare impedit*, which is a civil Caſe, there it might.

Mr. *Att. Gen.* The Reply is ours; and they ought not to break in upon us.

L. C. J. Holt.

L. C. J. Holt. If you will ſay any thing as to what has been miſtaken, you may. The Caſe of *Sherret* and *Talbot* is not to the Point: That was an Amendment, not in Behalf of the Crown, but of the Subject; and in a Civil Caſe. 'Twas in a *Quo Warranto*; wherein if the Subject take a limited Diſclaimer, and the Officer on the Roll enter a general Diſclaimer without Limitation, God forbid but that ſhould be amended. But then, even on the King's Side, if the original Indictment be right, and the Plea Roll be miſtaken; ſure the Plea Roll ſhall be rectified by the Indictment; and the Plea is to be made according to that.

The Caſes of *Tufton* and *Harris* are ſtrong Caſes. In that of *Harris* there was an actual Trial; and yet no Iſſue joined. He was indeed indicted as Criminal, and the Iſſue was enter'd; *& de hoc ponit ſe ſuper Patriam*, but without any Joinder thereupon, and ſo no compleat Iſſue. 'Tis true, in capital Caſes, they are free to join Iſſue or not: But in other Criminal Caſes 'tis otherwiſe; there muſt be a Joinder. And as to the Caſe of *Tufton*, that was an Amendment that went very far. That was an Information for Recuſancy againſt the Huſband and Wife for Recuſancy of the Wife. The Wife comes in, and ſhe alone (whereas it ſhould have been the Huſband and Wife) pleads Not Guilty; and Iſſue join'd thereon: And it was mended by the Docket: for that was right. It has been held, that the Statute of *Hen.* VI. did not extend to Criminal Matters; as Lord *Coke* (in *Blackmore*'s Caſe) is expreſly.

Mr. *Att. Gen.* But, my Lord, he gives the Reaſon of that Exception.

L. C. J. Holt. Now the 8th of *Henry* VI. has this Exception: And in *Stiles*, 304. no mention is made of the Statute of 8 *Hen.* VI. but that was by reaſon they thought it would not help them. And then the Quæry is, Whether this Caſe be within that Exception, and (as in Civil Caſes) may be amended? But this is a Caſe of a different Nature; and I will not ſay any thing now in the Point of this Caſe, becauſe of the Conſequence: Tho' I ſuppoſe it is not excepted by the Statutes: And I believe you don't deſire our preſent Opinion.

Mr. *Att. Gen.* Yes, my Lord, I deſire the Opinion of the Court in this Caſe; and I think it is of great Conſequence to us to have it now.

L. C. J. Holt. If you inſiſt on it, I muſt ſee if I can form an Opinion; but I would willingly defer it.

Mr. *Att. Gen.* My Lord, I lay it before you with Submiſſion.

Mr. *J. Powel.* It is a new Thing, and taken up againſt the current Opinion. Perhaps they might take it on Lord *Coke*'s Opinion; and did not examine it, as they ſhould had done.

Mr. *Att. Gen.* My Lord *Coke* does not ſay ſo himſelf.

Mr. *J. Powel.* No: But becauſe he ſays it is excepted, they gave Credit to his Words, and did not examine into the Buſineſs: And I believe that was the Foundation of this Opinion. But if you think it is amendable in the ſame Term, becauſe the Court may amend their own Judgments the ſame Term; you muſt ſpeak to that Point.

I do not know that they can amend their own Judgment in this Term: Though indeed, if it be amendable at all, it is amendable this Term. Beſides, I ſhould make no Difficulty but that it is a Miſpriſion of the Clerk; and it was his Negligence not to do it by the Warrant. And if this were in a Civil Proceſs, I believe it might be amended in any other Term: But this being in a Criminal Matter; and the current Opinion being that none of the Statutes did extend to Criminal Matters, it ought to be well conſider'd; for the current Opinion is a great Thing.

Mr. *Att. Gen.* There is no doubt of it, it ought to be conſider'd; but it is fit for me to deſire your Opinion.

Mr. *J. Powis.* I believe theſe Statutes were never ſo ſcann'd before; and I believe this Matter has been more ſearch'd into now, than ever it has been before. But it has been the general Opinion, that none of the Statutes of *Jeofails* did extend to Criminal Caſes: That may ariſe, becauſe all the Statutes take in ſo large a Compaſs. All Indictments and Informations, and no doubt the latter Statutes, do not extend to ſuch Caſes. And the Opinion might ariſe from that.

But now this Statute of the 8th of *Hen.* VI. has Exception of Felonies and Treaſons, and none elſe; and you cannot extend the Exception further. It is a Caſe of Difficulty, but it ariſes from the common Opinion; otherwiſe we might give our Opinion now without Difficulty: For the Words are as clear as may be; and it is againſt Reaſon, to except Things that that Statute did not except. But being a Thing that is not ſo particularly confin'd to this Term (for the Statute mentions nothing of Terms) if it be amendable, it may be amended in another Term.

But indeed, for Matter of Judgment, becauſe the Judgment muſt be in the ſame Term, in the Caſe of the Amendment, we may as well do it in this Term: And we may take ſome Time to conſider of it, and tell you what our Opinion is.

Mr. *J. Gould.* I ſhall not now ſay any thing in this Caſe, but reſerve myſelf entirely till the Court give their Opinion.

But as to that Caſe you were citing, *Perry*'s Caſe, the Caſe was *Perry* and *Munday*; for I was of Council in the Caſe. There was an Information againſt *Perry* and *Munday* for forging a Bond: They laid their Forgery at *Sherborn*. The Publication was at *Dorcheſter*; and the *Venire* was *Dorcheſter*. The Verdict was for the King. They brought an Arreſt of Judgment afterwards; and the Queſtion was debated on the Statute of 16 and 17 of K. *Charles* II. whether this were not within the Statute. Now they are agreed, that that Information, becauſe at Common Law, was without the Purview of the Statute.

L. C. J. Holt. That was an Information upon a Penal Law. They queſtion'd whether it was within the Purview of the Statute; and they thought it was not help'd by any Statute. That ſhews the Opinion of the Lawyers: They thought it not within any of the Statutes of *Jeofails*; and the Verdict was ſet aſide.

Mr. *Broderick.* Yes, my Lord; and the Court awarded a new *Venire Facias*.

L. C. J. Holt. There is a great Regard to be had to Practice. There were great Men at the Bar at that Time; and they did not think at that Time that it was within the Statute.

As to what you ſay of Copyholds, it has indeed been held, that the Statute did not extend to an Aſſignee of Copyhold Lands, or to a Covenant on the Alienation of the Copyhold by Leaſe.

Mr. *Att. Gen.* It was here argued that ——

L. C. J. Holt. It was my Opinion, that all Statutes extend to Copyholds, if it be for the Benefit

nefit of the Copyholder, and not one Jot to the Prejudice of the Owner: And therefore the Reſolution of *Jobbin*'s Caſe was that we went on. You muſt ſtay till the laſt Day of the Term.

Mr. *Att. Gen.* My Lord, I think we have ſhewn that it is amendable by the Statutes; and if not ſo, by the Common Law. And we have all Points with us.

Sir *T. Powis.* My Lord, I doubt it will be inſiſted on, that in another Term it cannot be amended.

L. C. J. Holt. Move us the laſt Day of the Term. It is certainly the Miſpriſion of the Clerk.

November 28. i. e. *The laſt Day of* Michaelmas Term.

Sir *T. Powis.* My Lord, we come in the Caſe of the Queen and Mr. *Tutchin*, if your Lordſhip be ready to give your Opinion.

Mr. *Att. Gen.* Call Mr. *Tutchin (who appeared).*

L. C. J. Holt. I muſt deſire you to ſtay in this Matter till the firſt Day of the next Term.

Mr. *Att. Gen.* My Lord, we did expect your Lordſhip would have given your Opinion now.

L. C. J. Holt. For my Part, I ſhould rather deſire Time till the next Term: But if you are not willing to ſtay till then, you muſt take ſuch an Opinion as we can give.

Mr. *Att. Gen.* I ſubmit to what your Lordſhip ſhall determine.

L. C. J. Holt. It may be, I may be then of the ſame Opinion I am now; but then I may defend my Opinion better. I would only put it off to the firſt Day of the next Term.

Mr. *Att. Gen.* My Lord, I have laid the Matter before you; and I acquieſce in what you ſhall think fit.

Sir *T. Powis.* Upon the Obſervation of *Blackmore*'s Caſe, where Lord *Coke* ſays, the Court cannot amend Miſpriſions of Clerks in Proceſs in another Term; if we have not Judgment this Term, we ſhall loſe that Advantage.

Mr. *Att. Gen.* There are two Points in this Caſe: One is, that it is amendable by Common Law; the other, that it is not excepted by the Statute of *Henry* VI.

Now my Lord *Coke* ſays, Error in Proceſs is amendable in another Term. But we ſubmit to the Court: I preſs nothing.

Mr. *J. Powel. Coke* ſay ſo: But I believe no Man will ſay, that ever a miſtaken Writ was amended in another Term. Therefore he muſt intend the ſubſequent Proceedings, or Proceſs: It may be the Proceedings of the original Entry on their Award, that may be amended in another Term; and *Coke* muſt mean that. There have been Entries of Awards amended in another Term; but the Miſtake of a Writ was never amended in another Term, that I can find.

L. C. J. Holt. If we put it off to the next Term, and our Opinion ſhould be againſt the Amendment, he can be try'd in that Term.

Mr. *Att. Gen.* My Lord, I ſubmit it to you.

Mr. *J. Powel.* We cannot now give ſo full Reaſons; yet I have enter'd my Opinion in the Caſe.

Mr. *J. Gould.* I was ſometime of Opinion, that it was amendable by the Statute; but really looking on the Caſes that have been cited, that is, the Caſes that are in Pleas of the Crown, it is not amendable by the Statute of *Henry* VI. I ſay, I formerly thought it might be amended by Virtue of the Statute: But upon Peruſal of *Blackmore*'s Caſe, *&c.* it ſeems to alter my Judgment. But notwithſtanding, I hold, that at Common Law it may be amended. For what means all the Caſes that are now extant; the Caſes of Informations, as the Caſe of Sir *Humphry Bond*, &c.?

The Caſe cited by *Yelverton*, in 2 *Bulſtrode* 35. is very ſtrong. There were two indicted for Felony, and found guilty. The Judge ſaw that it was in the ſingular Number, and ſtay'd Judgment: And they moved afterwards in another Term; and there, by the Judgment of nine or ten Judges, it was amended; and the Men were both hang'd.

Why now, it muſt be by the Statute Law, or by the Common Law, that it was amended in that Caſe. By the Common Law, I ſay, it is amendable.

There is a Caſe in *Raymond*'s Reports, 440. It is an Indictment on a Certificate of a Juſtice of Peace, that *Ingleſield*, being a reputed Papiſt, had refuſed to take the Oath of Supremacy, *&c.* Upon Not Guilty pleaded, the Jury found the Commiſſion *in hæc verba*, &c.

It was objected, That the Certificate was not found under Seal of the Juſtices, but only *in hæc verba*: And they did amend it.

This is the ſame Caſe. And I take it, that ſuch a Fault, as does not alter the Iſſue, nor the Trial, or Crime, is a Thing that is amendable.

Now there is Sir *John Curſon*'s Caſe, in 2 *Cro.* It is a ſtrong Caſe. There is an Information againſt him and his Wife for Recuſancy. The Wife only pleaded Not Guilty. The Queſtion was, Whether this were right? And whether they ſhould amend it? And it was reſolved, that it ſhould be amended.

The Caſe in *Siderfin*, that is (1 *Siderfin*, 243.) the Caſe of *Percival* and *Godfry*, I do not doubt, for my Part, but it is amendable; and take it as ſtrong as this is. They were indicted for a Riot: A *Venire Facias* iſſued *Vicecomitibus Canterburiæ*; and it was return'd by one Sheriff. They examin'd into the Truth of the Caſe, and they found there was but one Sheriff: And the Queſtion was, Whether this was amendable? And it was reſolved it ſhould be amended; and alſo that it was amendable at Common Law.

I muſt confeſs, I do not ſee that there is any Reaſon in the World againſt it. There is but only one Caſe that ſeems to be againſt it; that is the Caſe of *Theobald* and *Newton*, *Styles* 307. There indeed, by *Rolls* Opinion, it was not amendable, *&c.* But that is only a ſingle Opinion.

And as to the Caſe between the King, and *Read* and *Dawſon* (it ſhould have been two Caſes) there 'twas held, That the Statute of *Jeofails* does not extend to Informations of Intruſions; and yet it was ruled, that it ſhould be amended.

Indeed, my Lord *Hales*, in *Keble*, 191, 215. [He means *Twiſden*; *Vid. Keble*, 191, 198, 215.] did hold, that it was amendable within the Statute; and that the Amendment would ſtand in need of it: But it was ruled *contra*; and that it needed not the Help of the Statute of *Jeofails*. And I muſt needs ſay, if the Caſe of *Bradley* and *Banks*, in 2 *Croke*, 283. and in *Yelverton*, 204. were not in the way, I think the Writ had been good enough; for it is a Continuance from Day to Day, tho' the *Teſte* is the 24th, and the Award the 23d.

Now

Now, in my Mind, an Award the 23d, of a Writ, the 24th, is a perfect Continuance. And the Case of *Bradley*, &c. as it is in 2 *Croke*, 283. does not contradict this; tho' indeed that Case of *Bradley*, as it is in *Yelverton*, is contrary; but that seems mistaken. So that I do think, on the whole Matter, it is amendable at Common Law.

Note, Powis *accorded with* Gould, *that it was amendable*; *but* Powel *argued* contra, *that it was not.*

L. C. J. Holt. I should have been glad to have had Time till next Term, to consider of this Matter: For tho' I am satisfied in my Opinion, yet perhaps I may not give others that Satisfaction concerning it, as I might have done if I had had a longer Time.

I am of Opinion, That this is not amendable, neither by the Common Law, nor by the Statutes.

First, It must be admitted, that this is a Fault in the Writ, in a Point that is material: That is, The *Teste*, which should have been *Die Lunæ*, the 23d of *October*, and it is the 24th: For the 23d is the Day that the Defendant has in Court on the Return; and that being the Day he has in Court, the *Teste* of the Writ to continue the Process should have been that very Day.

Now I do not understand what my Brother *Powis* says, That there is no Interval between one Day and another. I would fain know, if a Day be appointed for a Man to appear on; and then he has another Day given him, when he appears not: As, if a Man appears the 23d of *October*, and there is a Day given, the 24th; will not this be a Discontinuance? No question but it is: Because he being in Court the 23d, and having no Direction the 23d when to come again, he is out of Court. Then shall you give another Day behind his Back? That cannot be in Reason. His Day in Court is the 23d of *October*; and that Day he should have another Day appointed. He has a Day in the Roll, but not in the Writ: That is issued behind his Back, the 24th; at which Time he is not in Court. Then if this be so, here is a Writ issued behind the Defendant's Back, and without any Award of the Court: For the Award is, *Die Lunæ prox. post tres Septimanas Sancti Michaelis*, which is the 23d of *October*; then there is a *Præceptum est* that Day. Now when this Writ issues the 24th; is this Writ warranted by the Roll? No, it is not; but another Sort of Writ, different from that which the Court awarded: Therefore being another Writ than what was awarded; where is there any Authority for it? Or how can the Jury be distrain'd upon it?

The Writ that issued the 24th, is another Writ: For there is a material varying between the Writ that issues, and the Award of the Roll; one is the 23d, the other is the 24th.

The Day of the Writ is material: And when it bears *Teste*, it is in the Judgment of the Law a Writ of that very Day; as it was adjudged in the Case of *Owen verf. Baily*, 17 *Ch.* 2. in a Trover and Conversion.

A Defendant, that is condemn'd in Debt and Damages, sells his Goods *bona fide*, between the last Day of *Trinity Term* and the first of *August*. After he had sold his Goods, the Plaintiff takes out a *Fieri Facias*, *Teste'd* the first Day of *Trinity Term*; which was before the Sale, tho' taken out after; setting forth, That the 4th or 5th of *July*, he had seized these Goods in the Hand of the Vendee; Tho' the Writ was not taken out actually in *Trinity Term*, yet bearing Date then, and the first of *August* the Goods were sold; yet the Writ being *Teste'd* the first Day of *Trinity Term*, 'twas held not amendable; and that the Hands of the Vendee were bound by it.

Now this Writ here is, in the Judgment of the Law, issuing out of this Court the 24th of *October*. If we should amend this, what Alteration should we make? We must make it another Writ: For a Writ that issues out of this Court the 24th, cannot be a Writ that issues out the 23d; and if we amend it, we make it as different as possibly can be.

Now why should we amend it? As we now take it, by the Statute of *Henry* VI. the Writ is good in it self; but it is not, as the Court awarded it. The Meaning of the Statute was not to amend mistaken Writs, but Mistakes in Writs: The Statutes meant nothing but that. Not that you should amend a Writ that was good in it self, and fit it to your particular Purpose.

Now here is a Writ executed in the same Term: Yet to make this Trial to be good, what must you do by this Amendment? You must make it to be another Writ: For you must make the Writ, even contrary to Truth, to be the 23d, which was the 24th: And therefore it cannot be made good; nor can the Trial be made good. You would make it the 23d, where it is indeed the 24th; and so you would change the Nature and Substance of the Writ. Is not this a material Variance, and different from the Award of the Court?

Before the Statute of *Jeofails*, if it had been in a Civil Case, it is help'd by the Statute of the 8th of *Henry* VI. because it is a Discontinuance of Process, it is help'd by that Statute; but that Statute extends not to this Case. I would fain know, whether there has been any Amendment, in any Case of this Nature, since the Statute of *Henry* the VIth? It's true, *Teste*'s of Writs have been often amended; but that was, where it was a void *Teste*; as on a *Sunday*, or out of Term; or where it is impossible, as after the Return, *&c.* That is a void *Teste*, if it bear Date on a *Sunday*, or in the Vacation.

In Civil Cases it is amendable; because it is the Fault of the Clerk by mistaking a Day; as in making it on a *Sunday*, or in a Vacation-Time: There may be Reason for it; and it may be amended by the Statute of *Henry* VI. because plainly a Mistake of the Clerk. And on this Reason is that Case in *Yelverton*, 64. and the Case of *Bradley* and *Banks*, 204. There was a *Venire* returnable one Day; and the *Teste* of the *Distringas* was of the same Date, and the same Day with the *Teste* of the *Venire*; and that was held amendable, because it is impossible you shall distrain before the Return of the *Venire*; and the *Distringas* bore *Teste* the same Day with the *Venire*: So that the *Teste* was repugnant to the Writ it self; and therefore the Writ is naught in it self, because it was to distrain a Jury that was not summon'd. But the Law has always been, That if upon the Return of one Writ, there is to be another Writ awarded; that other Writ must be *Teste'd* on the very Day upon which it was awarded, and the Return of the former.

And that Case of *Bradly* and *Banks*, in 2 *Cro.* and *Yelv.* is very strong to this Purpose. There the Person came in on the Exigent, and pray'd *Oyer* of the Writ and all Mesne Process: And therein appeared a Gap, the first Process being returnable *Decimo sexto Octobris*, and the Appeal being returnable *Quindena Sancti Michaelis*, that is, the

16th of *October*, were well. But the *alias Capias* goes out *Teſte'd* the 23d of *October*, which being ſeven Days after the Return of the former, that was wrong; for it ſhould have borne *Teſte* the 16th of *October*, then it had been right; but being the 23d, there was a Gap; and therefore it was held a Diſcontinuance.

And this is the Practice of the *Common-Pleas*, tho' not ſo much obſerved here in this Court, in Writs of Enquiry of Damages: But enquire of them in the *Common-Pleas*, and they will tell you, the ſubſequent Proceſs ought always to bear *Teſte* the Day of the Return of the former Writ. If you go to a *Capias*, either in Outlawry, or to diſtrain a Man; the ſecond *Diſtringas* is always *Teſte'd* the Day of the Return of the firſt; and the third is always *Teſte'd* the Day of the Return of the Second: And if it bear *Teſte* the next Day, all Proceſs is diſcontinued.

Ay, but you ſay, it is a Miſtake of the Clerk. It is ſo: But we are to judge of the Thing it ſelf, whether it is by way of Negligence, or for want of Skill. For aught I know, it may be for want of Skill, that it is *Teſte'd* another Day: But every Clerk does not know this. Nay, ſome have pretended to know, that it need not bear Date the Day of the precedent Writ's Return. Why then might it not be an Error in Skill? If he thinks it a right Writ, and ſays it muſt be *Teſte'd* the 24th, this is want of Skill; and then it is not amendable. And then this being a wrong Writ, the *Teſte* is material; and its being *Teſte'd* the 24th, is a Miſtake ſo material, that if it had been a civil Caſe, I ſhould have been againſt the Amendment; and therefore much more in this Caſe, I think, it ought to be quaſh'd, and a new *Venire* awarded.

Mr. *Att. Gen.* If the Court decide it, I cannot tell what to ſay.

Mr. *J. Powis.* What have you to ſay?

Mr. *Att. Gen.* The Court is divided, and there it hangs.

L. C. J. Holt. I would not be underſtood otherwiſe than thus: I do not ſay, this Caſe is within the Statute; but I look on it to be ſo material a Variance, than it is not amendable.

Mr. *Att. Gen.* The Court being divided in their Opinion, I know not any Rule to ſtop Judgment.

Mr. *J. Powis.* I know not how far it may go in criminal Caſes. That which ſway'd with me, was, to ſee ſo many bold Amendments in many Caſes; that went with me very far; and which were ſaid to be done by Common Law.

What I ſaid as to coming the next Day, I did not rely on it: Tho' it did ſeem to alleviate the Thing. But I was ſo tender in the Caſe, that I did think it might be better to have a new Trial. I have held, in my Opinion, with my Lord Chief Juſtice *Holt* and Mr. Juſtice *Powel* a great deal. I was tender before in the Point: And I do join with my Lord Chief Juſtice *Holt* and Mr. Juſtice *Powel*, that there ought to be a new Trial, and a new *Diſtringas*.

Mr. *Att. Gen.* With a Rule, I ſubmit; but without a Rule, I would have ſigned Judgment.

Mr. *Mountague.* My Lord, We move to ſet aſide this Trial, becauſe it is irregular.

Mr. *Att. Gen.* If you make a Rule, we need not diſpute it.

Mr. *J. Powel.* Judgment goes of courſe, unleſs you ſtop it.

Mr. *Att. Gen.* There is no Rule to ſtop it: And then I can ſign my Judgment.

Mr. *Mountague.* My Lord, tho' the Court can make no Rule for an Amendment, becauſe the Judges are divided about that Point; yet I humbly conceive, your Lordſhip, and the reſt of the Judges do agree, that the Writ, as it now is, is naught; and therefore I hope you will let us have a Rule to ſtay Judgment.

L. C. J. Holt. Mr. *Attorney*, They have been moving to have a new Trial.

Mr. *Att. Gen.* 'Twould be a Breach of Duty in me, not to ſign my Judgment, if you don't make a Rule while it is under Conſideration.

L. C. J. Holt. Here was Leave given to move in Arreſt of Judgment; and there is no Rule for ſigning Judgment.

Mr. *Att. Gen.* There is no Rule to ſtop it.

Mr. *Mountague.* What is the Rule that was made upon my firſt Motion?

Clerk reads, *Die Martis proximo*, &c.

Mr. *Mountague.* We take it, that tho' the Court be divided about the Amendment; yet ſince there can be no Amendment, the Writ being naught, we ought to go to a new Trial.

Mr. *J. Powel.* By all Means, go to a new Trial.

Mr. *J. Powis.* It is in a Caſe that was never ſo much look'd into before.

Mr. *Att. Gen.* If we muſt have a new Trial in this Caſe, we are in a worſe Caſe than I thought we were; for we are to begin Proceſs again. But if a Rule be made, we muſt ſubmit.

Mr. *Mountague.* There was a Rule made at the Side Bar, upon my Motion there, That all Things ſhould ſtay.

Mr. *Att. Gen.* That was not a Place to move for a Rule.

L. C. J. Holt. That is to ſtay *in ſtatu quo* they were then. There is no Rule for Judgment to ſtay.

Mr. *Att. Gen.* If on Motion to arreſt Judgment, the Judges of the Court are divided, I have heard it ſaid, that Judgment may be enter'd.

Mr. *J. Powis.* I ſaid at the Beginning, I was inclinable to have a new Trial.

L. C. J. Holt. I know not what you mean. You ſaid, you were inclinable to have it amended: I would have it amended, if I had followed my Fancy.

Mr. *J. Powel.* If my Brother has changed his Opinion, he may: For we have been arguing, that we may change our Judgments.

L. C. J. Holt. You have any Time to-day to move it again. Put us in mind of it: I may change my Mind too, it may be.

Mr. *J. Powis.* I judge not how it may go in criminal Matters: But all are of Opinion, that it ſhould not ſtand as it does.

L. C. J. Holt. The Court is divided that it ſhould be amended; but not that it is well as it is: And that is Mr. *Attorney*'s Motion, to alter what is to be amended.

Mr. *J. Powel.* Mr. *Attorney* makes no Motion for a Rule; but would have it ſtay as it does.

L. C. J. Holt. That it may remain *in ſtatu quo.*

Mr. *Att. Gen.* If you cannot agree in your Judgment, I ſubmit it to you, whether I may not enter Judgment for the Queen, tho' it be not amended.

Mr. *Mountague.* We hope Mr. *Attorney* ſhall not

not be permitted to ſign Judgment in this Caſe: For tho' 'tis true, that there can be no Amendment, becauſe the Court is divided; yet I do not apprehend that it is right as it is.

Mr. *Att. Gen.* If the Court be divided, no Rule can be made.

Mr. *J. Powis.* Let there be a new Trial.

Mr. *Mountague.* Mr. *Attorney*, The Court would have a new Trial: And I think you had better do ſo.

Mr. *Att. Gen.* I want none of your Directions.

Mr. *Mountague.* I may take notice of what the Judges ſay.

L. C. J. Holt. And he will make uſe of what we ſay, as far as is convenient for him.

Mr. *Att. Gen.* But Mr. *Mountague* muſt not pretend to give Directions, what I am to do.

Mr. *Mountague.* I don't give you Directions; but I hope I may take notice of what the Court ſays.

L. C. J. Holt. Mr. *Attorney*, We believe you don't want their Advice.

Mr. *Att. Gen.* But they are very ready to give it.

Mr. *Mountague.* I only took notice to Mr. *Attorney*, how far the Court was agreed: And only moved that the Rule, which I did conceive was pronounced by the Court, might be taken.

Mr. *Att. Gen.* You moved to no Purpoſe.

Mr. *Mountague.* I take it, that Mr. Juſtice *Powis* is for a new Trial.

Mr. *J. Powis.* Yes, I am ſo. It is a nice Caſe, and has never been conſider'd fully before.

Mr. *Mountague.* I hope now we have done.

Mr. *Att. Gen.* If I hear what Rule the Court makes, I ſhall ſubmit.

Mr. *Mountague.* I hear the Pleaſure of the Court is, that the Rule ſhall be for a new Trial.

L. C. J. Holt. You muſt have a new *Venire Facias.*

Mr. *Att. Gen.* That cannot be, with Submiſſion: A new *Venire* we cannot have.

L. C. J. Holt. You muſt have a new Trial. The Jury have given their Verdict; whereas they appeared to a wrong Writ, and ſo the former Trial is not warranted.

Mr. *Att. Gen.* I think they are warranted to appear by the Return of the *Venire*; and that we muſt go back, but where the Fault is, which is only but where the *Diſtringas* is made out: So that a *Diſtringas de novo* is to be for the ſame Jury. But I will meddle no more in it, without particular Order.

L. C. J. Holt. Do what you will; we will give you no Direction. We quaſh this Trial.

Sir *T. Powis.* My Lord, If you quaſh this Trial, then we are to begin again.

Mr. *Att. Gen.* If the Court is of Opinion that there ought only to be a new *Diſtringas* iſſued, and we can go back no further; I am afraid we ſhall never come right.

Mr. *J. Powel.* The Difficulty is in right awarding the *Diſtringas*, becauſe it does not bear Date with the Return of the *Venire.* But then conſider where you are: If you bring him on a new Trial, he can challenge any one that has given a Verdict before.

L. C. J. Holt. It is a *Diſtringas* to ſummon that Jury, but it is without *Teſte:* And that Jury having given their Verdict, they are not to ſerve again.

Mr. *Att. Gen.* I am ſure, according to Authorities, they muſt begin where the Fault was.

L. C. J. Holt. I ſhould have thought the *Venire de novo* had been proper: For this *Diſtringas* bearing *Teſte* out of Time, and that being erroneouſly executed, there ought to be a new *Diſtringas*, which is to be founded on a new *Venire.*

Mr. *Att. Gen.* If you do quaſh this Trial, I ſuppoſe your Lordſhip will make ſome Award for a new one.

L. C. J. Holt. We leave it to you.

Mr. *Att. Gen.* I cannot enter it.

Mr. *J. Powel.* We muſt grant a *Venire de novo*; which we cannot do without quaſhing this Verdict; and that is the way to try him again.

Mr. *Att. Gen.* My Lord, I am far from thinking I can alter your Rule; but I can't tell how to follow it.

L. C. J. Holt. What we do is *ex abundanti*, more than we are bound to. We can leave you to do what you can: The taking out the *Venire* and *Diſtringas*, are Things of courſe.

Mr. *Att. Gen.* I think there is a Neceſſity to explain my Meaning. I don't pretend to direct what you muſt do; but you muſt direct what is to be done: I cannot award a *Venire.*

L. C. J. Holt. It is taken out of Courſe. You may award that as well as the firſt, if it may be done.

Mr. *Att. Gen.* How can that be done, ſeeing you quaſh the *Diſtringas?*

Mr. *J. Powel.* That is the Award of the Court, and does not hinder you from taking out a new *Venire.*

Mr. *Att. Gen.* I cannot do it without the Court. When you quaſh this, you muſt award another.

L. C. J. Holt. We do award it.

Mr. *Att. Gen.* I remember in the Caſe of *Fitzwalter*, when they quaſh'd the Trial, they order'd a new one ſhould be had, *&c.*

L. C. J. Holt. If we make an Award, and you don't like it, you will not comply with it: Therefore we leave you to take it out as you will.

Mr. *Att. Gen.* You muſt order a new *Venire*; I cannot award a new one elſe.

L. C. J. Holt. You muſt have a *Venire Facias.*

Mr. *Att. Gen.* That muſt be the Judgment of the Court then. For if I award it, it muſt be by Order of Court.

Mr. *J. Gould.* You had better declare *de novo.*

Mr. *Att. Gen.* I am fearful of what I do. I hope the Court will diſcharge me.

L. C. J. Holt. When a Trial is quaſh'd and ſet aſide for any Irregularity of the Trial, that Jury is diſcharged: All the Pannel is diſcharged, and there muſt be a new Pannel.

Mr. *Att. Gen.* How will that appear?

L. C. J. Holt. If it appear that the *Diſtringas* did not iſſue as it ought, every thing ſhall be enter'd at large on the Rule: That the *Diſtringas* did not iſſue till the 24th of *October*; therefore they will conſider, that the Verdict ſhall be ſet aſide,

Mr. *Att. Gen.* And that we ſhall have Leave to go to a new Trial.

L. C. J. Holt. Preſumptum eſt.

Mr. *Att. Gen.* If you pleaſe to make the Rule then, I ſubmit.

L. C. J. Holt. We will adviſe how to make the Rule.

It was never afterwards thought proper to try him again.

CLXXXI. *The Trial of Captain* THOMAS GREEN, *and his Crew, at the High Court of* Admiralty *of* Scotland, *for* Piracy, March 14. 170$\frac{4}{5}$. 4 Ann.

THE Lords of Her Majesty's Privy Council having taken * Precognition of the Grounds of the Information against Captain *Thomas Green*, and others of his Crew; they thought fit, and order'd, That the said Captain *Thomas*, &c. should be put to a Trial upon the Crimes informed, before the Judge of the High-Court of *Admiralty*. As also, the Lords of the Privy Council thought fit at the same Time, to appoint Assistants to the *Procurator-Fiscal* of the High Court of *Admiralty*, for the better ordering and carrying on of the said Trial, according to the Tenor of their Act following.

* *Examination before-hand.*

AT Edinburgh, *the Thirteenth Day of* February, 1705 *Years. Committee* * *anent Captain* Green *and his Crew*, † Sederunt *Lord* Chancellor, *Marquis of* Anandale, *Earls of* Haddington, Leven, Ruglen, *Lords* Yester, Belhaven, Advocat, * Thesaurer-Depute. Anstruther, *Sir* John Home, *and* Ormistoun, *Younger. It's the Opinion of the Committee, That my Lord Chancellor should write to Court, for Remissions to* Charles May, *Chyrurgeon*; Antonio Ferdinando, *Cook's Mate*; Antonio Francisco, *Captain's Man*; George Haines, *Stewart*; George Glen, *Quarter-Master*; Alexander Taylor, *Fore-Mast-Man: And that the Trial against Captain* Green *and his Crew, should be pursued before the* Admiral-Court; *and that Assessors should be named to the Judges, and Assistants to the Procurator-Fiscal.*

* *about.* † *Present.* * *Treasurer.*

Sic subscribitur,
TWEEDALE, *Cancel.* J. P. C.

The above Report of the Committee, anent Captain Green *Commander of the Ship the* Worcester, *being upon the Day and Date of* † *thir Presents, read in Presence of the Lords of Her Majesty's Privy Council, and the* * *samen was Voted and* † *Approven. And the said Lords did thereby Nominat and Appoint Sir* James Stuart, *Her Majesty's Advocat, Sir* David Dalrimple, *and Mr.* William Carmichael, *Her Majesty's Sollicitors*; *Sir* Patrick Home, *Sir* Gilbert Eliot, *Mr.* Alexander Mackleod, *and Mr.* Francis Grant, *to be Assistants to Mr.* Alexander Higgins, *Procurator-Fiscal to the High Court of* Admiralty, *in prosecuting the Libel and Indictment to be given at his Instance, against the said Captain* Green *and his Crew, before the said Court, to the final End and Decision thereof. And the said Lords declared, That they would next Council-Day name five of their own Number, to be Assessors to the Judges of* Admiralty, *during the Dependance of the aforesaid* * *Process: And recommended to the Lords of* † *Thesaury, to pay the Lawyers that are employ'd to be Assistants accordingly.*

† *These.* * *Same.* † *Approved.* * *Trial.* † *Treasury.*

Extracted by me,

GILB. ELIOT, Cls. Sti. Concilii.

Whereupon the Judge of the High Court of *Admiralty* did present to the Lords of Council a Petition; "That since the Trial was order'd to be "made before him, of the foresaid Crimes inform-"ed against Captain *Green* and his Crew; and that "the Matter appear'd to be of great Importance; "he might have, according to Custom in the like "Cases, Assessors appointed and joined with him, "by the Authority of Council, for his Assistance "in the said Trial." Whereupon the Lords of Her Majesty's most Honourable Privy Council did Nominate and Appoint, the Earl of *Loudoun*, Lord *Belhaven*, Lord *Arniston*, Sir *John Home* of *Blackadder*, and *John Cockburn* younger of *Ormistoun*, to be Assessors to the foresaid Judge; and assist and vote with him in the Trial, at the *Procurator-Fiscal*'s Instance, against Captain *Thomas Green*, Commander of the Ship the *Worcester*, and others of his Ship's Crew, before the said High Court of *Admiralty*; for their being guilty of *Piracy, and other Crimes*; and that to the final End and Decision thereof; as an Act extracted and signed by the Clerk of Council, extant in the Records of the said High Court, bears.

Follows the Court of Justiciary of the High Court of *Admiralty*, with the whole Trial, as it proceeded before the Judge of *Admiralty*, and the Assessors above appointed.

CURIA JUSTICIARIA *supremæ Curiæ Admiralitatis tenta in Prætorio, vel nova Sessionis Domo Burgi de* Edinburgh, *quinto die Mensis Martii*, 1705. *per Judicem dictæ Curiæ, & per Honoratissimos Viros*, Joannem *Comitem de* Loudoun, Joannem *Dominum de* Belhaven, *Dominos* Robertum Dundas *de* Arniston, Joannem Home *de* Blackadder, & Joannem Cockburn *de* Ormistoun, *Assessores.*

Curia legitime affirmata.

The said Day, the said Earl of *Loudoun*, Lord *Belhaven*, &c. produced the Act of her Majesty's Privy Council above-mentioned, appointing them to be the Assessors to the said Judge.

Thereafter the said Assessors took the Oath of Allegiance and signed the same, with the Assurance, and took the Oath *de fideli administratione*, and were thereupon admitted and received.

Intran.

Captain *Thomas Green*, Commander of the Ship called the *Worcester*, now in *Bruntisland* Harbour.

Captain

Capt. *John Madder*, chief Mate of the ſaid Ship.
John Reynolds, ſecond Mate of the ſaid Ship.
Thomas Linſtead, Aſſiſtant to the deceaſed *Supercargo* of the ſaid Ship.
James Burn, Boatſwain of the ſaid Ship the *Worceſter*.
James Sympſon, Gunner.
Andrew Robertſon, Gunner's-Mate.
John Brucklie, Seaman.
George Kitchen, Seaman.
Henry Keigle, Carpenter.
Samuel Urlines, his Mate.
George Haines, Steward of the ſaid Ship.
Daniel Stringman, Cook.
Samuel Wilcocks, Chyrurgeon's Mate.
George Glen, Seaman there.
Henry Barnes, Seaman there.
Alexander Taylor, Seaman there.
And *John Bannantyne*, Seaman there.

All of them indicted and accuſed at the Inſtance of Mr. *Alexander Higgins*, Advocate Procurator-Fiſcal to the High Court of Admiralty, for the Crimes of *Piracy*, *Robbery*, and *Murder*, in Manner mentioned in the two ſeveral Indictments raiſed againſt them * thereanent, and whereof † the Tenor follows: Captain *Thomas Green*, Commander of the Ship called the *Worceſter*, now in *Bruntiſland* Harbour, Captain *John Madder* chief Mate of the ſaid Ship, *John Reynolds* ſecond Mate of the ſaid Ship, *Thomas Linſtead* Aſſiſtant to the deceas'd *Supercargo* of the ſaid Ship, *James Burn* Boatſwain of the ſaid Ship, *James Sympſon* Gunner of the ſaid Ship, *Andrew Robertſon* Gunner's Mate, *John Brucklie* Seaman there, and *George Kitchen* Seaman there, all Priſoners; You, and * ilk one of you are accuſed and indicted at the Inſtance of Mr. *Alexander Higgins*, Advocate Procurator-Fiſcal to the High Court of Admiralty, of the Crimes of *Piracy*, *Robbery*, and *Murder*, in manner after-mentioned, *viz.* That by the Law of God, the Laws of Nations, of this, and of all well govern'd Realms, the Crimes of *Piracy*, *Robbery*, and *Murder*, are prohibited, under all higheſt Pains; and that by the Laws of this Realm, the ſaid Crimes are prohibit under Pain of Death, and †Eſcheat of Moveables. *Nevertheleſs* it is of Verity, that Captain *Thomas Green*, Commander of the Ship called the *Worceſter*, now in *Bruntiſland* Harbour, and his Crew, are guilty, * Art and Part of the ſaid Crimes, or one or other of the ſame, in ſo far as the ſaid Captain *Thomas* or his ſaid Crew, having ſailed from *England*, in the ſaid Veſſel the *Worceſter*, upon Pretence of Merchandizing towards the *Eaſt-Indies*; the foreſaid Captain, and his ſaid Crew belonging to the ſaid Veſſel, did, upon one or other of the Days of the Months of *February*, *March*, *April*, or *May*, in the Year 1703. rencounter, or meet with another Ship or Veſſel, ſailed by its own Men or Crew, upon the Coaſt of *Malabar*, near *Calecute*; and the ſaid Veſſel bearing a red Flag, and having *Engliſh* or *Scots* aboard, at leaſt ſuch as ſpoke the *Engliſh* Language; the ſaid Captain *Thomas Green* and his Crew, after ſome * Intercommuning with them, did, without any lawful Warrant, or a juſt Cauſe, attack the ſaid other Veſſel, or Ship, while expecting no ſuch Treatment; and invading her firſt by their Sloup, which they had manned with Guns and other Arms for that Purpoſe, they fell upon the ſaid other Veſſel in an hoſtile Manner, by ſhooting of Guns and otherways; and after ſome Time ſpent in Fighting againſt her by their Sloup, and partly by the approaching of the ſaid *Thomas Green*'s Ship the *Worceſter*, they overcame, and boarded the ſaid other Veſſel, and having ſeized their Men, they killed them, and threw them overboard, and then carried, or cauſed to carry away the Goods that were aboard the ſaid other Veſſel, to their ſaid Ship the *Worceſter*; and then diſpoſed upon the ſaid Ship, by ſelling her a Shore on the ſaid Coaſt. Which Crime, being a wicked Piracy committed by Surprize in Parts ſo remote, and probably with all the Caution the Committers could uſe for concealing thereof, and for preventing Diſcoveries, comes now to be diſcovered in the ſeveral Parts and Circumſtances of the Action, and by ſuch as were preſent thereat; which being all conjoyn'd, does make up and infer the foreſaid Crime objected, and are as follows, *viz.* That the foreſaid Rencounter and Fight betwixt Capt. *Green* and his Crew, and the ſaid Veſſel the *Worceſter*, and the foreſaid other Veſſel taken by her, happen'd on the ſaid Coaſt as above: *Likeas*, at the ſame Time, one or more of the ſaid Ship the *Worceſter*, her Crew being on Shore, and at ſome diſtance from the Sea, heard the ſaid Shooting, which brought the ſaid Perſons to the Shore, where they, at leaſt the Chyrurgeon of the ſaid Ship the *Worceſter* one of them, ſaw her riding at a good Diſtance from the Shore upon her Birth (as they ſpeak) and having the other Ship at the Stern, as it were tied or towed to her, as being the Veſſel they had maſter'd or overcome, as ſaid is. *Likeas*, the ſaid Chyrurgeon did ſee the Boat belonging to the ſaid Ship the *Worceſter* coming aſhore from her, and the Chyrurgeon †demanding at ſuch of the Crew as were in her, what had brought them aſhore: They anſwer'd that they had been *Buſking* (a Sea-Term uſed for fitting and trimming a Ship for fighting) and they had drunk, ſpilt, or ſtaved all their Water, and they were come for a new Supply: And when a little Time thereafter the ſaid Chyrurgeon went aboard the ſaid Ship the *Worceſter*, he perceived the Deck thereof lumber'd and cover'd, and in a confuſed Manner, with Balls, Boxes, and Goods; whereof when he aſked the Reaſon, *John Madder*, one of the * Pannels, and a principal Actor in the Engagement, anſwer'd, *Damn you, what have you to do to enquire, meddle with your Plaiſter-Box.* And when the Chyrurgeon went down to his Station and Cheſt, he called for one of the Blacks *Antonio Ferdinando*, and one *Duncan Mokay* now dead, and another in order to dreſs them; but when he aſked what way they came by their Wounds, they declined to anſwer; whereupon the Chyrurgeon refuſing to dreſs them, if they would not tell him how they got their Wounds, the ſaid *John Madder* came to the Chyrurgeon in a Paſſion, and aſked what was his buſineſs to aſk ſo many Queſtions, when he did ſee the Wounds ſo plain before him, calling him a Blockhead for not dreſſing them; and at length the Conteſt was ſo warm betwixt the ſaid *Madder* and Chyrurgeon, that *Madder* charged him to aſk no more Queſtions, and he charged the Men wounded, not to anſwer a Word: And further ordered him back to the Shore, which the Chyrurgeon was forced to comply with; where the Chyrurgeon meeting with *Franciſco*

de

* *Concerning the ſame.*
† *Contents.*
* *Every one.*
† *Forfeiture.*
* *Of contriving and acting.*
* *Diſcourſe.*
† *Aſking.*
* *Perſons indicted.*

de Olivera the † Linguiſter, aſked him whether he ſaw any of the *Worceſter*'s Men that had carried the foreſaid Ship ſo taken into *Keilon* River, and the Linguiſter anſwered, that he had not, but that they were ſome of the *Worceſter*'s Company, who as ſoon as they had brought her in and made her faſt, took their Boat and went directly on Board: The Ship taken being carried into *Keilon* River as ſaid is, where ſhe was left with her Yards and Top-maſts down, all unrigged: And the ſaid Linguiſter told the Chyrurgeon further, that one *Coge Commodo* complained he had bought the ſaid Ship taken too dear; whereby it appears that the ſaid Ship taken by Violence, was ſold in manner aforeſaid. *Likeas*, for further Evidence of the ſaid Piracy, ſince the Time that *John Reynolds* one of the Pannels was ſeized with the reſt, for his Acceſſion thereto, there was found a Letter wrote to him by one *Sarah Newlands*, bearing Date *January* the 6th, wherein ſhe tells him, *That tho' he had been baſely wicked, yet ſhe ſhould be ſorry to hear he were guilty of any thing that might bring him to the Gallows*; *and therefore adviſes him to confeſs*; *adding, that in his own Letter which ſhe had ſeen, he ſays, That ſome of their Men had baſely confeſſed* (which ſays he) *implies that they were guilty*. And when *Reynolds* was queſtioned upon his Letter, he acknowledged that he had wrote a Letter to his Wife the ſaid *Sarah*'s Siſter, which had occaſioned her writing the ſaid Letter to him; and thereupon he produced the Copy of the ſaid Letter to his Wife, which agrees with what *Sarah* ſays, as the ſaid Copy and *Sarah*'s Letter both put in the Clerk of the Admiralty's Hands, to be ſeen by the Pannels, bear. *And further*, *George Haines* one of the Crew of the ſaid *Worceſter*, ſince his coming to *Scotland*, and when at *Bruntiſland*, being aſked by one *James Wilkie*, Taylor, † Burgeſs of *Edinburgh*, ſome Day in *October* laſt, about his Brother *Andrew Wilkie*, who went Chyrurgeon in Captain *Drummond*'s Ship, if ever the ſaid *Haines* had ſeen the ſaid *Andrew Wilkie* in his Voyage, he flew in a Paſſion, and ſaid, *what Devil was his concern with Captain* Drummond? Upon which *James Wilkie* forbearing a little till he ſhould be calmer, aſked the ſaid *Haines*, whether he had heard or ſeen any *Scots* Ship coming to or from the *Eaſt-Indies* during their Voyage? *Haines* anſwered, that when they were upon the Coaſt of *Malabar*, a *Dutch* Ship informed them, that one Capt. *Drummond*, commanding a *Scots* Ship, and having a Sloop in Company, was turned Pirate. Upon which *Haines* and they manned their Ship to be in readineſs, but ſaw him not; only a little thereafter *Haines* added, that he had in his Cuſtody, the Time the ſaid Ship the *Worceſter* was ſeized, which he would not have fallen into the Seizer's Hands for twice the Value of the Ship, but that he had thrown it over-board; adding further, that there was ſtill in the Ship what would never be found by the Seizers, unleſs they pulled her Board from Board, tho' he knew where the Thing lay. *Likeas*, when after the ſaid *James Wilkie* departed, one *Anna Seaton* in *Bruntiſland*, did at his Deſire further enquire at *Haines* about Captain *Drummond*'s Ship; he anſwered, that he ſaw they had a Deſign to pump him, but that they ſhould not be the wiſer of him: At all which Paſſages, *Kenneth Mackenzie* * Indweller in *Cannongate* was a preſent Witneſs. And the ſaid *Anna Seaton* did further tell the ſaid *Kenneth Mackenzie*, that when ſhe expoſtulate with *Haines* for his being in Paſſion, as ſaid is; he anſwered, that he knew more of Captain *Drummond* than he would tell at that Time; and that if the ſaid *Andrew Wilkie* was with Captain *Drummond*, he would not be ſeen again. *And further*, the ſaid *Anna Seaton* heard the ſaid *Haines* own and declare their ſaid Wickedneſs; and ſhe and *William Wood*, one of the Gunners of her Majeſty's Artillery, with one *John Henderſon* † Writer in *Edinburgh*, being in *September* laſt, in *Anna Seaton*'s Mother's Houſe, after having drunk one Health or two; the ſaid *Haines*, who was there preſent, fell in a melancholy Fit, and expreſs'd himſelf, *That it's a Wonder, that ſince we did not ſink at Sea, God doth not make the Ground to ſwallow us up for the Wickedneſs that has been committed during the laſt Voyage, on Board of that* Old Bitch Beſs, pointing to Captain *Green*'s Ship. And further, the ſaid *Haines* ſaid, That if what the ſaid *John Madder* had done in the ſaid Voyage were well known, he deſerved as much as his Uncle *Madder* met with at *Amſterdam*, who was there burnt in Oil, for attempting to burn their Ships. And when at another Time, the ſaid *Anna Seaton* told *Haines*, that ſhe had an old Sweetheart who went away with Captain *Drummond*, and would gladly hear ſome Tidings, whether he was dead or alive; the ſaid *Haines*, who was then a * Suiter to *Anna Seaton*, aſſured her, ſhe would never ſee him again, if he was in *Drummond*'s Ship. And for a further Confirmation of the Truth of the ſaid Piracy, when a Committee of Council was ſent to *Bruntiſland*, to cauſe Search and unload the ſaid Veſſel, it was found by the Skippers and Seamen employed, that the Goods aboard her were not ſtow'd as Merchant Goods uſed to be, but were found in the Hold in ſuch Confuſion, as if taken by Piracy, and no otherways. *Likeas*, when the ſaid Ship the *Worceſter* was ſeized, the ſaid *John Madder* being queſtion'd about Captain *Drummond*'s Ship, he took out of his Pocket, or at leaſt ſhew'd in his Hand, the Seal of the *African* Company, which he could never lawfully have got. By all which, they being joined and connected together (as a Diſcovery of ſuch a Wickedneſs practiſed in ſuch remote Parts, and ſo induſtriouſly and obſtinately endeavour'd to be concealed, deſerves to be) the ſame in all the Points and Circumſtances thereof, at leaſt ſuch, and ſo many of them as are † relevant, and are offered to be proven by a cumulative Probation, do plainly amount to ſuch a plenary Evidence, as may fully convince all impartial Men, that the aforeſaid Captain *Green* and his ſaid Crew, are all and each of them guilty, Art and Part, of the foreſaid Crimes of *Piracy*, *Robbery*, and *Murder*, or one or other of them above charg'd; which being found by a Verdict of an † Aſſize before the Judge of the Admiralty, and the Lords Aſſeſſors appointed by the Lords of the Privy-Council, the forenamed Perſons, and each of them, ought to be puniſhed by Sentence of the ſaid Court, with the Pain of Death, and Confiſcation of their Moveables, to the Example and Terror of others, to do or commit the like in Time coming.

† *Interpreter.*

† *Clerk for Law Buſineſs.*

* *Sweetheart, or Wooer.*

† *Citizen.*

* *Inhabitant.*

† *Sufficient to bear an Indictment.*

† *Jury.*

Additional Concluſion to the Indictment, at the Inſtance of Mr. Alexander Higgins *Procurator-Fiſcal to the Court of Admiralty, againſt Captain* Green, *&c.*

Viz. THAT the Concluſion of the ſaid Indictment given on *Saturday* the ſeventeenth Inſtant, bearing the Pain of Death, and of Eſcheat and

and Confiſcation of Moveables, ſhould extend to the Eſcheat and Confiſcation of the ſaid Ship and Cargo, by reaſon of the foreſaid Crime and Piracy; and that the ſaid Captain *Thomas Green*, &c. ſhould anſwer to the foreſaid Concluſion, as thus explained, and extended to the Confiſcation of the ſaid Ship and Cargo, as in Caſe of Piracy, the † *Appearance.* 5th of *March*, which is the Day of † Compearance aſſigned to the ſaid Pannels, or at leaſt upon the 6, 7, 8, or 9 Days of *March* thereafter, as the true Import, or at leaſt a clear Conſequent of the foreſaid Crime and Indictment given thereupon: The Liſt of * *Jurors.* Witneſſes and * Aſſizers remaining the ſame, as ſubjoined to the foreſaid principal Indictment. *Sic Subſcribitur*

ALEXANDER HIGGINS.

HEnry *Keigle* Carpenter in the Ship called *Worceſter*, now in *Bruntiſland* Harbour, *Samuel Urlines* his Mate, *George Haines* Steward of the ſaid Ship, *Daniel Stringman* Cook of the ſaid Ship; *Samuel Wilcocks* Chyrurgeon's Mate, *George Glenn* Seaman there, *Henry Barnes* Seaman there, *Alex. Taylor* Seaman there, and *John Bannantine* Seaman there; all of Captain *Thomas Green* Commander of the ſaid Ship his Crew: You, and ilk one of you are accuſed and indicted at the Inſtance of Mr. *Alex. Higgins* Advocate, Procurator-Fiſcal to the High Court of Admiralty, of the Crimes of *Piracy*, *Robbery* and *Murder*, in Manner after-mention'd, *viz.* That by the Law of God, the Laws of Nations, of this, and of all other well-govern'd Realms, the Crimes of *Piracy*, *Robbery* and *Murder*, are prohibite under all higheſt Pains: And that by the Laws of this Realm, the ſaid Crimes are prohibite, under Pain of Death, and Eſcheat of Moveables. *Nevertheleſs*, it is of Verity, that Captain *Thomas Green* Commander of the Ship called the *Worceſter*, now in *Bruntiſland* Harbour, and his Crew, are guilty, Art and Part, of the ſaid Crimes, or one or other of the Seamen, in ſo far as the ſaid Captain *Thomas*, or his ſaid Crew, having ſailed from *England* in the ſaid Veſſel the *Worceſter*, upon Pretence of Merchandizing towards the *Eaſt-Indies*, the foreſaid Captain and his ſaid Crew belonging to the ſaid Veſſel, did upon one or other of the Days of the Months of *February*, *March*, *April* or *May*, in the Year 1703, rencounter and meet with another Ship or Veſſel, ſailed by its own Men or Crew, upon the Coaſt of *Malabar* near *Calecute*; and the ſaid Veſſel bearing a red Flag, and having *Engliſh* or *Scots* aboard, at leaſt ſuch as ſpoke the *Engliſh* Language, the ſaid Captain *Thomas Green* and his Crew, after ſome intercommuning with them, did without any lawful Warrant, or juſt Cauſe, attack the ſaid other Veſſel or Ship, while expecting no ſuch Treatment; and invading her firſt by their Sloop, which they had manned, and furniſhed with Guns and other Arms for that Purpoſe; They fell upon the ſaid other Veſſel in an hoſtile Manner, by ſhooting of Guns and otherways; and after ſome Time ſpent in fighting againſt her by their Sloop, and partly by the approaching of the ſaid *Thomas Green*'s Ship the *Worceſter*, they overcame, and boarded the ſaid other Veſſel, and having ſeized their Men, they killed them, and threw them over-board, and then carried, or cauſed to carry away the Goods that were aboard of the ſaid other Veſſel to their ſaid Ship the *Worceſter*, and then diſpoſed upon the ſaid Ship, by ſelling her aſhore on the ſaid Coaſt. Which Crime being a wicked Piracy, committed by Surprize in Parts ſo remote, and probably with all the Caution the Committers could uſe for concealing thereof, and for preventing Diſcoveries, comes now to be diſcovered in the ſeveral Parts and Circumſtances of the Action, and by ſuch as were preſent thereat: Which being all conjoyned, does make up and infer the foreſaid Crime objected, and are as follows, *viz.* That the foreſaid Rencounter and Fight between Captain *Green* and his Crew, and the ſaid Veſſel the *Worceſter*, and the foreſaid other Veſſel taken by her, happen'd on the ſaid Coaſt as above: *Likeas*, at the ſame Time, one or more of the ſaid Ship the *Worceſter*, her Crew being on Shore, and at ſome Diſtance from the Sea, heard the ſaid ſhooting, which brought the ſaid Perſons to the Shore, where they, at leaſt the Chyrurgeon of the ſaid Ship the *Worceſter* one of them, ſaw her riding at a good Diſtance from the Shore upon her Birth (as they ſpeak) and having the other Ship at her Stern, as it were tied or towed to her, as being the Veſſel they had maſter'd or overcame, as ſaid is. *Likeas*, the ſaid Chyrurgeon did ſee the Boat belonging to the ſaid Ship the *Worceſter* coming aſhore from her, and the Chyrurgeon demanding, at ſuch of the Crew as were in her, what had brought them aſhore? They anſwered, that they had been *Buſking* (a Sea-Term, uſed for fitting and trimming a Ship for fighting) and that they had drunk, ſplit or ſtaved all their Water, and they were come for a new Supply; and when a little Time thereafter the ſaid Chyrurgeon went aboard the ſaid Ship the *Worceſter*, he perceived the Deck thereof lumber'd and cover'd, and in a confuſed Manner with Balls, Boxes and Goods; whereof when he aſk'd the Reaſon, *John Madder* one of the Pannels, and a principal Actor in the Engagement, anſwer'd--*Damn you, what have you to do to enquire, meddle with your Plaiſter-Box.* And when the Chyrurgeon went down to his Station and Cheſt, he called for one of the Blacks *Antonio Ferdinando*, and one *Duncan Mackay* now dead, and another, in order to dreſs them; but when he aſked what way they came by their Wounds, they declined to anſwer: Whereupon the Chyrurgeon refuſing to dreſs them, if they would not tell him how they got their Wounds; the ſaid *John Madder* came to the Chyrurgeon in a Paſſion, and aſked what was his Buſineſs to aſk ſo many Queſtions, when he did ſee the Wounds ſo plain before him? Calling him a Blockhead for not dreſſing them. And at length the Conteſt was ſo warm betwixt the ſaid *Madder* and Chyrurgeon, that *Madder* charged him to aſk no more Queſtions, and he charged the Men wounded not to anſwer a Word: And further, order'd him back to the Shore, which the Chyrurgeon was forced to comply with. Where the Chyrurgeon meeting with *Franciſco de Olivera* their Linguiſter, aſked him, whether he ſaw any of the *Worceſter*'s Men, that had carried the foreſaid Ship ſo taken, into *Keilon* River? And the Linguiſter anſwered, that he had not; but that they were ſome of the *Worceſter*'s Company, who, as ſoon as they had brought her in, and made her faſt, took their Boat, and went directly on board: The Ship taken being carried into *Keilon* River, as ſaid is, where ſhe was left, with her Yards and Top-Maſts down, all unrigged. And the ſaid Linguiſter told the Chyrurgeon further, That one *Cogo Commodo* complained he had bought the ſaid taken Ship too dear; whereby it appears, that the ſaid Ship taken by Violence, was ſold in Manner foreſaid.

Likeas, for further Evidence of the ſaid Piracy, ſince the Time that *John Reynolds*, one of the Pannels, was ſeized with the reſt, for his Acceſſion thereto; there was found a Letter wrote to him by one

Sarah.

Sarah Newlands, bearing Date the 6th of *January*; wherein ſhe tells him, That tho' he had been baſely wicked, yet ſhe ſhould be ſorry to hear he were guilty of any thing that might bring him to the Gallows: And therefore adviſes him to confeſs; adding, That in his own Letter, which he had ſeen, he ſays, that ſome of their Men had baſely confeſſed; which, ſays ſhe, implies, that they were guilty. And when *Reynolds* was queſtioned upon his Letter, he acknowledged that he had wrote a Letter to his Wife, the ſaid *Sarah*'s Siſter, which had occaſioned her writing the ſaid Letter to him: And thereupon he produced the Copy of the ſaid Letter to his Wife, which agrees with what *Sarah* ſays; as the ſaid Copy, and *Sarah*'s Letter (both put in the Clerk of the *Admiralty*'s Hands, to be ſeen by the Pannels) bear.

And further: George Haines, one of the Crew of the ſaid *Worceſter*, ſince his coming to *Scotland*, and when at *Bruntiſland*, being aſked by one *James Wilkie*, Taylor, Burgeſs of *Edinburgh*, ſome Day in *October* laſt, about his Brother *Andrew Wilkie*, who went Chyrurgeon in Captain *Drummond*'s Ship; if ever the ſaid *Haines* had ſeen the ſaid *Andrew Wilkie* in his Voyage? He flew in a Paſſion, and ſaid, *What Devil was his Concern with Captain* Drummond? Upon which, *James Wilkie* forbearing a little, till he ſhould be calmer, aſk'd the ſaid *Haines* again, Whether he had heard or ſeen any *Scots* Ships, coming to or from the *Eaſt-Indies*, during their Voyage? *Haines* anſwered, That when they were upon the Coaſt of *Malabar*, a *Dutch* Ship inform'd them, That one Captain *Drummond*, commanding a *Scots* Ship, and having a Sloop in Company, was turn'd Pyrate: Upon which *Haines* ſaid, they mann'd their Sloop to be in Readineſs, but ſaw him not: Only a little thereafter *Haines* added, That he had in his Cuſtody the Time the ſaid Ship the *Worceſter* was ſeized, which he would not have fallen into the Seizer's Hands for twice the Value of the Ship; but that he had thrown it overboard: Adding further, That there was ſtill in the Ship what would never be found by the Seizers, unleſs they pull'd her Board from Board, though he knew where the Thing lay.

Likeas, when after the ſaid *James Wilkie*'s Departure, one *Anna Seaton* did, at his Deſire, further enquire at *Haines* about Captain *Drummond*'s Ship; he anſwered, That they had a Deſign to pump him, but that they ſhould not be the wiſer of him. At all which Paſſages, *Kenneth Mackenzie*, an Indweller in *Canongate*, was a preſent Witneſs. And the ſaid *Anna Seaton* did further tell the ſaid *Kenneth Mackenzie*, That when ſhe expoſtulat with *Haines* for his being in a Paſſion, as ſaid is; he anſwered, That he knew more of Captain *Drummond* than he would tell at that Time: And that if the ſaid *Andrew Wilkie* was with Captain *Drummond*, he would not be ſeen again.

And further, The ſaid *Anna Seaton* heard the ſaid *Haines* own and declare their ſaid Wickedneſs. And ſhe, and *William Wood*, one of the Gunners of Her Majeſty's Artillery, with one *John Henderſon* Writer in *Edinburgh*, being in *September* laſt at *Anna Seaton*'s Mother's Houſe; after having drank a Health or two, the ſaid *Haines*, who was there preſent, fell in a melancholy Fit; and expreſs'd himſelf, *That it's a wonder that ſince we did not ſink at Sea, God doth not make the Ground to ſwallow us up, for the Wickedneſs that has been committed during the laſt Voyage on Board of that* Old Bitch *Beſs*; pointing to Captain *Green*'s Ship. And further, the ſaid *Haines* ſaid, That if what the ſaid *John Madder* had done in the ſaid Voyage were well known, he deſerved as much as his Uncle *Madder* met with at *Amſterdam*; who was there burnt in Oil, for attempting to burn their Ships. And when, at another Time, the ſaid *Anna Seaton* told *Haines*, That ſhe had an old Sweet-heart who went away with Captain *Drummond*, and would gladly hear ſome Tidings whether he was dead or alive. The ſaid *Haines*, who was then a Suitor of *Anna Seaton*'s, aſſured her, ſhe would never ſee him again, if he was in *Drummond*'s Ship.

And for a further Confirmation of the Truth of the ſaid Piracy, when a Committee of Council was ſent to *Bruntiſland*, to cauſe Search and unload the ſaid Veſſel; it was found, by the Skippers and Seamen employ'd, that the Goods aboard her were not ſtowed as Merchant Goods uſed to be; but were found in the Hold in ſuch Confuſion, as if taken by Piracy, and no otherways. *Likeas* when the ſaid Ship the *Worceſter* was ſeized, the ſaid *John Madder* being queſtion'd about Captain *Drummond*'s Ship; he took out of his Pocket, or at leaſt ſhewed in his Hand, the Seal of the *African Company*; which he could never have lawfully got.

By all which, they being joined and connected together (as a Diſcovery of ſuch a Wickedneſs practiſed in ſuch remote Parts, and ſo induſtriouſly and obſtinately endeavour'd to be concealed, deſerves to be) the ſamen, in all the Points and Circumſtances thereof; at leaſt ſuch, and ſo many of them as are relevant, and are offer'd to be proven by a cumulative Probation; do plainly amount to ſuch a plenary Evidence, as may fully convince all impartial Men, that the foreſaid Captain *Green* and his ſaid Crew, are all and each of them guilty, Art and Part, of the foreſaid Crimes of *Piracy*, *Robbery* and *Murder*, or one or other of them above charged. Which being found by a Verdict of an Aſſize before the Judge of the *Admiralty*, and the Lords Aſſeſſors appointed by the Lords of Privy Council; the forenamed Perſons, and each of them, ought to be puniſh'd by Sentence of the ſaid Court, with the Pain of Death, and Confiſcation of their Moveables; to the Examples, and Terror of others, to do or commit the like in Time coming.

Additional Concluſion of the Indictment, at the Inſtance of Mr. Alexander Higgins, *Procurator-Fiſcal to the Court of* Admiralty, *againſt Captain* Thomas Green, *&c.*

Viz. THAT the Concluſion of the ſaid Indictment given on *Saturday*, the Seventeenth Inſtant, bearing the Pain of Death, and of Eſcheat and Confiſcation of Moveables, ſhould extend to the Eſcheat and Confiſcation of the ſaid Ship and Cargo, by reaſon of the foreſaid Crime of Piracy: And that the ſaid Captain *Thomas Green*, &c. ſhould anſwer to the foreſaid Concluſion, as thus explained, and extended to the Confiſcation of the ſaid Ship and Cargo, as in the Caſe of Piracy, the foreſaid Fifth of *March*, which is the Day of * Compearance aſſigned to the ſaid Pannels, or at leaſt upon the 6th, 7th, 8th, or 9th Days of *March* thereafter; as the true Import, or at leaſt a clear Conſequent of the foreſaid Crime and Indictment given thereupon: The Liſt of Witneſſes and Aſſizers remaining the ſame, as ſubjoined to the foreſaid principal Indictment.

* *Appearance.*

Sic ſubſcribitur,
ALEXANDER HIGGINS.

PURSUERS.

PURSUERS.

Mr. *Alexander Higgins*, Procurator Fiscal.
Sir *James Stuart*, her Majesty's Advocat.
Sir *David Dalrymple*, and Mr. *William Carmichael*, her Majesty's Sollicitors.
Sir *Patrick Home*.
Sir *Gilbert Eliot*.
Mr. *Francis Grant*.
Advocats.

Procurators in DEFENCE.

Sir *David Cunningham*.
Sir *David Thoirs*.
Sir *Walter Pringle*.
Mr. *David Forbes*.
Mr. *George Alexander*.
Mr. *John Spotswood*.
Mr. *John Elphinston*.
Advocats.

The *Procurator-Fiscal* declared judicially, he * passed from *Samuel Urlines*, Carpenter's-Mate of the Ship the *Worcester*, *Henry Barnes* Seaman, and *Daniel Stringman* Cook of the said Ship; whereupon they were dismissed from the Bar.

* *had nothing against.*

Alexander Higgins.

Her Majesty's Advocat for the Pursuers craved, that the † Dyet against Captain *Thomas Green* and others, contained in that Indictment with him, might be continued.

† *Time of Prosecution.*

It was objected by the Pannel's Procurators, that the Dyet could not be continued against them; being contrair to the Act of Parliament *for preventing wrongus Imprisonment*, and contrair to an expres Clause therein.

It was replied for the Pursuers, that the Act of Parliament is opponed; which only requires the Dyet of the Trial to be fixed within sixty Days after Intimation, which was done; but then allows to the Pursuers to insist, and to the Judge to determine by a final Sentence, within forty Days, if before the Lords of Justiciary, and thirty Days, if before any other Judge.

*Which Objection, with the Answers and Replies made thereto, being considered by the Judge and Assessors, they * repelled the Objection, and continued the Dyet against the said Captain* Green *and others, contained in the Indictment against him, till* Wednesday *next at Nine of the Clock; and ordained the Pannels to be carried back to Prison.*

* *rejected, or over-ruled.*

JAMES GRAHAM, *I. P. A.*

It was alledg'd by the Procurators for the Pannels, that the Crime * libelled being alledg'd to be committed upon the Coast of *Malabar*, and by *Englishmen*; they ought to be remitted to be tried in *England*; and cannot be judged by the Judge of the High-Court of *Admiralty* and Assessors, who are not Judges competent.

* *indicted.*

The Procurator-Fiscal and Pursuers Procurators answer'd, That they opponed the Act of Parliament, 1681, which founds the Admiral's Jurisdiction in the Case libelled: Declaring expresly, *That the High Admiral hath the sole Privilege and Jurisdiction in all Maritime and Sea-faring Causes, Foreign and Domestick, whether Civil or Criminal whatsoever, within this Realm; and over all Persons, as they are concerned in the same: And that he is his Majesty's Lieutenant and Justice General upon the Seas*, &c.

*Which * Alledgeance and Answer, with the other Replies and † Duplices, being considered by the Judge and Assessors; they repelled the Alledgeance in respect of the Answer; and found that the Judge Admiral and Assessors are competent and proper Judges, to ‖ cognosce and determine in the Case and Crimes libelled.*

* *Allegation.* † *further Answer.* ‖ *inquire into.*

JAMES GRAHAM, *I. P. A.*

THE Grounds of the Indictment, at the Instance of the Procurator-Fiscal, against *Henry Keigle*, *George Haines*, *Samuel Wylcocks*, *George Glen*, *Alexander Taylor*, and *John Bannantyne* here present, being fully debated *vivâ voce*: The Judge of the High-Court of *Admiralty* and Assessors continue the Dyet, at the said Mr. *Alexander Higgins*'s Instance, against the said *Henry Keigle*, and other Pannels above-named, till *Tuesday* the 13th Instant, at Nine a-Clock in the Forenoon; and ordain both Parties to give in their * Informations betwixt and that Time; the Pursuer to give in his betwixt and *Thursday* next at Twelve a-Clock of the Day; and the Pannels to give in theirs betwixt and *Saturday* next, at Twelve Afternoon thereafter; in order to be recorded in the Court-Books: And ordains the Assizers and Witnesses to attend then, and at the other Dyet upon *Wednesday* next, against Captain *Green* and others, * ilk Person under the Pain of one hundred *Merks*; and the Pannels to be carried back to the respective Prisons.

* *Pleas, or Briefs.*

* *every.*

JAMES GRAHAM, I. P. A.

CURIA JUSTICIARIA, *Supremæ Curiæ Admiralitatis tenta in Prætorio, vel nova Domo Sessionis Burgi de* Edinburgh, *septimo Die Mensis* Martii, 1705, *per Judicem dictæ Curiæ, & per Honoratissimos Viros*, Joannem *Comitem de* Loudoun, Joannem *Dominum de* Belhaven, *Dominos* Robertum Dundas *de* Arnestoun, Joannem Home *de* Blackadder, & Joannem Cockburn *de* Ormistoun *Assessores.*

Curia Legitimè Affirmata.

Intran.

Captain *Thomas Green*, Commander of the Ship called the *Worcester*, now in *Bruntisland* Harbour.
Captain *John Madder*, Chief-Mate of the said Ship.
John Reynolds, Second-Mate of the said Ship.
Thomas Linsteed, Assistant to the deceas'd *Super-Cargo* of the said Ship.
James Burn, Boatswain of the said Ship.
James Simpson, Gunner.
Andrew Robertson, Gunner's-Mate.
John Bruckley, Seaman.
George Kitchen, Seaman.

All of them indicted and accuſed at the Inſtance of Mr. *Alexander Higgins*, Advocat, Procurator-Fiſcal to the High-Court of *Admiralty*; for the Crimes of *Piracy*, *Robbery* and *Murder*, in Manner mentioned in the Indictment raiſed againſt them thereanent, before inſert in the Court holden the Fifth of *March* Inſtant.

PURSUERS.

Mr. *Alexander Higgins*, Procurator-Fiſcal.
Sir *James Stuart*, her Majeſty's Advocat.
Sir *David Dalrymple*, and Mr. *William Carmichael*, her Majeſty's Sollicitors.
Sir *Patrick Home*.
Sir *Gilbert Eliot*.
Mr. *Alexander Mackleod*.
Mr. *Francis Grant*.
Advocats.

Procurators in DEFENCE.

Sir *David Thoirs*.
Sir *Walter Pringle*.
Mr. *David Forbes*.
Mr. *George Alexander*.
Mr. *John Elphinſton*.
Mr. *John Spotſwood*.
Advocats.

The Grounds of the Indictment at the Inſtance of the Procurator-Fiſcal, againſt Captain *Green* and other Pannels here preſent, and the Reaſons why *John Reynolds*, one of the Pannels, who is a Witneſs cited in the * Exculpation, at the Inſtance of the other Pannels, ſhould be tried firſt upon the Libel, to the effect, that if † aſſoilzied, he may be adduced as a Witneſs for the ſaid other Pannels in the foreſaid Exculpation, being debated *viva voce*. The Judge of the High-Court of *Admiralty*, and Aſſeſſors, continue the Dyet at the ſaid Mr. *Alexander Higgins*'s Inſtance againſt the ſaids hail Pannels, till *Tueſday* the thirteenth Inſtant, at Nine a-Clock in the Forenoon: And ordains both Parties to give in their Informations betwixt and that Time; the Purſuer to give in his betwixt and To-morrow; and the Pannels to give in theirs betwixt and *Saturday* thereafter, in order to be recorded in the Court-Books: And ordains the Aſſizers and Witneſſes to attend with ilk Perſon, under the Pain of two hundred Merks; and the Pannels to be carried back to Priſon.

* *Plea of Defence.*

† *abſolv'd, or acquitted.*

JA. GRAHAM, I. P. A.

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* INFORMATION

* *Plea, or Brief.*

For Mr. *Alexander Higgins*, Procurator-Fiſcal of the High-Court of *Admiralty*:

AGAINST

Captain *Thomas Green*, Commander of the *Worceſter*, and his Crew and Complices.

* *Indictment.* THere being two * Libels raiſed before the High-Court of *Admiralty*, and the Lords Aſſeſſors appointed by the Lords of Privy-Council, both at the Inſtance of the ſaid Mr. *Alexander Higgins*; but the firſt againſt *Henry Keigle*, Carpenter in the Ship called the *Worceſter*, now in *Bruntiſland* Harbour; *Samuel Urline*, his Mate; *George Haines*, Stewart of the ſaid Ship; *Daniel Stringman*, Cook in the ſaid Ship; *Samuel Wilcocks*, Chyrurgeon's Mate; *George Glen*, Seaman there; *Henry Barnes*, Seaman there; *Alexander Taylor*, Seaman there; and *John Ballantyne*, Seaman there: And the ſecond againſt the ſaid Captain *Thomas Green*, Commander of the ſaid Ship the *Worceſter*; Captain *John Madder*, Chief Mate of the ſaid Ship; *John Reynolds*, Second Mate of the ſaid Ship; *Thomas Linſtead*, Aſſiſtant to the deceas'd Supercargo of the ſaid Ship; *James Burn*, Boatſwain of the ſaid Ship; *James Simpſon*, Gunner of the ſaid Ship; *Andrew Robertſon*, Gunner's Mate; *John Brucklie*, Seaman there; and *George Kitchin*, Seaman there; all Priſoners.

Both the Libels being the ſame, the Tenor thereof prefixt to the Information is *verbatim* conform to the Indictments on the preceding Pages, in the Court holden the Fifth of *March*, 1705, and whereto this refers.

When the * haill foreſaids Pannels were brought to the Bar, and the ſaid Libels read againſt them; the Procurator-Fiſcal declared, That he inſiſted firſt upon the firſt Libel, *viz.* againſt the ſaids *Henry Keigle* Carpenter, *Samuel Urlane*, *George Haines*, *Daniel Stringman*, *Samuel Wilcocks*, *George Glen*, *Henry Barnes*, *Alexander Taylor*, and *John Ballantyne*; and after ſome Debate moved by the Pannels Procurators, that the Pannels having uſed the Method preſcribed by the Act of Parliament, to bring themſelves to a Trial within ſixty Days, they ought now all of them to be inſiſted againſt; and it being anſwered, That all that the Act of Parliament required was, That a Day ſhould be fix'd for the Trial within ſixty Days after the Charge given for that Effect, the ſame was done, and alſo the whole Pannels ſo far inſiſted againſt, that their Libels were read, which fully ſatisfies that Part of the Act; and that as to further inſiſting, proſecuting and concluding, the Act of Parliament allowed fourty Days further before the Commiſſion of Juſticiary, and thirty Days before any other inferior Judicature: So that the Procurator-Fiſcal might very well proceed againſt theſe contained in the firſt Libel this Day, and continue theſe contained in the ſecond Libel till the next Court-Day. The Lord High-Admiral repelled the foreſaid Alledgeance made for all the Pannels, and allowed the Procurator-Fiſcal to inſiſt againſt theſe in the firſt Libel, the foreſaid 5th of *March*, and continued the Dyet againſt theſe in the ſecond Libel, till the 7th of the ſaid Month.

* *whole.*

It was then alledged for theſe in the firſt Libel, No Proceſs, in regard the Crimes charged were libelled to have been done in the *Eaſt-Indies* in *Malabar*, far without the *Scotiſh* Seas, nor was there any Accuſer either of the Owners of the Ship and Goods, or of the neareſt of Kin of the Perſons alledged, Murder'd; ſo that the Admiral was in competent to this Trial; For the *competentia fori* (*Competency of the Court*) * in Criminals, being founded either in the *locus delicti* (*the Place where the Crime was committed*) or in the *locus domicilii* (*the Place of Habitation* of the Pannels) or in the *locus originis* (*Place of Birth*) neither of theſe could be ſubſumed upon in this Caſe: The Pannels *Engliſhmen* and Strangers, and the Crimes libelled to have been committed

* *Criminal Caſes.*

in

in the *East-Indies*, as said is. And * *esto*, that the Crime of Piracy may be tried any where, where the Pirates are found, yet that is only where the accused are notoriously such. And farther, tho' the Pannels could be accused here in *Scotland*, yet they could be only accused before the † Commission of Justiciary, and not before the High Admiral, whose Jurisdiction extends no further than the Seas within the Compass of her Majesty's Sovereignty.

* *allowing.*

† *Court for criminal Cases.*

To all which it is answer'd by the Pursuer. 1. That though the Competency of the Judge in Criminals be ordinarily said, to be found either *in loco delicti* (the Place where Crime was committed) or *in loco domicilii* (Place of Habitation of the Delinquents) or *in loco originis* (the Place of their Birth) yet there is a superior Consideration, and that is the *locus deprehensionis* (Place where they were taken) where the Criminal is found and deprehended, which doth so over-rule in this Matter, that neither the *locus domicilii* (Place of Habitation) nor the *locus originis* (Place of Birth) doth † found the Judges Competency, *nisi ibi reus deprehendatur* (except the Criminal be apprehended there). And so it is that here the Pannels were and are deprehended, which happening in the Cause of Piracy, a Crime against the Law of Nations, and which all Mankind have an Interest to pursue, wherever the Pirates can be found: The Procurator-Fiscal's Interest to pursue is thereby manifest, and the Pannels being here deprehended, cannot decline the Admiral's Jurisdiction as incompetent. 2. As to what is alledged, that the Pannels are not libelled to be habitual and notorious Pirates, but on the contrary, had and do produce a Commission, which frees them of that Suspicion.

† *Justify or make good.*

It's answer'd, That Piracy being † libelled, as to the Particular charged, even habitual Piracy is thence presumed; but a single Act of Piracy libelled doth both give the Pursuer a sufficient Title and Interest, and likeways founds the Admiral's Jurisdiction, in respect the Pannels charged for Piracy are here found. And 3. The Lord High-Admiral is most proper for this Cognition and Trial, because by the Act of Parliament, 1681, he is declared to be † Justice-General upon the Seas, which albeit it be limited inwardly towards the Land, yet outwardly is not limited; so that the Lord High-Admiral is there declared to have the sole Jurisdiction in all Maritime and Sea-faring Causes, Foreign and Domestick, whether Civil or Criminal, within this Realm, and over all Persons, as they are concerned in the same, which as to the Seas and all Maritime Crimes whatsoever, makes the High Admiral Justice-General, as said is, without Limitation; and therefore it is in vain for the Pannels to pretend, that if their Cause be cognoscible here, it must at least be tried before the Commission of Justiciary, since the Lord High-Admiral is in this Case fully vested with the Justice-General's Power; and as for what may be the Custom of *England*, it doth not concern, nor can be any Rule for us.

† *mentioned in the Indictment.*

† *Lord Chief Justice.*

And the Lord High-Admiral and Assessors having * advised the Debates, they repelled the Declinator †, and found the Court competent.

* *considered.*

† *declining the Jurisdiction of the Court.*

Thereafter it was alledged for these in the first Libel, That they were conveened ‖, as having been of Captain *Green*'s Crew, and his Complices in the Crimes libelled; so that he being their Commander and Captain, they could not be put to answer, unless the Captain himself was insisted against; seeing first, it was obvious, that he being their Commander and Captain, ought first to be answerable. And second, That they being under his Command, could not be charged for any thing alledged done by them as his Crew, unless he were first tried, seeing that he might have Defences both for himself and them, which probably they could not make for themselves.

‖ *Summoned or brought to the Bar.*

To which it was answered by the Pursuer, That the Captain and his Crew were not † conveened for any thing alledged acted by him as their Captain, and by them as his Crew, but were all conveened as Complices and *socii* (i. e. *Fellow-Criminals*) and Partakers of the foresaid wicked Crimes of Piracy, Robbery and Murder; which Crimes as they could be warranted by no Commission or Character the Captain did or could pretend, so could they be as little warranted by their Condition of being subject to him as his Crew; for here the Saying holds, That they were all *hic socii & facinus quos inquinat æquat*, (i. e. *they were Fellows in this Case, and being defiled with the said Crime, were in that Respect equal*). As also the other Maxim, That † Wrong has no Warrant; and therefore, seeing that neither the Captain's Character, nor their Condition as his Crew, could be pretended as a Defence either to him or them; and that the Libel of the foresaid Crimes did charge them all, as being *Socii*, and together involved therein; and that without Question, in the Case of such an Accusation for such horrid Crimes, every one must answer for himself; the Alledgeance could not be † respected. Besides that it was evident, that if Captain *Green*, and these in the second Libel, were all confessing and pardon'd; yet the first Libel against these of his Crew therein contained, would still lawfully proceed; and Captain *Green* himself, and those joined with him in his Libel, might be made use of as Witnesses against these contained in the first Libel. By all which it was evident, that the Trial ought to proceed against these in the first Libel, without respect to the foresaid dilatory Defence. This being the dilatory Defence objected against the first Libel, and answered above; and the † peremptory Defences against both Libels being common and coincident, for the more clear Method; the dilatory Defence proponed also for these contained in the second Libel, with the Answers thereto, are hereunto subjoined.

† *brought before the Court.*

† *Injustice.*

† *regarded.*

† *positive.*

The Dilatory then proposed for Captain *Green*, and others (in the second Libel) was, The foresaid *John Reynolds* was conveened and † impannelled with him; whereas it was acknowledged by the Pursuer, that *Reynolds* was ashore the Time of the Piracy, and other Crimes libelled to have been committed by Captain *Green*, and the rest of his Complices; whereby *Reynolds* appeared, even by the Pursuer's Acknowledgment, to be innocent. Like as Captain *Green* and the other Pannels, had raised an † Exculpation, and therein had cited *Reynolds* for a Witness: So that according to the Method practised in Criminals, Captain *Green* and the other Pannels had good Ground to demand, that *Reynolds* might be first tried, and so purged from being *Socius Criminis* (a

† *indicted.*

† *a Form of Law for vindicating any Person.*

Fellow-Criminal) and put in † Caſe to be a Witneſs, for the Captain and the other Pannels, to prove their Grounds of Exculpation. For there could be nothing more reaſonable, as it was alſo ordinary, than that when a Purſuer did raiſe a Libel againſt ſeveral Perſons (whereof ſome were innocent, and might be Witneſſes for the other Criminals and Pannels) theſe other Pannels might juſtly crave, that ſuch as they alledged to be innocent, might be firſt tried and purged, and ſo made capable to be Witneſſes; ſince otherways any malicious Purſuer might include both the Defenders and all their Witneſſes in one Libel: And thus by making the Witneſſes *Socii Criminis (Fellow-Criminals)* in the Libel, prejudge the Defenders of all their Evidences and Defences.

† *Condition.*

To which it was anſwer'd for the Purſuer, That he acknowledged, that when ſuch a Courſe was taken, to include both Actors and Witneſſes in one Libel, with a Deſign to make the Witneſſes (which the Actors were to uſe *Socii Criminis*, *Fellow-Criminals)* and ſo to deprive the Actors of their Defence, and thePrabation thereof; theſe Actors might, and were allowed to † condeſcend upon thoſe whom they intended to uſe as Witneſſes, and at the ſame Time to propoſe a Ground of Exculpation for them; and ſo crave that they might be firſt tried upon the foreſaid Ground, to the effect that if thereupon acquit, they might be in Caſe to be Witneſſes. But this could never be pretended to by any of the Pannels: For an antecedent Trial of ſuch of their *Socii* as they alledged were innocent, and to be their Witneſſes unleſs at the ſame Time the Pannels did condeſcend upon the Ground of their Innocence, or upon the Ground of their Exculpation, whereupon they deſired them to be firſt tried: For otherways there could be nothing more groundleſs, and (in effect) manifeſtly tending to elude all Criminal Proceeding againſt Complices of the ſame Crime, than to allow any of them at Random to crave others to be firſt tried; and ſo the Trial to proceed of one ſingle Perſon after another, until all ſhould be † aſſoilzied. Whereas the true and plain Method was, and is, That the Purſuer inſiſts againſt ſuch as he pleaſes, either ſingly or jointly; and unleſs ſome ‖ Speciality be alledged, why the Trial of one ſhould proceed before the Trial of another, it never was, nor could be left to the Arbitriment of the Pannels. And thus it was practiſed in all the Inſtances alledged by the Pannels, of trying ſuch as were impannelled for *Socii Criminis* (*Fellow-Criminals*) to be firſt purged, in order to beWitneſſes, *viz.* That the ſame was never allowed, unleſs ſome Ground of Exculpation was poſitively alledged for clearing of their Innocence. And therefore, unleſs Captain *Green*, and the other Pannels, will poſitively offer to prove, that *Reynolds* (whom they would have firſt tried) was *alibi* (*elſewhere*) and not preſent in the Action; their arbitrary Demand of having him tried in the firſt Place, without any Reaſon aſſigned, cannot be regarded. Which Debate being heard, the Lord High-Admiral and Aſſeſſors † ſuperſeded to give Anſwer, until the Defenders ſhould give in their other Defences, and all ſhould be informed upon together.

† *name.*

† *acquitted.*

‖ *Special Cauſe.*

† *delay'd.*

Theſe being the Preliminary Defences, ſeparately proponed by the Perſons conveened in the firſt and ſecond Libels; the following Defences were proponed in common, by the Defenders in both Libels.

And 1. That the Libel was informal and inſufficient, as being too general and indefinit. And 2. That it did not † condeſcend upon Day and Place. And 3. That the Qualifications whereupon the Relevancy appeared to be founded, were wholly ‖ irrelevant. And 4. That the additional Concluſion was groundleſs and unwarrantable.

† *name.*

‖ *inſufficient, or not to be ſuſtain'd.*

And as to the firſt of theſe Defences, it was alledged, That the Libel was informal and inſufficient, as being too general and indefinit; not condeſcending upon the Name and Deſignation of the Ship † wrongouſly attacked, nor upon the Perſons and Deſignations of theſe alledged to be murdered, nor upon the Quantity and Quality of the Goods alledged to be robbed and ſpoiled: All which ought to be done, ſeeing that Criminal Libels ought to be certain, and not general and indefinit; whereby alſo the Defenders might be prejudged of Defences, that might ariſe to them upon a particular Condeſcendance. As for Example; if the Name and Deſignation of the Ship were condeſcended on, they might prove the ſame Ship to be yet exiſting: And ſo of the Perſons alledged murdered, they might prove them to be yet alive: As alſo, that the Goods alledged robb'd, were yet extant, and lawfully diſpoſed on by their Owner.

† *wrongfully.*

To which it was anſwered by the Purſuer, That he opponed his Libel, which was libelled aſ definitly as the Thing would allow: For it being libelled, that the Pannels did, without any lawful Cauſe or Warrand, attacque a Ship ſailed by her own Crew, and having her own Cargo aboard, and that they over-maſter'd the ſaid Ship in hoſtile Manner, and murder'd the Men, and robb'd their Goods. Theſe were certainly Crimes manifeſt in themſelves; and if the Pannels had acted them in ſuch Manner, as to deſtroy the Ship and the Men, and embezled the Cargo, ſo as no farder Knowledge could be had thereof, it was only an Aggravation of their Villany and Wickedneſs, but could never hinder the Accuſation to proceed; ſeeing that whatever the Ship, or Men, or Goods were, it was certainly Piracy, Robbery and Murder, to attacque a Ship † hoſtilely, and to deſtroy the Men, and rob the Goods. And further, A Condeſcendance was not at all in this Caſe neceſſary, ſeeing that any ſuch Condeſcendance could be no Ground of Exculpation. For whether the Ship was of ſuch a Name and Deſignation, or of another; or whatever the Men and the Goods were, yet the Crime was ſtill the ſame; *viz.* To attack and invade a free Ship, without any Cauſe or Warrant, and to kill her Men, and rob her Goods.

† *in hoſtile Manner.*

And furder; It's very well known in our Criminal Practice, that Robberies and Depredations are ſuſtained, albeit neither the Quality of the Goods nor their Owners be condeſcended on: And, in effect, the Pannels their Defence of Indefinitneſs upon the Ground foreſaid is ſuch, that if even in the Road of *Leith*, before Hundreds of Spectators from both Coaſts, one Ship ſhould attack another, and hoſtilely invading her, ſhould deſtroy her Men,

ſeize

ſeize her Goods, and ſink the Veſſel, without ſuffering either Veſſel, Men, or Goods to be known; there could be no criminal Libel upon it; becauſe forſooth, tho' Hundreds ſee the whole Action, yet it could not be more definitly libelled; ſave that the Commander and Crew of the one Ship attack'd the other hoſtilely, and deſtroyed her Men, and ſeized her Goods, and ſunk her without further Condeſcendance; which were moſt abſurd. And therefore, the Libel, as it's libelled, both as to Ship, Men, and Goods, attack'd, murder'd, and robb'd, without any juſt Cauſe or Provocation, is both ſufficiently definit and moſt relevant.

And whereas the Defenders alledged, this Indefinit libelled ſhould the rather be rejected, becauſe that the Pannels were clothed with Commiſſion; which tho' they did not plead to exculpat the particular Charge brought againſt them, yet was always a Ground of Preſumption that they acted lawfully; unleſs the contrair were made appear, by a particular Condeſcendance.

It was anſwered, That nothing did charge the Pannels more home than the pleading of this Commiſſion; in ſo far as firſt, They neither could, nor durſt plead it, to exculpat the Piracy, Murder, and Robbery charged. 2. It did not ſo much as make any Preſumption for the Pannels; becauſe the very Tenor of the Commiſſion obliged them to keep a particular Journal of whatſoever Veſſel they ſhould attack hoſtilely; and their Journals were produced by themſelves, and no ſuch Thing appeared in their Journals. And therefore it was manifeſt, that their Pretence of a Commiſſion, is only the more wickedly to cover their Villany; ſince they can alledge nothing acted ſuitably to their Commiſſion, but that their own Journals † redargues them.

† *Refutes.*

The ſecond Defence alledged by the Pannels in both Libels, was, That the Libel was ſtill defective and imperfect, wanting Day and Place; in ſo far as the Place was generally deſigned the Coaſt of *Malabar*, which is of a long and vaſt Tract; and the Day was one or other of the Days of *February*, *March*, *April*, *May*, which is indefinit, and as good as no Day. And Day and Place were not only requir'd to be condeſcended on by our old Law † *Quon. attach*, but the Condeſcendance is alſo neceſſary for the Defender's Exculpation; ſeeing that if Day and Place were condeſcended on, he might then prove himſelf *alibi* (*elſewhere*) and ſo elude the Libel, which now he cannot do.

† *A Book ſo called.*

To which it was anſwered, That the Condeſcendance in the Libel, as to Day and Place, is ſufficient; becauſe the Facts objected are thereby declared.

2. Day and Place are never eſſential to a Libel, except where either the Nature of the Crime, or its particular Specification requires it; for then indeed it muſt be diſtinctly and poſitively libelled. As if a Man either charge another, or aggravate his Crime, by its being a Breach of the LORD's Day; then the LORD's Day muſt be condeſcended on. Or if a Man libel another for beating, or drawing his Sword within the King's Palace; where the Place is alſo eſſential. But as to other Crimes, which of their own Nature are Crimes at all Times; for what can the mention of Day or Place ſignify in ſuch Crimes, as at all Times, and in every Place, are Crimes without Exception. And ſuch are the Crimes libelled. But,

3. If it be ſaid; that the condeſcending on Day and Place, is neceſſary to afford the Defender his juſt Exculpation of *alibi* (*being elſewhere*): It's anſwer'd, That in that Caſe, the Defender may put the Purſuer to condeſcend on Day and Place, for proving his Exception of *alibi* (*being elſewhere*) as ſaid is. But then, in common Senſe and Law, it muſt be upon this Condition; That the Defender acknowledge the Crime charged to have been committed; and only endeavours to exculpat himſelf by offering to prove *alibi* (*being elſewhere*) and that more pregnantly than the Purſuer offers to prove his Indictment. For what Senſe or Reaſon is there, that the Purſuer ſhould be put to condeſcend poſitively on Day and Place, in Crimes that are Crimes at all Times, and every where; unleſs it be for this very Reaſon, that the Defender acknowledging the Crime, offers to purge himſelf by the Exception of *alibi* (*being elſewhere*)? And therefore, ſince Day and Place are libelled in ſuch a juſt Latitude, as may declare the Facts and Crimes charged; and that the Defender, on the other hand, doth not acknowledge the Facts and Crimes themſelves, and offer to clear themſelves by the Exception of *alibi* (*being elſewhere*) there needs no further Condeſcendance. And this is the conſtant Opinion of Lawyers, and the perpetual Cuſtom of our Practique.

The third Defence propponed for the Pannels, was, as to the Qualifications of the Libel, That they were no ways relevant, nor could be regarded to infer the Concluſion of the Libel, in as much as, 1. There was here no *corpus delicti*, viſible Effect or Subject of the Crime, offered to be proven, which is always neceſſary, and principally where the Crime is offered to be proven *per preſumptiones & indicia*, by Preſumptions and Tokens: For there *cum conſtat de corpore delicti*, when the Subject of the Crime is viſible, this ſuſtains the Preſumptions, and gives the *indicia*, Tokens or Signs, their juſt Weight.

To which it was anſwered, That the Pannels Procurators appear to be in a miſtake, either as to what is the *corpus delicti*, the Subject of the Crime, or as to what is meaned by it: And for clearing of this Point, it is to be conſidered, the Crimes are of two Natures, ſome *cum effectu permanente*, with permanent Effects, as the killing of a Man, or the burning of a Houſe; in which Caſes, the dead Body, and the Rubbiſh, are permanent Effects: But other Crimes have no ſuch permanent Effects, as treaſonable Plottings, Falſhoods, Blaſphemies, and the like, where indeed there is no ſuch *corpus delicti*, Subject of the Crime, as in the former Crimes; but here all the Crime conſiſts *in facto & animo*, in the Fact and Way of doing it; and the Fact, tho' tranſient, yet if *doloſe*, unjuſtly done, makes the Crime. And therefore, according to this Diſtinction, the *corpus delicti*, Subject of the Crime, is never requiſite to be proven, but in the foreſaid Crimes that leave permanent Effects; and neither then alſo, unleſs the Crimes be libelled with theſe Effects: For if it ſhould be libelled, for Example, that a Murderer not only killed, but burned the Body to Aſhes, or drowned it in the Sea, there would be no farther need to prove this *corpus delicti*, Subject of the Crime, but only to prove the Fact of killing, and killing *doloſe*, unjuſtly, in which indeed the Eſſence of the Crime conſiſts. And thus in Confeſſions, as well as in Libels; if a Man confeſs a Murder, and yet the Body murdered no where appears; then the Confeſſion is not raſhly to be laid hold upon, becauſe it may proceed from Deſign, or Melancholy: But yet even in this Caſe, that

that the Confeſſion ſhould bear not only the Murder, but the deſtroying of the Body murdered, by Fire or Water, as ſaid is, then all the Enquiry would be, whether the Fact of Murder be proven or not? Which Things, if applied to our preſent Caſe, where it is expreſly libelled, not only that the Pannels invaded the Ship by Piracy, but that they threw the Men murder'd over-board into the Sea, and alſo ſold the Ship; all the Enquiry that remains is, whether this Fact was ſo done or not? And the Libel is moſt relevant, tho' neither Ship or Men appear. And yet farther, if the Pannels Procurators will ſtill be ſo † graſſier as to require a *corpus delicti*, Subject of the Crime, when it's expreſly libelled, that the Effect of the Delict was deſtroyed and put out of the Way, they may ſatisfy themſelves, that the Goods robbed are ſtill extant, and were found on board of Captain *Green*'s Ship: And therefore 'tis plain, that in this Caſe, and to ſuſtain the *Indicia*, Tokens and Qualifications libelled on, there needs no farder either Condeſcendance or Proof of the *corpus delicti*, Subject of the Crime, which was induſtriouſly deſtroyed.

† *dull or unreaſonable.*

But, ſecondly, It was objected, That all the Qualifications are inſufficient and remote, and at beſt but probable: Whereas the known Rule is, that Crimes muſt be proven either *per Teſtes*, by Witneſſes above Exception, or *per documenta clariſſima*, very clear Proofs, or *per indicia indubitata*, undoubted Tokens: None of which hold in this Caſe; for as for the *Indicia*, Tokens, there is not one of them, but take the ſame ſingly, as the hearing of Shooting on the Shore, the ſeeing the Ship *Worceſter*, having another lying at her Stern, the Boats coming aſhore for Water, and the Crew ſaying, *they had been a Buſking*, *& ſic de cæteris*, and ſo of the reſt; but take them ſingly, and they may all have a good and innocent Conſtruction: Nor can it be ſaid, that jointly they become ſtronger, and fortify one another, as ſingle Arrows eaſily broken when apart, yet cannot be broken in a Sheaf, becauſe that all the Qualifications and *Indicia*, Tokens in the Libel, with the foreſaid Conſtructions, may be put upon them, the Conſtructions will ſtill take off the Face; beſides that, it's well known, that there are ſome *Indicia* only *probabilia*, ſome Tokens only probable, and that the Law requires *Indicia indubitata*, undoubted Signs; it being ſtill the ſafer Side to ſpare doubtful Innocents, than to condemn only preſumed and probable Guilt. To all which is to be added, That's the common Opinion of Doctors, that Preſumptions can ſcarce ever conclude *ad pœnam ordinariam*, to ordinary Puniſhment, but at the moſt only *ad pœnam arbitrariam*, to Puniſhment at Pleaſure of the Judge: And *Mackenzie* in his † *Criminals*, ſays, "Preſumptions "are only founded on *may be's*, which "may not be; and to allow Crimes "to be proven by Preſumptions, would leave "Judges to be Arbitrary." So that the common Opinion runs againſt Preſumptions. But,

† *A Book ſo called.*

To all this it's anſwer'd, That yet it is clear Law, that Crimes may be proven *per indicia indubitata*, by undoubted Tokens, which in Law are no more than violent Preſumptions, *quæ fidem extorquent*, that force a Belief: But the Truth is, That in this Caſe the Purſuer hath not only *indicia indubitata*, undoubted Tokens, but likewiſe poſitive Witneſſes, and alſo Documents in Writing; which all being conjoined, do make a ſatisfying Evidence, and fix a clear Conviction; which is the utmoſt Deſign of Probation.

But ſecondly, it's moſt certain, both in Law and † Pratique, that many Crimes are only diſcover'd and proven *per preſumtiones & indicia*, by Preſumptions and Tokens; and that the Doctors in ſeveral Crimes, eſpecially theſe more atrocious, as Treaſon, Piracy, Forgery, and the like, where Wickedneſs endeavours moſt induſtriouſly to hide itſelf, do allow and approve Probation *per Indicia*, by Tokens, as moſt neceſſary for the puniſhing of theſe Crimes. It were needleſs to multiply the Citations both from the Law and Doctors, that might be adduced in this Caſe, as *l.* 3. § 2. *D. de Teſtib.* where the Reſcript bears, *Quæ argumenta ad quem modum probandæ, cuique rei ſufficiant nullo certo modo ſatis definire poteſt:* "The Arguments "to be uſed, and the Manner of proving every "thing ſufficiently, can't certainly be defined, and ſoforth: and ſo concludes, *Non utiq; ad unam probationis ſpeciem cognitionem ſtatim alligari debere, ſed ex ſententia animi tui, te æſtimare oportere, quid aut credas aut parum probatum tibi opinaris. Item. l.* 22. *cod. ad legam Corneliam de falſis, ubi falſi examen inciderit tunc acerrima fiat indago, argumentis teſtibus ſcripturarum collatione, aliiſque veſtigiis veritatis, &c.* "You are not to be tied in taking Cognizance of "a Matter to one Method of Probation, but you "muſt act according to your own Judgment, and "conſider what you are to believe, and what you "think not fully proved. *Item*, &c. when the Falſhood of a thing is to be enquired into, then a "moſt ſtrict Search is to be made, by Arguments, "Witneſſes, comparing of Hands, and other Signs "of Truth, *&c.*" By which Law it's plain, that *Indicia & Preſumptiones*, Tokens and Preſumptions, have place, and may make full Faith; and how can it be otherwiſe, ſince firſt, it is certainly the Intereſt of Mankind that Crimes be puniſh'd. 2. It's no leſs certain, that Crimes endeavour to cover themſelves. 3. That Proof or Probation is only to make an Evidence for Diſcovery. 4. That the End and Standard of this Diſcovery, and of all Probation, is the ſatisfying Conviction of the Judge that has Power to puniſh. Now if moſt Crimes be committed without Witneſſes, and yet do otherways appear certainly to be committed; and if this Certainty ariſe from Preſumptions, and be withal ſatisfying, it is juſt the ſame as if the Crime was proven by many Witneſſes. And thus *Matheus de Criminibus*, *Tit. de Probationib. cap.* 6. *per totum*, and *Gail. lib.* 2. *Obſ.* 149. *Numb.* 9. where he reaſons moſt juſtly upon Probation by Preſumptions, where there is a Difficulty by Reaſon of the Want of Witneſſes; and ſtill brings the Matter to this true Period, That whatever way Faith be fully made to the Judge, either *per Teſtes*, or *per Indicia*, or *per Preſumptiones*, either by Witneſſes, Tokens, or Preſumptions, the End of Probation is attained, and ſo the Evidence ſufficient.

† *Practice.*

The Procurators for the Pannels alledged, That this were to make Judges too arbitrary; but tho' it hath indeed been the Care of all Lawyers to prevent Arbitrarineſs, yet it's moſt certain, that where Evidence doth only riſe as Providence offers, and Circumſtances concur, the Arbitriment of the Judge muſt take Place, and the Safety of Mankind doth preciſely lie here in the Integrity and Diſcretion of the Judge, helped indeed by ſome Rules of Law, but no ways bounded or fix'd to preciſe Rules, which the Matter will not bear. And therefore we ſee, that even in the moſt certain Manner of Probation, *viz.* by Witneſſes, and the higheſt Law of it, *that in the Mouth of two or three Witneſſes ſhall every Thing be eſtabliſhed*. There is ſtill an Arbitriment inſinuate as to the Diſcretion of the Judge, or otherways the Law would not have ſaid, two or

three

three, but would have fixed the Number preciſely; whence it is moſt certain, that in all Probation there is an Arbitriment of Diſcretion, and that tho' this Arbitriment may be bounded by ſome Rules, yet the ultimate and true Standard of all Probation, is the ſatisfying Conviction of the Judge, according to his beſt diſcerning.

Theſe things then premiſed, *viz.* That a Proof may be ſufficient, *per Indicia & præſumptiones*, by Tokens and Preſumptions, the Application to the preſent Caſe is plain; for where the Procurators for the Pannels would take off the Qualifications, as ſeparately inconcludent, and at beſt probable, it is clearly captious; it being certain that many *Indicia*, Tokens, conjoined and connected, as in this Caſe, may make a ſufficient Evidence, and that here *quæ non proſunt ſingula multa juvant*, i. e. "Thoſe Things which taken "ſingly, are of no Effect, yet many of 'em toge-"ther are." And thus, if firſt the Probation that ſhall be offered, of the hoſtile invading the other Ship, by the Pannels be laid down and thereto added the Surgeon's Declaration of other Circumſtances, with all the other Qualifications in the Libel, they will certainly force a Faith and full Perſuaſion upon all rational Men, tho' ſeparately they cannot have that Weight; one Witneſs proves not, yet two prove, and in ſome Caſes two are ſcarce ſufficient, but three are beyond Exception. If then even in Witneſſes there be a mutual and fortifying Concurrence, the ſame muſt alſo be admitted in Preſumptions & *Indicia*. So that upon the whole, the Purſuer craves no more, than that every Man that hears this Libel, and ſhall hear its Proof, lay himſelf fairly open, without any Prejudice to the Light ariſing naturally from the Matter itſelf, and its Circumſtances, and the Proofs and Confirmations thereof, as they are ſet down in the Libel; and if he do not wilfully reſiſt, he will certainly be ſatisfied to a full Conviction.

There are indeed hidden Crimes, and ſuch as are ſaid to be of * difficil Probation, and the moſt atrocious, as Treaſon, Aſſaſſinations, Piracy, Forgery, are ordinarily moſt hid; and Doctors ſay with Reaſon, that their Preſumptions ought to be examined, *acerrima indagine*, with the Strickteſs Scrutiny; but all this ſhould be far from impreſſing any with the Prejudice, as if a ſatisfying Evidence may not be found in theſe Caſes. And therefore ſince all pleaded by the Purſuer, is, that firſt his complex Probation *per Teſtes & Indicia*, by Witneſſes and Tokens, may be fairly received. 2. That concurring and coming together, they may be allowed their juſt Weight. And 3. That if that juſt Weight, and the Evidence that attends it, be ſatisfying, it may be held as concludent. It's clear as the Sun-Light, that no Stretch is intended, but Juſtice fairly proſecuted: And tho' in this Caſe of ſuch an extraordinary Crime, and where ſo much Evidence appears, the Purſuer might even, according to the Claim of Right, preſs the Supplement of Torture, yet he contents himſelf to inſinuate, that tho' this may be both juſt and neceſſary, yet he is hopeful, the Force of his Evidence may otherways prevail.

The fourth Particular is the additional Concluſion; but as to that Concluſion, it is ſo natural in itſelf, and ſo well fortified by the Authority of Doctors, and ſo certain, not only in the Caſe of Counterband, but even of other forbidden Good, that nothing needs be added; for ſince every Pirate is preſumed to have the Ship and all in it at his Command, as his own; and ſince the Ship is certainly the Inſtrument, as well as the Goods are preſumed to be the Effect of Piracy, it follows naturally, that the Confiſcation of both Ship and Goods ſhould be a Part of the Pains concluded.

In reſpect whereof, &c.

Here follows the Laws, and ſome other Quotations uſed in the Debate, where they are alſo *Engliſh'd* in their proper Places.

L. 2. §. 2. *Ejuſdem quoq; Principis extat reſcriptum ad Valerium verum de excutienda fide teſtium, in hæc verba: Quæ argumenta ad quem modum probandæ cuique rei ſufficiant, nullo certo modo ſatis definiri poteſt, ſicut non ſemper, ita ſæpe ſine publicis monumentis cujuſque rei veritas deprehenditur, alias numerus teſtium alias dignitas & auctoritas, alias veluti conſentiens fama confirmat rei de qua quæritur fidem, hoc ergo ſolum tibi reſcriberi poſſum ſummatim, non utique ad unam probationis ſpeciem cognitionem ſtatim alligari debere, ſed ex ſententia animi tui, te æſtimare oportere, quid aut credas aut parum probatum tibi opinaris.*——"The true Reſcript of that Prince to "*Valerius*, about enquiring into the Credibility of "Witneſſes, is alſo extant as follows. What Ar-"guments are ſufficient to prove any thing, cannot "certainly be determined; for tho' not always, yet "it many times happens, that the Truth of a Matter "is found out without publick Monuments. Some-"times the Number, ſometimes the Dignity and "Authority of the Witneſſes, and at other times "common Fame confirms the Truth of the thing "in Queſtion. I can only therefore enjoin you, in "ſhort, that in your Enquiry, or Examination into "a Matter, you are not to be tied to any one Sort "of Proof; but you muſt judge according to your "own Conſcience, what you think to be proved, "or not proved to you."

L. 22. C. ad Legem *Cornelium* de falſis. *Ubi falſi examen inciderit, tunc acerrima fiat indago argumentis, teſtibus, ſcripturarum collatione, aliiſque veſtigiis veritatis: Nec accuſatori tantum queſtio incumbat, nec probationis ei tota neceſſitas indicatur; ſed inter utramque perſonam ſit Judex medius: Nec ulla interlocutione divulget quæ ſentiat; ſed tanquam ad imitationem relationis, quæ ſolum* audiendi *mandat officium, præbeat notionem: Poſtrema ſententia, quid ſibi liqueat prodituras:*——"When you are to en-"quire into the Falſhood of Evidence, you muſt "make the ſtricteſt Inquiſition that's poſſible, by "Arguments, Witneſſes, comparing of Hands, and "other Signs of Truth. Neither muſt the Accu-"ſer only be queſtion'd, or the whole Charge of "the Proof be laid upon him: But the Judge muſt "act an indifferent Part betwixt the Plaintiff and "Defendant; and by no means divulge his Opini-"on, but give both Parties the Hearing, and at laſt "pronounce according to his own Judgment."

Mathæus de Criminibus, *Lib.* 48. *Dig. Tit.* 15. de Probationibus, *Pag.* 675. *Itaque ſi cum uno illo Teſte nulla concurrant argumenta, nequaquam audiendus erit: ſed cum* Paulo *dicendum in Lege* duo 30 *d. de Teſtam. tut. non Jus deficit, ſed Probatio. At ſi argumenta alia concurraut, audiendus: Non enim neceſſe eſt unum Crimen, uno & eo Probationis, genere oſtendi, veluti teſtibus tantum vel tabulis, vel argumentis. Poſſunt & diverſa genera ita conjungi, ut quæ ſingula non noccrent, ea univerſa tanquam grando reum opprimant.* L. 3. Sect. 3. ejuſdem d. de Teſtib. *Hoc eſt, quod aliis verbis dicitur plures Probationes imperfectus poſſe conjungi.*——"Therefore if with that one Witneſs there

" there be no concurring Arguments, he is not at " all to be regarded: But we muſt ſay with *Paulus, in Lege duo* 30 *d. de Teſtam. tut.* The Law " is not defective, but the Proof. But if other " Arguments concur, he is to be regarded: For it " is not neceſſary that one Crime be made evident " by one manner of Proof only; as by Witneſſes, " by Writing, or by Arguments only: For ſeveral Sorts of Proof may be ſo conjoined, that thoſe " which taken alone, would not affect the Criminal, yet being put all together, come upon him, " and overwhelm him like a Storm of Hail." *L.* 3. Sect. 3. *of the ſame D. concerning Witneſſes*; " That " is, as it is expreſſed in other Words, ſeveral imperfect Proofs may be join'd together."

Gail Obſ. 66. Num. 12. P. 416. *Et regulariter Teſtes ſingulares plenam Fidem faciunt, quando aliquid ingenere probandum eſt: puta* Titium *eſſe infamem aut furioſum, quo licet ſingulares ſint reſpectu actuum, tamen ſi ratione finis conveniant, integrè probant.*——" And regularly ſingle Witneſſes make " full Proof, when any thing is to be proven in " general; for inſtance, that *Titius* is an infamous " Perſon, or a Madman: For tho' the Witneſſes be " ſingle in reſpect of the Acts, yet if they agree in " the End, the Proof is full.

It may be eaſily granted, that *regulariter Indicia debent eſſe indubitata, ad condemnandum reum:* " That regularly Preſumptions ought to be uncontrovertible, when a Criminal is to be condemn'd " upon them." But at that ſame time it muſt always be owned, that there are Crimes excepted from the Rule, by the general Opinion of the Doctors; ſuch as *Crimen Læſæ Majeſtatis, & Crimen Aſſaſſinii*, Treaſon and Aſſaſſination; of which laſt Sort, the Crime of Piracy is the moſt atrocious. And therefore *Giurba, in Concil.* 22. *Num.* 5. ſaith, *Sed Aſſaſſinii qualitas homicidio adjecta, novam conſtituit Delicti Speciem:*——The Quality of Aſſignation added to Murder, forms a new Sort of Crime. *Num.* 17. *In Aſſaſſinio omnia procedant quæ in Criminibus exceptis:*——In Aſſaſſination, all things are to proceed as in excepted Crimes. And *Num.* 18. *Aſſaſſinii Crimen, ob illius Atrocitatem æquiparatur Crimini Læſæ Majeſtatis:*——The Crime of Aſſaſſination, becauſe of its Atrociouſneſs and Enormity, is made equal to Treaſon. And then *Num.* 22.. he concludes, That *in Probatione Aſſaſſinii, probabilia ſufficiunt Argumenta:*—— In the Proof of Aſſaſſination, probable Arguments are ſufficient. And *Maſcard, de Probationibus, Concluſ.* 1228. *Num.* 77. *In Crimine Aſſaſſinii probabilibus Argumentis probari poteſt:* Aſſaſſination may be proved by probable Arguments. And *Num.* 78, 79, 80, and 83. he names the other atrocious Crimes, where the like Probation is ſufficient; and in that ſame Concluſion, *Num.* 51. *Quod ex multis Indiciis ſimul junctis, reſultat plena Probatio etiam ad quem criminaliter condemnandum:*—— Many Preſumptions joined together, make full Proof to condemn any Man in a Criminal Caſe. And *Queſt.* 8. *Num.* 8. *Probatio per Evidentiam omnibus eſt potentior, & inter omnes ejus generis major eſt illa, quæ fit per Teſtes de viſu:*——Proof by Evidence is the ſtrongeſt of all Proof, and eſpecially by Eye-Witneſſes. And *Concluſ.* 831. *Num.* 4. *Probatio per Conjecturas & Indicia, in his quæ difficilia ſunt probata, & clandeſtinè committuntur, habentur pro evidenti & clara Probatione:*——Probation by Conjectures and Preſumptions, in Things hard to be proven, and clandeſtinly committed, are held to be good and evident Proof.

Carpzovius, Queſt. 223. Num. 57. *Secus tamen Res ſe habet, ſi plura Indicia concurrant & conjunctim reum aggravent, quorum unumquodque per teſtem ſingularem probetur; nam una Preſumptio aliam juvat, plurimaque Indicia conjuncta fidem faciunt:*——But the Matter is otherwiſe, if many Preſumptions concur, and load the Defendant; of which any one may be proved by a ſingle Witneſs: For one Preſumption ſtrengthens another; and many of them joined together, make Proof.

And in the Trial of *John Swintown* for murdering of his Wife, there was no direct Proof by Witneſſes; but the Libel being qualified, the Proof was by a young Girl of 14 or 15 Years, who left *John Swintown* and his Wife alone in the Houſe, and went to the Smith's Shop to enquire for Letters; but returning, found the Door ſhut, and therefore went away for a little Space; and then coming back and knocking, her Maſter opened, and ſhe perceived ſome Red, like Blood, upon his Shoes. And when ſhe came in, ſhe found her Miſtreſs dead in the † Spence; which was all ſhe could ſay. And then another Man declared, that he ſaw *John Swintown* go from his Houſe to a ‡ Stank, and there waſh his Shoes. Which *Indicia*, Preſumptions, being joined with the Proofs of their ill Agreement, and frequent Quarrellings before, did determine the † Aſſize. And tho' it was ſtrictly objected, that *in the Mouth of two or three Witneſſes, every thing ſhould be eſtabliſhed*; and that in the aforeſaid Cale there was no direct Witneſs at all, far leſs two or three; and that even the aforeſaid Circumſtances were only proven by ſingle Witneſſes; yet the Aſſize found that Evidence in the Preſumptions and † *Indicia* laid together, that they brought in their Verdict *proven*; and *Swintown* thereafter confeſſed, and was executed.

† *Buttery.*

‡ *Ditch.*

† *Jury.*

† *Tokens.*

And in effect, unleſs that *Indicia* and Preſumptions be ſuſtained, and even ſingle Witneſſes for proving theſe ſeveral Preſumptions and *Indicia*; which is called a *Cumulative Probation*, when all the Witneſſes and Teſtimonies concur *in idem Crimen, & ad eundem Finem*, in the ſame Crime, and to the ſame End, Crimes, and theſe the moſt atrocious, would eſcape unpuniſhed.

And therefore, upon the whole, it is moſt certain, when Preſumptions, Qualifications, and *Indicia* concur, and make a full perſuaſive Evidence; the Probation ſhould be held for as fully ſufficient, as the moſt direct Witneſſes; ſince all that the Witneſſes can do, is only to make full Faith in the Matter, which may be otherwiſe ſupplied, as ſaid is.

As to the additional Concluſion, it may be † noticed, that *Molloy, de Jure Maritimo, Lib.* 1. Cap. 3. *Sect.* 19. *Pag.* 60. ſaith, That when a Merchant procures Letters of Mart or Reprize, and then delivers the Commiſſion to Perſons to endeavour a Satisfaction; if ſuch Perſons commit Piracy, the Veſſel is forfeited without Controverſy.

† *obſerved.*

IN·

INFORMATION *for Captain* Thomas Green, *Commander of the* Worceſter, *Captain* John Madder, *his Chief Mate, and others; againſt Mr.* Alexander Higgins, *Advocate, Procurator-Fiſcal of the High Court of* Admiralty.

THE ſaid Captain *Thomas Green*, Captain *John Madder*, and others belonging to the Ship called the *Worceſter*, being purſued at the Inſtance of the ſaid Mr. *Higgins*, Procurator-Fiſcal, before the High Court of *Admiralty*, and the Lords Aſſeſſors appointed by the Privy Council; for the Crimes of Piracy, Robbery and Murder, conform to two Criminal Indictments, raiſed at the Inſtance of the Fiſcal. The Caſe being fully plead ed before the Honourable Judges of *Admiralty*, and the Lords Aſſeſſors; both the Accuſer and Accuſed were ordained ſeverally to inform, as Uſe is in ſuch Caſes.

The Criminal Indictments being holden as repeated, which † coincide both as to the Concluſion, and *Media concludendi*, way of concluding; and denied it is needleſs to repeat ſome preliminary Defences that were proponed, ſeeing it ſeemed juſt to the Honourable Court to repel the ſame: And therefore the Pannels proceed to their Defences, whereupon they were ordained to inform. Theſe are of two Sorts; Firſt, † Dilator; and Secondly, ‖ Peremptor.

† *are the ſame.*

† *for putting off, or delay.*
‖ *Poſitive.*

And firſt, it was proponed for *Henry Keigle*, Carpenter, and others of the Pannels in the ſame Indictment with him, That they could not be put to anſwer, unleſs the Captain himſelf were firſt inſiſted againſt; becauſe they being his Crew, and under his Command, they could not be charged with any thing done by them, unleſs he were firſt tried.

It was anſwer'd for the Purſuer, that they were not † convened for any thing alledged acted by their Captain, and by them as his Crew; but that they were convened as *Socii*, Fellow-Criminals, and Partakers of the Crimes libelled; which could be warranted by no Commiſſion nor Character the Captain did, or could pretend to: And that they were all charged as being *Socii*, Fellows, and involved together in one Crime; and ſo every one muſt anſwer for himſelf.

† *called to the Bar.*

It was replied for the ſaid *Henry Keigle*, and the other Pannels with him, that the Pannels are libell'd againſt as the Crew of the *Worceſter*, under the Command of Captain *Thomas Green*; and that under his Command they did attack a Ship, *&c.* So that they are here libelled only as Complices, and Acceſſaries to the Crime alledged; and therefore, according to the Principles of Law, the principal Delinquent ought to be firſt try'd; eſpecially where the Captain was in Cuſtody, and might be brought to his Trial; and that by the Commiſſion produced under the Great Seal of *England*, ſuperſcribed by King *William*, the ſaid *Thomas Green*, was cloathed with a Power, authorizing him to attack and ſuppreſs Pirates, which is a Military Power, and conſequently implies an Authority and Command over the Crew of the Ship, to give ready Obedience in all theſe Matters: So that the poor Pannels, who are of the Crew, have all Reaſon in the World to contend, That the Captain, whoſe Actings in theſe Matters they could hardly well debate, ſhould firſt paſs the Trial upon the Crimes alledged; who might, by Virtue of his Commiſſion, and otherways, † exculpate, and defend himſelf againſt the Crimes libelled; and conſequently, all the Crew that were in Subjection under him.

† *vindicate.*

This Defence the Pannel might perhaps plead, to a further Extent to abſolve them entirely; but at preſent they conceive, it can hardly be denied, the Captain ſhould firſt undergo the Trial. And there is a great Difference betwixt *Socii Criminis*, Fellow-Criminals, which are either independent upon one another, or if aſſociate under one Head, as *Banditti* and Pirates uſually are (which is illegal and unwarrantable Authority taken up) and Perſons accuſed as *Socii Criminis*, Fellow-Criminals, who by Legal Authority are ſubjected to the Command of others: In which Caſe, if the Perſon truſted with the Authority, has tranſgreſſed or abuſed it; if it does not plead an abſolute Exemption from the Puniſhment of the Tranſgreſſion, at leaſt it ſhould have this Effect, That the Head and Chieftain ſhould be obliged firſt to his Defence; which it is hoped the Honourable Judges will find juſt and reaſonable.

The other dilatory Defence, propoſed for the Captain and others in the ſecond Libel, was, That whereas *John Reynolds*, ſecond Mate, was convened and pannelled with him, as alſo ſome others, as *Socii Criminis*, Fellow-Criminals, whom the Captain and other Pannels had cited as Witneſſes in their † Exculpation; it was both ordinary and abſolutely neceſſary, that theſe Perſons ſo cited for Exculpation, ſhould be firſt tried; to the End, that being purged of the Imputation of any Crimes, they might be capable to be Witneſſes, for proving the Defences of Exculpation, that the Captain and other Pannels did propoſe and inſiſt upon, for the Vindication of their Innocency.

† *Defence.*

It was anſwer'd for the Fiſcal, That he owned, when both † Actors and Witneſſes were included in one ‖ Libel, of Deſign to deprive the Actors of their Defences; the Actors might, and were allowed to condeſcend upon thoſe whom they intended to uſe as Witneſſes: But then at the ſame time, they were obliged to propoſe a Ground of Exculpation for them, and ſo crave that they might be firſt tried upon the foreſaid Ground; otherways they could not, without ſuch a ſpecial Condeſcendance, † intervert the Form of Trial. And there could be nothing more groundleſs, tending to elude all Criminal Proceedings againſt Complices of the ſame Crimes, than to allow any of them at random to crave others to be firſt tried; and ſo the Trial to proceed of one ſingle Perſon after another: Whereas the true and plain Method were, that the Purſuer inſiſt againſt ſuch as he pleaſes, either ſingly or jointly. And unleſs ſome † Specialty be alledged, why the Trial of one ſhould proceed before the Trial of another; it never was, nor could be left to the Arbitriment of the Pannels. And therefore unleſs the Captain will offer to prove, that *Reynolds*, and others whom they would have firſt tried, were *alibi*, elſewhere; their arbitrary Demand

† *Actors.*
‖ *Indictment.*

† *alter.*

† *Special Cauſe.*

of having them tried in the firſt Place, without any Reaſon, cannot be regarded.

It was anſwered for the Captain, and the other Pannels, That their Demand upon this Point was moſt conſonant to Reaſon, Law and Form, in Criminal Procedures: That Exculpation, which tends to the Proof of Innocence, and Freedom from Guilt, was moſt favourable; becauſe it is ſtill preſumed, till the Crime be proved. And therefore it is, that Witneſſes who are not regularly admitted for proving of a Crime, becauſe of ſome Exception, will be allowed to prove the Defender's Innocence. And upon this Account it is, that ſeveral things in Form are remitted in Exculpation: And there is nothing more material for Defence of Perſons accuſed, againſt the Proſecutor (who ordinarily is prejudged and prepoſſeſſed) to guard them againſt all the indirect Methods that may be taken by the Purſuer; to preclude the Accuſed from the uſual Means of proving of their Defences, than what is now demanded. And ſince none can be more proper Witneſſes for proving a Pannel's Defence (as for Inſtance, *Moderamen inculpatæ Tutelæ*, *i. e.* the Rule of blameleſs Self-Defence, as Perſons ſaid to be preſent) therefore a violent Purſuer might, in ſuch a Caſe of Deſign to preclude the Pannel from his Defence, cite thoſe preſent as acceſſary. Upon which Account it is, that both Reaſon and Law provides, that if the Pannel does offer to prove a relevant Defence, by the *Socii Criminis*, Partakers of the Crime accuſed with him; the Purſuer muſt neceſſarily firſt proceed to the Trial of theſe *Socii*, Partakers, who otherways would have been led as † habile Witneſſes; to the End that being purged, they may be yet habile. This is ſo plain in Reaſon, and has been look'd upon as the conſtant Practice in all Criminal Procedures in the Juſticiary Courts of *Scotland*, that it is admired the Fiſcal ſhould make any Oppoſition to it.

† *Legal or good.*

He ſo far owns in his Pleading, that it is Form and juſt upon the Matter; but would ſhift it in this particular Caſe, unleſs the Pannels would alledge and † found upon a particular Ground of Exculpation, and offer to prove and inſtruct the ſame, as that their *Socii*, Companions, cited as Witneſſes, were *alibi*, elſewhere; but this is altogether without Foundation. For in all criminal Proſecutions, the Accuſed are not put to prove their Defences, becauſe the denying of the Libel is a Defence ſufficient of itſelf; and if the Libel be not proved, the Pannel goes free by the Rule *Actore non probante abſolviter reus*, the Plaintiff failing in his Proof, the Defendant is abſolved, ſo that when there are Perſons accuſed as *Socii Criminis*, Fellow-Criminals, who might be very habile Witneſſes for exculpating the reſt, if they did not lie under the Imputation, when their Trial is firſt required, that they may be purged of the Imputation, there is no Neceſſity to propone for them any ſpecial Defence, † elideing the Libel; ſeeing the very Denial of the Libel is enough, and their Innocence is preſumed, except Guilt be proved. And if the Fiſcal will have the Captain, and the other Pannels, to condeſcend upon what Ground their other *Socii*, Companions cited as Witneſſes, ſhould be acquit; they need ſay no more, but that they ought to be acquit, becauſe the Libel is not true. And is there not the ſame Reaſon to acquit Pannels, becauſe the Libel is not proved; and conſequently, to render them habile Witneſſes for other Perſons accuſed, as if the ſaid Perſons were acquit upon a Defence proponed, elideing the Libel; whereby it plainly appears the Anſwer given is ſtrained, and does mightily increaſe the Suſpicion againſt the Fiſcal, that he has indicted the Witneſſes cited by the Captain, and the other Perſons in their Exculpation, of purpoſe to preclude them from their Means of Defence; and the rather, that the Pannels appeal to the Honourable Judges, if it was not owned by the Purſuer in the Debate, that Mr. *Reynolds* was aſhore at the time of the pretended Attack; beſides that, the Libel bears the Chyrurgeon, and others of the Crew, were aſhore the time of the pretended Action, which frees the Pannels of all Calumny. There can be innumerable Inſtances given before the High Court of Juſticiary in criminal Matters, that where there are ſeveral Complices indicted, if any of them have Grounds of Exculpation, which they can prove by others of the Pannels, their Trial proceeds firſt. This is plainly aſſerted as unconteſted by Sir *George Mackenzie*, in his Book of the Laws and Cuſtoms of *Scotland*, in Matters Criminal, *Tit. Excul. Par.* 9. nor does he make any Diſtinction, or requires that any ſpecial Defence ſhould be condeſcended upon for purging *Socii Criminis*, the Fellow Criminals, to render them habile Witneſſes. The Rule is plain in the Proſecution of † Delicts, before Civil Courts, in order to repair Damages, that if more Perſons be cited, as *Co-rei ejuſdem delicti*, guilty of the ſame Crime, and that ſome of them are neceſſary Witneſſes for proving the Defences proponed for others; the Proof muſt firſt proceed againſt theſe. And ſo it was found by the Lords of Seſſion the 24th of *February*, 1662. *Mackartney* againſt *Irving*, much more ought it to be in criminal Caſes, as lately in the Caſe of *Roſs*, of *Auchnacloich*, againſt Captain *Monro*, before the Lords Juſticiary. Nor is there any Inconvenience from what is alledged, that this ſhould tend to elude all criminal Proceeding againſt Complices, and occaſion the lengthning out of the Trial, to proceed to one ſingle Perſon after another; for as no time is to be grudged in the Enquiry of ſuch Matters, which concerns the Life of Man, ſo the Pannels do not propone this preliminary Defence to protect or delay the Trial, and therefore are ſatisfied, that not only *Reynolds*, but their other *Socii*, Companions, indicted, who are likewiſe cited in their Exculpation, go to the Trial at one and the ſame Time. The Captain, and other Pannels with him, do plainly argue thus; Either *Reynolds*, and the other Perſons cited in the Exculpation, are guilty or not; if they be guilty, it ought to be found ſo, for till that be, they are preſumed innocent; if not guilty, what Law or Reaſon is there to preclude them from being Witneſſes for the Captain, and the other Pannels Defence; or what Law is there that can oblige them to condeſcend upon, and propone a particular Defence elideing the Libel, when the Libel is not owned to be true, and that the Pannels have all denied the ſame? So it is hoped the honourable Judges, and the Lords Aſſeſſors, will not preclude them from the ordinary Privilege, which, hitherto, has not been denied to any Pannel.

† *Crimes.*

† *inſiſt upon.*

† *Making void the Indictment.*

For if this was allowed, a violent Purſuer might prevent Probation, and render it impracticable. For, ſuppoſe one Man kill another in Self-Defence, two Gentlemen walking can teſtify this; but to prevent the Probation of *inculpata tutela*, unblameable Self-Defence, they are cited as Parties; and they can prove by other two Perſons, at a greater Diſtance, their *alibi*, being elſwhere, which when the Purſuer gets notice of, they are made Parties alſo; and

ſo

ſo *in infinitum*. So that the ſaid violent Purſuer might prevent all Probation, if the Defender were obliged to alledge *alibi*, being elſewhere, for the Witneſſes of his Exculpation.

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*The * peremptory Defences proponed for the whole Pannels in both Libels, as totally excluding the ſame as †† Irrelevant, are as follows.*

* *Poſitive.* †† *Not good or ſufficient in Law.*

1. THAT the Libel was irrelevant, as being general and indefinite, not condeſcending upon the Name, Deſignation, or any other Sign or Evidence, by which the Ship alledged to be ſeized might be particularly diſtinguiſh'd, nor yet the Perſons Names alledged to be murdered, or to whom the Ship and Goods robbed did belong; which ſeemed to be abſolutely neceſſary in all ſuch criminal Indictments, not only as a Requiſite in Form, but in Equity and Reaſon; without which, Perſons accuſed ſhould be in great Hazard from general and indefinite Libels, and precluded from their Means of Defence, which otherways are obvious, when the Accuſation is certain, ſpecial, and pointed.

It was anſwered by the Purſuer, That he had libelled as definitely and cloſely, as the thing would allow; for it being libelled, that the Pannels did, without any lawful Cauſe of Warrant, attack a Ship, ſailed by her own Crew, and having her own Cargo aboard, and that they over-maſter'd the Ship, in a hoſtile Manner, and robb'd the Goods: Theſe were certain Crimes manifeſt in themſelves, and if the Pannels acted them in ſuch a Manner, as to deſtroy the Ship and the Men, and imbezzled the Cargo, ſo as no further Knowledge could be had thereof, it was only an Aggravation of the Crime, and could not hinder the Accuſation to proceed; nor was any † Condeſcendance here neceſſary for Exculpation; for of whatever Deſignation the Ship was, and whatever the Men and Goods were, yet the Crime was ſtill the ſame; and that it was known in our Practice, Robberies and Depredations are ſuſtained, albeit neither the Quality of the Goods nor Owners be condeſcended upon; and in effect, the Pannels Defence of Indefinitneſs is ſuch, that if in the Road of *Leith*, before hundreds of Spectators, one Ship ſhould invade another, deſtroy her Men, ſeize her Goods, and ſink the Veſſel, whereby none of all theſe could be condeſcended upon, there could be no criminal Libel upon it, becauſe of the Defence of Indefinitneſs, which were moſt abſurd.

† *Particular Inſtance.*

It was replied for the Pannels, That what was ſaid, did not take off the Objection of the Indefinitneſs of the Libel, which by our Form and Law can be the Ground of no criminal Accuſation; for in all ſuch Procedures, *debit conſtare de corpora delicti*, the viſible Effect or Matter of the Crime ought to appear; that is, that ſuch a Ship is taken by Piracy, ſuch Men murdered, and the like. It is inconſiſtent with the Nature of a criminal Accuſation, that Men ſhould be alledged to be murdered, Ships ſeized, and theſe not condeſcended upon, and by our conſtant Practice it is ſo required: Nor can it be inſtanced, that ever any ſuch indefinit Libel was ſuſtained. There are no Queſtions whatſoever that are more nice than theſe concerning the Life of Man, and therefore the *Engliſhman Coke*, 7 *Rep. Calvin*'s Caſe, obſerves, that an Indictment ſhould be moſt curiouſly and certainly penn'd; and the ‖ *Old Books of the Majeſty*, requires ſeveral Things to be ſpecially expreſſed, as the Name of the Parties, Day, Year, Place, Cauſe of Complaint, and Damage; and as it is neceſſary in Form, ſo this Form has been founded upon juſt Reaſon, for otherways theſe Inconveniences ſhould plainly follow from general and indefinit Libels.

‖ *A Law Book ſo called.*

Firſt, A Perſon indefinitly accuſed of a Crime, as for Example of Murder, without expreſſing the Perſon alledged to be murdered, can never be ſafe from an Abſolution or Acquitment in Courts; for how can he oppone his † Sentence Abſolviture to a ſpecial Accuſation that afterwards may be raiſed, ſeeing he cannot make the one meet the other. And if Captain *Green*, and the other Pannels, ſhall be now * Aſſoilzied, this ſhould not be a good Defence to them, neither in *Scotland* nor *England*, if they ſhould be afterwards criminally purſued, for attacking a Ship, and murdering of Men, ſpecially condeſcended upon, becauſe it is not clear, that the preſent Indictment, as drawn, did concern theſe ſpecial Accuſations; and therefore Accuſations of that Nature ſhould be ſo ſpecial, as that afterwards the Accuſed be not brought to any further Diſturbance. 2. The Reaſon why ſuch Accuſations ſhould be ſpecial and definit, is, That the Pannels be not precluded from the obvious Defences, that tend to elide the Libel; as here in this Caſe, if the Libel were ſpecial and circumſtantiate, and ſome Deſignation given of the Ship and Crew, it might be in their Power to prove the obvious Defence, that ſuch a Ship was at the Time libelled, in ſuch another Part of the World; that ſuch a Ship was either caſt away by Storm, or taken by Pirates in ſuch a Place; or that the Ship is yet extant, and the Crew alive: From all which, the Pannels are precluded by a general and indefinit Libel; and therefore Law has fixed the Forms in theſe Caſes, that ſuch Accuſations be not vagrant and looſe.

† *His being acquitted by the Court.*

* *Abſolved.*

It will not be denied, but that the Time and Place muſt be expreſſed: The ſame Parity of Reaſon obliges to a ſpecial Condeſcendance of the Party injured, Damage ſuſtained, as relating to ſuch particular Perſons. And the above-cited Sir *George Mackenzie*, in his Title of Libels, and the Forms thereof, does ſet down, That if the Defender crave the Purſuer to expreſs the Day, becauſe he offers to prove *alibi*, being elſewhere; then the Judge ſhould force the Purſuer to expreſs the Day, or elſe the Defender would be precluded from proving his Innocence. The ſame Reaſon is, that the Purſuer here ſhould be particular, as to the Ship alledged to be ſeiz'd, *&c.* becauſe the Pannel might offer to prove that that Ship was *alibi*, elſewhere, at the time: And many more Defences ariſe from the condeſcending upon the *Corpus delicti*, the viſible Effect of the Crime, than from the Circumſtance of either Time or Place. And this is not laid down conditionally, that theſe are not the Requiſites of a Criminal Indictment; except firſt the accuſed propone their Defence, *verbi gratia*, *alibi*, for Inſtance, elſewhere: But it is laid down as a Rule, That theſe are the Requiſites of all Criminal Libels; and the

Reaſon given is, That the Pannels be not precluded from their Defences: So that it is not † *obſerv'd.* more † noticed, whether in this or that particular Caſe this Defect is prejudicial, becauſe Neceſſity has firſt induced the Form; and then this Form turns to be a Law in all ſuch Caſes. And the forecited Sir *George Mackenzie*, in the ſame Paragraph, thinks it ſo far a Requiſite of a Criminal Libel that the † *inſtanced, or argued from.* Crime ſhould be particular † ſubſumed, that he brings it as an Argument why it ſhould be ſo, that it is declared by the 148th *Act Parl.* 12 K. *James* VI. That a Libel bearing common Regrating, or Foreſtalling, in the general, ſhall be relevant, without condeſcending on the Time or Way of committing the ſame; and therefore concludes, that ſeeing this was an Act diſpenſing with the regular way; *Exceptio firmat Regulam in non exceptis*, an Exception confirms the Rule in Things not excepted. And hence it is not a good Argument, that the Purſuer has libelled as definitely and cloſely as he could in the preſent Matter: For better an Inconvenience ſhould be ſuffered in a particular Caſe, than that a dangerous Preparative be laid down, of admitting indefinite and general Criminal Libels, whereby poor Pannels may be precluded from their Means of Defence. And this will ſerve to obviate the Argument drawn from a very infeazible Chance, ſuppoſed to fall out in the Road of *Leith*; which as proponed, will likewiſe be otherwiſe circumſtantiate as to a poſitive Probation, and not founded upon Conjectures and Preſumptions, as this Caſe is.

Nor can the Fiſcal altogether excuſe his indefinite Libel, ſeeing the Means was not wanting of his coming to the Knowledge of the Ship, if it be true what is libelled; ſeeing the Ship was not ſunk, but ſold to a particular Perſon; and by ſome Evidence of the Ship, the Crew might likewiſe have been known.

3. As Law and Form require ſuch Libels to be definite and ſpecial, ſo more eſpecially in this Caſe; becauſe Captain *Green* was clothed with a Commiſſion under the Broad Seal of *England*, which empower'd him to act in Hoſtility againſt all Pirates: And therefore a general and indefinite Libel, upon attacking and ſeizing a Ship in his Caſe, would ſeem very improper: For the Preſumption muſt run in his Favours, That if any Acts of Hoſtility were done by him, they muſt be preſumed in Proſecution of his Commiſſion. This is not pleaded as a ſeparate Defence to elide the Libel; nor is it pleaded to have given him full Liberty to have ranged *impune*, with Impunity, but as a Specialty in this Caſe; that as it is a Defect in all Criminal Libels to be general and indefinite, ſo much more in this Libel, he being clothed with a Commiſſion, and hav- † *attack.* ing Power to † aſſail. And therefore the Preſumption runs in his Favours; except the particular Ship were condeſcended upon, known to be a Merchant and Trading Ship, and conſequently he out of his Duty in attacking the ſame. And therefore it is frivolous to object, that the Commiſſion obliged him to keep a particular Journal of whatſoever Veſſel he ſhould attack hoſtily; ſeeing the attacking of any Veſſel whatſoever is denied and the Argument from the Commiſſion only preſſed to this End, That no indefinite Libel of attacking Ships, is relevant againſt a Perſon clothed with a Power to attack in certain Caſes; and which the Accuſer was ſo far convinced of, that for ſupplying that Defect in his Libel, he in his Pleading and Information, is pleaſed to condeſcend upon this ſpecial Qualification, and Mark of the Ship attacked, that ſhe was a free Ship; which therefore he is obliged to prove.

The Purſuer was at the Pains to defend his Libels from an Objection, as if they had wanted time and Place. The Pannels did indeed conjoin this with the other; That as the determining the Time and Place ſeem to be abſolutely requiſite; ſo likewiſe the Condeſcendance upon the particular Names, and Deſignations of the Ship and Perſon, both being equally and neceſſarily required, that Pannels be not precluded from their juſt Defences. And the time libelled comprehending the Space of four Months, being too indefinite; it is likewiſe reaſonable in ſuch a Caſe, that the Accuſer ſhould be more ſpecial; which the Pannels humbly remit to the Honourable Admirals, and Lords Aſſeſſors.

The Second Peremptory Defence proponed for the Pannels, was, That this being a Libel founded upon ſeveral Qualifications and Preſumptions, the ſame was no way relevant, to infer the Concluſion of the Libel. A Proof of Crimes from Preſumptions, is very hazardous: And hence it is, that ſome foreign Nations do not condemn to Death upon *Indicia*, Tokens, but make them only Ground to † put to the Queſtion. † *Torture.* And many Lawyers are of Opinion, that the ordinary Pain of Death is not to be inflicted upon a Proof ariſing from *Indicia*, Tokens, tho' never ſo pregnant. Of this Opinion is *Pharinacius*, a great Criminaliſt, and many others; and ſo is *Brunemannus*, *ad L. ult. Cod. de Prob.*

But in the next place, whatever the Diverſities of Opinions and Practices of Nations may be in this Point, yet it is certain, where *Indicia*, Tokens, are taken as a Proof, in order to Puniſhment by Death, they muſt be ſuch as amount to a full Proof, and leave no Room for any Scruple or Doubt. This cannot be better expreſs'd, than in the Words of that Excellent Conſtitution of *Theodoſius* the Emperor, *L. ult. Cod. de Prob. Sciant cuncti accuſatores eam ſe rem deferre in publicam notitiam debere, quæ munita ſibi idoneis teſtibus, vel inſtructa apertiſſimis documentis, vel Indiciis ad Probationem indubitatis, & luce clarioribus expedita:*——Let all Purſuers take notice, that when they bring a Matter into Publick Judgment, it ought to be ſupported by proper Witneſſes, or plain Proofs, or undoubted Signs and Tokens, as clear as the Sun at Noon. And it will plainly appear from the Libel, that the Qualifications therein narrated, are not ſuch *Indicia*, Tokens, as that excellent Conſtitution requires; *indubitata*, undoubted, *apertiſſima luce clariora*, moſt evident, clearer than Sunſhine. There muſt always Difference be made: Some have a probable Shew, and incline the Mind of the Judge; and yet cannot go the Length of a full Proof. *L. 5. in Principio Pand. de Pœnis*——*Sed nec de Suſpicionibus debere aliquem damnare; ſatius enim eſt impunitum relinqui facinus nocentis, quam innocentem damnare:* Nor ought any Man to be condemned upon Suſpicion; for it is better that a guilty Man paſs unpuniſh'd, than that an innocent Man ſhould be condemned. *Indicia & Præſumptiones*, Tokens and Preſumptions, have much eaſier Place, where *conſtat de Corpore delicti*, where the Subject of the Crime is viſible; becauſe this helps to ſuſtain the Preſumption, and gives indeed the *Indicia*, Tokens, their juſt Weight. But theſe, in ſuch a Caſe as this, *ubi non conſtat de Corpore delicti*, where

where the Subject of the Crime is not certain, are hardly receivable, seeing they want to be applied to a particular Crime.

This so necessary a Qualification of a Criminal Libel, *ut constet de Corpore delicti*, that the Subject of the Crime should be visible, the Pursuer endeavoured to evade, by distinguishing betwixt Crimes that are *cum effectu permanente*, have permanent Effects, and such as have no permanent Effects. In the first, the *Corpus delicti*, visible Effect of the Crime, was necessary, not in the latter; and therefore † subsumes that in the Cases libelled, there could be no permanent Effects; because all are libelled to be destroyed, and put out of Reach: But plainly this Distinction is against the Pursuer; because certainly Piracy, Robbery and Murder, are such Crimes, as have permanent Effects.

† *argues.*

By the *Corpus delicti*, Subject of the Crime, is not meant, that the Subject of the Crime must be so extent, as to fall under the Senses; but that the Loss sustained is felt and known. As for Example: In the Crime of Murder, though the Body cannot be reached, yet the particular Loss is known: It is notorious the Queen wants a Subject; Friends want a Relation, whom they can point out: In Piracy and Robbery, Merchants want their Ships and Goods: So that the Loss is felt and known, tho' (*de facto*) the Subject cannot be pointed out. Whereas in this Case, no such particular Evidences can be given: None can complain of any particular Loss, either Queen or Subject. And this is the true Meaning of what is *Corpus delicti*, a Subject of the Crime. And whatever be the Import of the Objection against the Libel, yet it is certain, to alledge Qualifications as the Proof of a Crime, *ubi non constat de Corpore delicti*, where the Subject of the Crime does not appear, is most incongruous. Add granting, as the Pursuer does further contend, that he has libelled a *Corpus delicti*, a Subject of the Crime; in so far as he has libelled a Criminal Fact, and Deed of Piracy, Robbery and Murder; which still being general, is not that *Corpus delicti*, Subject of the Crime, that Law requires. Yet it was never heard, nor can there be any Lawyer whatsomever adduced, that owns the *Corpus delicti*, Subject of the Crime, can be made out of Presumptions and Qualifications. When once it is known that a Crime is committed, it may be owned that *Indicia indubitata*, undoubted Tokens, such as Law requires, may be a Ground to fix the Guilt upon particular Persons; because there the Certainty of a Crime committed, does negatively inforce and give Weight to the Presumptions adduced: But when it is not known that a Crime is committed, and that this is first to be made out; it is positively contended, this cannot be but by a positive Probation of concurring † habile Witnesses: For Presumptions may be apt to fix a Guilt, *quando constat de Corpore delicti*, when the Subject of the Crime appears, or that the Fact was done, but not before.

† *legal.*

In the third Place, the Presumptions libelled are very far from being of that nature, as to be concluding to a Conviction; and of that Certainty and Clearness as Law requires. All Probations in Criminal Cases should be infallible and certain; and if there be any Meaning put upon Presumptions founded upon for proving a Crime, other than to infer a Crime; that is to be laid hold upon, according to the manifest Principles of Law and Humanity.

Now the Qualifications libelled, are either such as not only can bear an obvious Sense, different from what is imposed, but even a probable one; or are such as are vagrant Expressions and Hear-says, importing little or nothing, and cannot be applied to the Crimes libelled.

1. The Chyrurgeon his having heard Shooting at a Distance, while in the mean time he saw no Engagement; can easily be applied either to Shooting from other Ships, or Shooting upon Salutation, *&c.*

2. That he did see the *Worcester* riding in her Birth, and another Ship (as it were) towed to her Stern. 1. It is only Conjecture, being at such a Distance. 2. It is improbable, because it is not the ordinary way; and hazards the Ship falling foul of one another, in such common Roads; which might be a Ground to the Chyrurgeon's Mistake at such a Distance.

3. That he did see the Goods lying lumber'd upon the Deck when he came aboard. 1. It is usual in Coast-Trading, that the Goods are brought by Sloops, and so laid upon the Deck till they be stowed. 2. This might be occasioned by the Ship's drawing Water. And to what concerns the Word Busking, and bringing Water from the Shore, it is taken notice of in the Exculpation.

4. That when the Doctor enquired what was the Occasion of the Goods lying in Confusion, Captain *Madder* should have answered, *Damn you*, &c. might proceed from the said Captain *Madder*'s being in a Passion, and concerned for the Goods being damaged, and a Tarpauling-Temper, very usual among Seamen.

5. That the Chyrurgeon did dress two wounded Men; first, one is dead, another is not named in the Libel; and the *Black* as the two other also, might have got their Wounds by fighting among themselves, which is not unusual; and the rather, that they appeared unwilling to tell the Chyrurgeon, of purpose to conceal their Quarrel from the Captain.

6. As to what is alledged to have occurred betwixt the Doctor and the Linguister, *First*, It is only Hear-say; in the *second* Place, there might be a Ship sold to *Coge Commodo*, but not taken by Captain *Green*, and it is improbable he would have bought any Ship taken by Piracy upon that Coast.

7. What is libelled about *Reynolds* and his Sister, their missive Letters, is far from being any Qualification: For, *First*, *Reynolds*'s Letter is only a † Double. It is strained to put such a Gloss upon the Expression *(basely confess)* to imply a Guilt, and a Guilt confessed; seeing the Words may easily bear the Meaning of a false Accusation, and is explained by a subsequent Expression, That he would rather die innocent, than accuse any Man falsly; and in the Beginning of the Letter, declares, he knew nothing of the Matter.

† *Copy.*

8. What relates to *Haines* his Intercourse with *Anna Seaton*, and others, are nothing but general and ambiguous Expressions, from which nothing can be gathered of the Crimes libelled, and infers no more, than that he was using some Stratagems to gain his Mistress.

And as to the Expression of the Wickedness committed aboard their Ship, it may easily relate to other Crimes, which are but too frequent in such Voyages; as also, as to what was done aboard after the Ship was in the Harbour; and as to the libelled Expression used by *Haines* against Captain *Madder*,

der, as the ſame is general and indefinite, relating to no particular Crime, ſo this might ariſe from ſome particular Pique and Prejudice againſt Captain *Madder*: As to what follows * anent the Condition of the Cargo, when the Committee of the Council unloaded the Ship, it is ſufficiently taken off in the Exculpation.

* *about.*

Laſtly, As to what is libelled anent the *African* Company's Seal: *Firſt*, It will not be pretended, that the Company were in uſe to give their Seal to any Ship whatſomever trading by their Commiſſion. 2. If any had caſually gotten the Seal, there are an hundred Ways whereby the ſame might have come to the *Worceſter*'s Crew without Piracy. And 3. The Seal found aboard, and which is lying in the Clerk's Hands, which has a Ship for its Creſt, might have given Occaſion to this Miſtake.

It being plain, that the Qualifications libelled, are not of that Import to give a full Conviction; the Purſuer's Argument adduced from the End of Probation, which is to find out the Guilt, and convince of the Truth, may be plainly taken off; that there is no ſuch convincing Proof, as can fully and certainly determine any Judge, but, at moſt, reſolves in a conjectural Proof, never to be admitted to take away the Life of Man.

The Purſuer allows, that if every one of the Circumſtances ſhould be taken ſeparately, they would not be ſufficient; but being taken jointly, and according to the Series of the Thing, they amount to a full Proof and Conviction; and this is the Nature of all cumulative Probations; which is not to be diſjoined, *Quæ non proſunt ſingula multa juvant*: The Purſuer does likewiſe adduce Arguments and Authorities for a cumulative Probation to be of this nature, that there needs not two concurring Witneſſes for every Circumſtance. In anſwer to which, the Pannels do ſtill plead, there is a great Difference to be made betwixt Caſes where previouſly, *conſtat de corpore delicti*, the Subject of the Crime appears, and that Preſumptions are only fixed upon to find out the Guilty; and theſe Caſes, where in general a Crime is libelled, altho' Preſumptions may be admitted in the firſt, yet never in the other, as is already obſerved. 2. In all Caſes, Preſumptions muſt be ſuch as leave no room to doubt, and muſt not only have a Probability with them, but a concluding Certainty, which does not give Ground to Suſpicion, but plainly and firmly convinces; which certainly cannot be inferred from the Qualifications libelled; all which either can bear a different Conſtruction, or are ſuch vagrant Hear-ſays, and indefinite Expreſſions, as amount to no certain and ſpecial Crime. 3. Such Preſumptions cannot be conjoyned, which particularly taken, are either of ſmall Weight, or amount to very little, or that they can probably bear another Senſe and Meaning, as has been demonſtrated. And, 4. As to the Conjunction of a cumulative Probation, there is a Difference to be made betwixt Crimes that are continued, and where the Proof may be had from the Reiteration of the Acts, and thoſe other Crimes which conſiſt only in Fact or Deed.

In the firſt, a cumulative Probation may be admitted; as in a Libel of Bribery, one Witneſs may be admitted for one Fact, another for another, and ſo a third, which may conjoyn, altho' there be not two concurring for every particular Fact, if there be other concurring Evidences and Arguments: But where there is one poſitive Fact libelled, this does not ſo eaſily admit of a cumulative Probation, eſpecially which is always to be taken along, where the Crime is not ſpecified and determined, as in this Caſe, and that the *ipſum corpus delicti*, the Subject of the Crime itſelf, is ſtill to be made out: So that the Texts of the Law, and Authorities made uſe of by the Purſuer, may be eaſily cleared, that either they relate to Civil Caſes, as *l. 3. par. 2. digeſt. de teſtibus*, where there muſt be a Preference of a Civil Right of the one to the other: Or if the Texts and Authorities relate to Crimes, the *Indicia*, Tokens, allowed by them, muſt be *indubitata & luce clariora*, undoubted, and clearer than Sun-ſhine; and preſuppoſes a Crime committed, *& corpus delicti*, the Subject of the Crime, and tends only to fix the Guilt. And it is poſitively denied, that there is any Law, or Lawyers, allowing any cumulative Probation to prove a Crime in general, *ubi non conſtat de corpore delicti*, where the Subject of the Crime does not appear; and this is a Speciality in the Caſe of the preſent Pannels; and the Honourable Judges and Lords-Aſſeſſors, are earneſtly intreated to conſider it; which does really diſtinguiſh them from the other Caſe mentioned by Lawyers; all which relates to * Delicts actually committed, and that the Preſumptions deduced, tend only to fix the Guilt: But when a Crime is alledged in general to be committed, and no ſpecial Condeſcendance upon what Subject, upon whom, and againſt whom, Preſumptions there are not ſufficient, without concurring habile Teſtimonies; even ſuppoſing ſuch a general indefinit Libel could be relevant, againſt which there are abundance of Arguments already given; for unleſs a Fact be proved, even Confeſſion is not ſufficient to fix a Guilt, as muſt be acknowledged by all; much leſs Preſumptions, except the Fact be once known.

* *Crimes.*

The Grounds of Exculpation.

As the Pannels are confident, the Lords Judges will not find the Libels ſo general and ſo qualified, relevant to infer the Pains of Death: So for further clearing their Innocence, they offer the Grounds of Exculpation following, which are either inſtantly inſtructed, or offered to be proved.

And this may be laid down, which cannot be denied, that *Preſumptio non delicti excludit preſumptiones delicti*, the Preſumption of a Crime not committed excludes the Preſumption of a Crime; to which Purpoſe, *Carpz. Part. 3. Q. 123. Num. 69.* and in the ſame Place, in *dubio ſemper in mitiorem partem eſt preſumendum*. In a doubtful Caſe we muſt always take the more charitable Side; where he cites Multitudes of Lawyers.

1. There is no Reaſon to ſuſpect the Pannels of the Crimes libelled, being Perſons of entire Fame, without any Imputation as to their antecedent Life.

2. That they were under a Charter-Party, commiſſioned to a Trading Voyage, and Inſurance made upon Ship and Cargo, which does remove all Suſpicion of Piracy, ſeeing ſuch do ordinarily aſſociate, and out-rig themſelves for that End.

3. A ſtrong Argument of the Pannels Innocence as to Piracy, is, That they were upon their Voyage homeward, to make Account to their Fraughters and Owners of their outward Cargo and Returns; of all which they have exact Journals and Accompts, and upon their coming to *Frazenburgh* gave Advice to their Owners of their Arrival, which was inſert in the Publick Prints from *London*, as is uſual, and likewiſe ſent a Packet over Land from *Frazenburgh* to the *African* Company in *Scotland*, from Mr. *Innes*, their

their Correſpondent in the *Eaſt-Indies*, which is not to be ſuppoſed a Pirate would be intruſted with: Whereas, when ſuch turn Pirates, it is uſually for their own Profit, and ſo not only rob others, but begin firſt with their Owners, and are not found to return to make any ſuch Accounts; which is a ſtronger Proof of the Pannels Innocence, than any Circumſtance libelled to the contrary.

4. *Menocheus de preſumptionibus, lib. 5. Prif. 59.* treating of the Preſumptions of Innocence, lays down two very pregnant. Firſt, That if the guilty Perſon could flee and did not, that very Preſumption waſhes away the Guilt; and gives Account of a Caſe out of *Lucian de amicitia*, that *Antiphilus* and *Demetrius* being accuſed of Sacrilege, were diſmiſſed by the *Prætor*, becauſe when they could have fled, they did not. A ſecond, when the accuſed Party offers himſelf to the Judge, it is a ſtrong Preſumption of his Innocence, ſince the Innocent fear nothing, and the Guilty have always the Puniſhment before their Eyes: Both theſe favour the preſent Pannels; for the Rumour was ſpread, and came to their Ears ſome Weeks before they were impriſoned, and yet none of them offered to flee; and one *Ballantine* being at full Liberty amongſt his Friends the Time of the † Incarceration of the reſt, did of his own accord offer himſelf to Priſon.

‖ Impriſonment.

5. That the alledged Confeſſion made by the Chyrurgeon, muſt certainly labour under ſome Miſtake, becauſe, altho' he mentions the Attack to have been at *Callicut*, and that he heard the Ship was ſold at *Keilon*, which are at leaſt fifty Leagues diſtant: And altho' he was aboard all the Time, yet he makes no mention how the Ship was brought along, or any thing relating to it.

6. It is offered to be proven, that the *Black* who is alledged to be wounded in the Action, was not aboard forty-eight Hours before the *Worceſter* ſailed from the Coaſt of *Malabar*. And further, that the *Black* declared when he came aboard, that he got the Wound in his Arm by the Bite of a Snake. And further, it can be inſtructed by Chyrurgeons, that the Wound, as it well appears, is more probable to have been got that way than by Gun-ſhot.

7. Whereas it is libelled, That the Ship was attacked by the *Worceſter*'s Sloop upon the one Side, and her coming up upon the other:

It is impoſſible a Piracy of that nature could have been committed upon the Coaſt of *Malabar*, and not certainly known in *England* long before the Arrival of the Ship, ſuch is the exact Correſpondence, eſpecially as to ſuch Matters; nor could the Captain either have traded upon the Coaſt, or been received by the Factories and Governors there, if he had committed any ſuch Piracy; whereas it is offered to be proven, that after the Time libelled he was aſhore kindly entertained, exchanging Letters with the Governor of *Anjango*, and had Inſtructions and Recommendation from thence to the Governor of *Fort William* upon the Coaſt of *Bengal*, whether he was obliged to go for refitting his Ship, and ſtopping the Leak, which he could not conveniently do at *Malabar*, becauſe of the want of Timber, Cordage and Money to be taken up upon Bottomry.

8. It was aſſerted by the Fiſcal in the Time of the Trial, that the Action laſted two Days and a half, which is a moſt improbable Story; for either the Night would have ſeparated them, or the Ship attacked might rather have run a-ſhore, than fall into the Hands of the Pirates.

9. That the Wor' *Buſking*, libelled as a Term ſignifying a Ship preparing to fight, has a quite different Conſtruction in the ordinary Acceptation among Seamen, and ſignifies, bearing cloſe upon the Wind by a preſs Sail.

10. It is offered to be proven, that their Water was ſtaved on the Coaſt of *Malabar* in a Storm, and not by *Buſking*, as it is libelled.

11. And to ‖ redargue the Circumſtance libelled, that the Goods were not right ſtowed; it's acknowledg'd the Ship was ſix Months in a Harbour at *Bengal*, after the libelled Engagement, and there loaded and unloaded: So that they had all Opportunity to ſtow the Goods as they thought fit, and certainly they were ſtowed as ſuch Goods uſually are, which cannot be preſs'd without Damage.

‖ Refute.

12. That the whole inward Loading does not amount to a Value beyond what might be reaſonably expected from the outward Cargo, in a Trading-Voyage to theſe Places.

And *laſtly*, That in *January* preceding, the Time of the alledged Action, there was a Proteſt taken by the Pannels againſt the Governor of *Cochin*, for not allowing the Ship *Worceſter* to be refitted there, which ſhe extremely needed before ſhe could return to *Europe*; and ſo was in no Capacity, either to fight or take a Ship, as is libelled, in the Months of *February*, *March*, *April*, or *May* thereafter; and was a Ship ſheathed with Lead, and therefore altogether unfit for ſuch Action; as alſo a ſlow Sailer, and has not the leaſt Mark of any Gun-ſhot upon her.

So that upon the whole Matter, The Qualifications libelled being ſo weak and conjectural, and the Preſumptions of Innocency ſo ſtrong upon the other Hand; it is confidently expected, that the Honourable Judges and Lords Aſſeſſors will reject the Libel, and let the Pannels go free; which they expect from the Juſtice of the Nation, and the † Humanity with which they are in uſe to treat all Strangers.

† Courteſy.

An ANSWER *to the Fiſcal's Citations. With the Counter-Citations for the Pannels.*

THO' the Doctors differ about the Force of Preſumptions, and the Effect of Probation, *ab Indiciis & Argumentis*, from Preſumptions and Arguments; yet they all agree, that Parallels drawn from Civil Cauſes to Criminal ones, are not univerſally to be admitted. Now the Fiſcal cites *L.* 3. §. 2. *de Teſtibus*, for evincing that Preſumptions, *Indicia & Argumenta*, Tokens and Arguments, are to be received.

This Law is taken out of the Fourth Book *de Cognitionibus*, written by *Calliſtratus*; the which Book only treats of Civil Caſes, as is manifeſt from the Title of that Book, diſpers'd in the *ff.* and † congeſted by *Labittus*, to which I refer. Wherefore this being a Reſcript of the Emperor *Hadrian*, in a Civil Cauſe, can never be applied in a Criminal one.

† collected.

The next Citation is, *L.* 22. *C. ad l. Cor. de falſis*, which is a Reſcript of the Emperor *Conſtantine* to the Governor of *Rome*, about a forged Writ. Now as the Law ſays, ſuch Forgeries can only be diſcover'd by † Collation of Writs, Arguments inferr'd from thence, and Witneſſes. And it is well

† Comparing of Hands.

known,

known, that in our Law we have two Ways of † Improbation; the Direct, and the Indirect. Now to apply that to the Crime of Robbery or Murder, which must be proven * *liquidissime*, and not by † Writs, seems very ‖ anomalous. Besides, Crimes, according to their different Nature, must be diversly proven; some by Ear-witnesses, as Blasphemy, Heresy, Cursing of Parents, &c. Others by Eye-witnesses; as Robbery, Murder, &c. And the Witnesses competent for proving the one Crime, are not so in the other.

† *Disproving.*

* *most clear.*
† *Writing.*
‖ *irregular.*

The third Citation is out of *Antonius Matheus de Criminibus, ad Lib. ff.* 48. *Tit.* 15. *C.* 3. *N.* 4. The Fiscal cites the latter End of this Section; but omits to set down what the Author refers to in the *C.* 6. of that Title; the doing whereof will serve for an Answer. The Position is, *Unus Testis non est audiendus; at si Argumenta alia concurrant, audiendus est:* One Witness is not to be regarded; but if other Arguments concur, he is to be regarded. Now these *Argumenta* must be taken out of the *C.* 6. of that Title. *Argumentum nihil est aliud, quam Ratio quæ rei dubiæ facit fidem; & est vel necessarium, vel contingens. Necessarium, cujus Consequentia necessaria est; veluti coivisse eam quæ peperit, furtum fecisse, qui rem furtivam efferens deprehensus est. Contingens, cujus Consequentia probabilis est; veluti, cædem fecisse, qui cruentatus est:* " An Argument is " only a Reason which proves a doubtful Thing; " and is either necessary, or contingent. That is a " necessary Argument, whose Consequence is ne- " cessary: As for Instance, That she who has brought " forth a Child, has certainly known a Man; or that " he who is taken in the Fact carrying off stoln " Goods, has certainly committed Theft. A con- " tingent Argument, is that whose Consequence is " only probable: As for Instance, That the Man " who is bloody, has committed Slaughter." The necessary Argument obtains in Criminal as well as in Civil Cases; but the contingent one, which the Lawyers call a Presumption, is not of such Force. However, our Author is of Opinion, that *Contingentia Argumenta quanquam singula fidem non faciant, plura tamen conjuncta crimen manifestare possunt. Rem uno atque altero exemplo declarabimus. Occisus est Calendis* Mævius: Titius *perempti inimicus fuit; eidem sæpius non solum interminatus, sed & insidiatus est: Cum deprehenderetur iisdem Calendis in loca cædis, cruentatus, cum gladio cruento, ad mensuram vulneris facto, toto vultu expalluit; interrogatus, nihil respondit, trepide fugit. Hic singula quidem Argumenta infirmiora sunt, universa tamen cædis autorem* Titium *evidenter designant. Simile est illud,* Clodius *cum* Pompeia: *Nudus cum nuda reperti sunt in eodem Cubili; preteriit id momentum quo turpitudo perfici potuit. Jam olim ille mulierem deperibat, ad stuprum per literas sollicitaverat. Quis dubitet utrumque Adulterii damnare?* " Tho' contingent Arguments " singly by themselves make no Proof; yet several " of them join'd together, may make the Crime evi- " dent. We shall make it plain by an Instance or " two. *Mevius* was kill'd on the first Day of the " Month: *Titius* was an Enemy to the Person kill'd, " and not only frequently threaten'd him, but way- " laid him. And when he was found on that same " Day of the Month in the Place of Slaughter, " bloody, with a bloody Sword, answerable to the " Dimensions of the Wound; he look'd as pale as " Death: Being examin'd, gave no Answer, but " run away in a Fright. In this Case, indeed, the " Arguments singly considered don't say much; " but taken all together, they plainly prove *Titius* " to have been the Author of the Murder. What " follows is such another Instance. *Clodius* and " *Pompeia* were found naked in the same Bed, but " not in the Act; the Time for that was past: But " he had long courted the Woman, and sollicited " her to Lewdness by Letters: Then who can " make any Doubt to charge them both with Adul- " tery?" Now there being in the present Case no such Presumptions as these are; the Rules laid down by this Lawyer *Matheus*, shew the Circumstances libelled are not † re- levant.

† *sufficient.*

The fourth Citation is from *Gail. L.* 2. *Obs.* 66. *N.* 12. The setting down of the Title of the Observation, which is *Jus venandi an Servitus sit realis vel personalis*, Whether Hunting be a real or personal Service; and also the Apostle of the Section, which is, *In Materia Decimarum, testes singulares probant*; In Matter of Tythes, single Witnesses are good; does shew, that the Matter there treated is Civil, and not Criminal. And many Things are allowed in Civil Cases, which are not in Criminal. *A. Matheus ad* Lib. *ff.* 48. Tit. 15. *de Probationibus*, Cap. 2. Num. 1. *Quicunque Testes in Causis civilibus esse non possunt, iis nec in Criminalibus Testimonii dictio est. At non contra; quicunque in Causis civilibus audiuntur, ii etiam in criminalibus audiendi sunt. Graviora enim criminalia Judicia civilibus sunt, ideoque & Testium major delectus adhibendus est.* " Whosoever cannot be Witnesses in Civil Causes, " are not to be admitted in Criminal Causes. But " the contrary does not hold, *viz.* That whoever " may be Witnesses in Civil Causes, may also be ad- " mitted in Criminal Causes: For Criminal Causes " are of more Weight than Civil Causes; and there- " fore in Criminal Causes we ought to be more nice " in the Choice of Witnesses." And the Author illustrates this Doctrine, by Examples set down in that Chapter.

What has been said, will serve to answer what is cited out of *Giurba* and *Mascardus*.

The Citation from *Carpzovius*'s Criminal Practicks, *Q.* 123. *N.* 57. is imperfectly excerpted: For I shall give no other Answer, than what is in the same Place, from *N.* 55, to *N.* 59. *Probantur etiam Indicia ad Torturam per unicum Testem, in casu quo plura Indicia simul concurrunt, super quibus Testes examinati diversimode deponunt; ac unus de uno, alter de alio, tertius etiam de alio testificatur: Tum enim omnium Testificatio simul juncta, verisimiliter facit de Reo, qui propterea sub Tormentis interrogari potest. Etsi enim hac de re non omni ex parte Interpp. conveniant, nec desint qui Assertionem hanc simpliciter rejiciant: Testesque hosce, ut singulares conjungendos non esse autument, eo quod singuli Testes haudquaquam fidem faciant. Verissimum tamen est, plures imperfectas Probationes in Causis capitalibus conjungendas esse ad plenam Probationem faciendam, quoad effectum torquendi: Quod communiter Dd. placuisse, licet namque unicum indicium ab uno Teste probatum, semiplenam Probationem & Fidem, ad Quæstionem de reo habendam non faciat: Secus tamen res se habet, si plura Indicia concurrant, & conjunctim reum aggravent, quorum unumquodque per Testem singularem probetur. Nam una Præsumptio aliam adjuvat; plurimaque Indicia conjuncta Fidem faciunt. Quod ipsum tamen non aliter accipi velim, quam hisce tribus concurrentibus. Primo, Ut Testes sint omni exceptione majores & idonei, ac Vitæ probatæ. Secundo, Ut deponant super Indiciis proximis delicto, non etiam super valde remotis*

remotis Indiciis. Tertio, Indicia ſuper quibus Teſtes iſti ſingulares deponunt ſunt plura, & talia quæ reddunt animum Judicis queſi certum quod Reus deliquerit: Quorum alterutrum ſi deficiat, nullum in Jure habeant Effectum. " Preſumptions make " Torture lawful, when there is but one Witneſs, " in a Caſe where ſeveral Preſumptions concur, upon " which Witneſſes being examined, ſwear in a dif- " ferent Manner, and one witneſſes as to one Pre- " ſumption, another as to another, and a third con- " cerning a third. Then all their Evidence being " joined together, makes the Charge againſt the " Perſon probable, who therefore may be examin'd " by Torture. For tho' Interpreters don't all agree " in this Point, and that ſome of them do abſolute- " ly reject this Opinion, and think theſe Teſtimo- " nies are not to be joined, becauſe ſingle Witneſſes " don't make Proof; yet it is a certain Truth, that " in Capital Caſes ſeveral imperfect Proofs are to " be joined together, in order to make a full Proof " as to the Effect of Torture. This is the com- " mon Opinion of the Doctors; for tho' one Pre- " ſumption prov'd by one Witneſs, does not make " half Proof in order to examine the Priſoner by " Torture; yet the Matter is otherwiſe, if ſeveral " Preſumptions concur jointly to charge the Pri- " ſoner, of which any one may be proved by a " ſingle Witneſs; for one Preſumption ſtrengthens " another, and many of them joined together make " up a Proof. But I would not have this to be un- " derſtood to be ſo, except when thoſe three Things " concur: 1. That the Witneſſes be above all Ex- " ception, proper in the Caſe, and of a good Life. " 2. That they ſwear as to Circumſtances immedi- " ately relating to the Crime and not as to thoſe " which are very remote. 3. That the Preſumpti- " ons upon which thoſe ſingle Witneſſes ſwear, be " ſeveral and ſuch as in a Manner may ſatisfy the " Judge, that the Priſoner is guilty of the Crime. " But if any of thoſe Things be wanting, they can " have no Effect in Law."

The Preſumptions in *Swintown*'s Caſe were not in the Indictment, but in the Probation, and ſeem to have been very pregnant and near, whereas theſe libelled againſt Captain *Green* are moſt remote.

But to put this Matter in its true Light, the Honourable Judge and Aſſeſſors are deſired to remember, That Preſumptions never reſpect the Delict, or the *Corpus delicti*, but the Delinquent, and the Perſon of the Accuſed: For as *Menoch. de Preſumpt. L.* 1. *Q.* 8. *N.* 2. very well ſays, *Præſumptio verſatur circa id quod geſtum eſt, ſed ignoratur qualiter geſtum*; a Preſumption relates to the Thing done, but not to the Manner of doing it. Now, in the Opinion of all Lawyers, *Delictum debet eſſe manifeſtum*, a Crime ought to be manifeſt. *Julius Clarus, Sententiarum Lib.* 5. *Q.* 4. *Sciendum eſt autem quod in omnem Caſum nunquam debet Judex procedere ad aliquem actum, niſi prius illi conſtet Delictum ipſum fuiſſe commiſſum.* " But you muſt know, that a " Judge in no Caſe ought to proceed to any Act of " Court, except it appear to him before-hand that " the Crime was committed." And in that Place, illuſtrates this Doctrine by Examples, and the Authority of other Lawyers, to which I refer. His Sentiment in the End of that Queſtion being, *Et ubi conſtet Scelus non interveniſſe, ſilebit Proceſſus:* And where it appears that no Crime has been committed, Proceedings muſt ſtop.

So that *ubi conſtat de delicto*, where the Crime is certain, the Doubt and Controverſy ariſes about the Delinquent, ſo as it is uncertain who is the Perſon guilty, or the Committer of this Crime, whether it be Robbery, Piracy or Murder. Thoſe who admit of Probation, *per Indicia & Argumenta*, by Preſumptions and Arguments, diſtinguiſh theſe into *Proxima & Remota*, near and remote; and to each of them give a different Effect in Law. *Capr. Q.* 120. *N.* 6. *Indicium definitur argumentum delicti perpetrati demonſtrativum, ſeu Indicativum. Idem, Q.* 121. *N.* 1. *Indicia propinqua ac certa, quorum unumquodque per ſe ſufficit ad Torturam. Hujus generis Indicia non veriſimilia ac probabilia ſed certa, non levia aut perfunctoria ſed urgentia; non dubia aut æquivoca, quæ multipliciter interpretari queunt, ſed concludentia, & ad Delictum inferentia ſunt, & Crimini quaſi inhærent, ita ut iis apparentibus, nihil ni ſi Rei Confeſſio deeſſe videatur.* And *N.* 14. *& ſeqq. ut Indicium ſemiplenæ Probationis per ſe ſolum ſufficiens & Idoneum ſit ad Torturam, tria requiruntur,* 1. *Ut Teſtis ille unicus ſit omni exceptione major.* 2. *Ut hic Teſtis deponat de actu immediato, quod fieri intelligitur, ſi Teſtis ſuæ aſſertionis rationem per ſenſum corporeum rei convenientem reddat, quod nempe ipſemet Delictum ab accuſato perpetrari viderit vel preſens interfuerit. Quare, Si Teſtis non de ipſo crimine deponat, ſed de aliquo actu ad delictum proxime accedente, Indicium ſufficiens non facit. Sicuti nec illius Teſtimonium idoneum ac ſufficiens eſt, qui deponit de Delicto quod in oculos cadit, & rationem reddit de alio ſenſu.* 3. *Ut Teſtis verbis dilucidis & indubitatis de Crimine teſtificetur.* " A Preſumption " is defined to be a demonſtrative or declarative " Argument of a Crime committed. *Q.* 121. *N.* 1. " Near and certain Preſumptions, of which every " one is ſufficient of itſelf to juſtify Torture. Pre- " ſumptions of this kind, ought not to be likely or " probable, but certain; not ſlight or trifling, but " urgent; not doubtful or equivocal, that may ad- " mit of many Interpretations, but concluding, " really inferring the Crime, and ſo inſeparable " from it, that thoſe Preſumptions appearing, " there ſeems to be nothing wanting but the Con- " feſſion of the Criminal, *& N.* 14. and following. " To make the Preſumption of half full Proof ſuf- " ficient to juſtify Torture, there are three Things " required. 1. That that one Witneſs be beyond " all Exception. 2. That the Witneſs ſwear as to " the immediate Act, which muſt be underſtood, " that the Witneſs give for the Reaſon of his Af- " ſertion, ſome bodily Senſe proper to the Thing; " as for Inſtance, that he ſaw the Crime committed " by the Priſoner, or was preſent at the Time: " Therefore if the Witneſs don't ſwear concerning " the Crime itſelf, but concerning ſome Act that " comes next the Crime, it is not a ſufficient Pre- " ſumption. So neither is his Evidence proper " and ſufficient, who ſwears concerning a Crime " that is the Object of Sight, and gives an Ac- " count of it from ſome other Senſe. 3. That the " Evidence concerning the Crime be in clear, and " not doubtful Expreſſions." After which our Author gives Examples; and it is to be obſerved, That theſe *Indicia*, Preſumptions, are requir'd in order to torture; for they are not, in this Author's Opinion, ſufficient to condemn, unleſs they be *Certiſſima, Indubitatiſſima, & Luce Meridiana Clariora*, moſt certain, undoubted, and as clear as the Sun at Noon, in which Caſe they have the Effect of a compleat Probation.

The *Indicia remota*, remote Preſumptions, which are alſo term'd, *Dubitata, Semiplæna, quæ rem veram eſſe arguunt, non ſemper ſed plerumque tantum, unde etiam non dicuntur ſimpliciter certa in-*

dicia, ſed veriſimilia & probabilia, ſeu veluti certa Indicia: " Doubtful, half full, which don't always " argue the Matter to be true, but almoſt always; " whence it comes, that they are not ſimply called " certain Preſumptions, but likely, probable, or " almoſt certain Preſumptions." And theſe cumulatively and in great Number concurring, may bring a Perſon to Torture, but never to Condemnation.

Now, by applying this general Doctrine to the Indictment, it is *Juris Incontraverſi*, uncontravertible Law, that the *Delictum*, Crime itſelf, cannot be proven *per Indicia & Preſumptiones*, by Tokens and Preſumptions. And as to the Pannels, tho' a Delict Crime were proven *per Teſtie omni exceptione majores*, by unexceptionable Witneſſes, yet it will appear, That the Circumſtances libelled, do not deſerve the Name of *Indicia*, Preſumptions; and tho' they ſhould be allowed that * Compellation, yet they are *Remotiſſima*, very remote, and by conſequence can have no Effect as to Condemnation.

* *Name.*

As to the additional Concluſion, that the Ship and Cargo ſhould be * eſcheated, the Fiſcal cites a wrong Place, and ſuppoſes the Caſe to be what it is not: But ſeeing he values Mr. *Molley*'s Authority ſo much, his Opinion in this Matter, as expreſs'd in the ſame Treatiſe, *C.* 4. §. 21, 22. is thus: By the Law *Marine*, if Goods are taken by a Pirate, and afterwards the Pirate attacks another Ship, but in the Attempt is conquered, the Prize becomes abſolutely the Captors, ſaving the Account to be render'd to the Admiral; and it is accounted in Law a juſt Caption of whatſoever may be got or taken from ſuch Beaſts of Prey, be the ſame in their own or in their Succeſſor's Poſſeſſion. But then an Account ought to be render'd to the Admiral, who may (if they happen to be the Goods of the Fellow Subject of the Captors, or of Nations in Amity with his own Sovereign) make Reſtitution to the Owner; the Coſts and Charges, and what other Things in Equity ſhall be decreed to the Captor, firſt conſidered and deducted.

* *forfeited.*

§. 22. By the Statute 27 *Edward* III. *cap.* 13. If a Merchant loſe his Goods at Sea, by Piracy or Tempeſt (not being wreck'd) and they afterwards come to Land, if he can make Proof they are his Goods, they ſhall be reſtored to him in Places guildable by the King's Officers, and ſix Men of the Country.

This Law hath a very near Relation with that of the *Romans*, called *de Uſucapione*, or the *Atinian* Law; for *Atinius* enacted, That the Plea of Preſcription or long Poſſeſſion, ſhould not avail in Things that had been ſtolen, but the Intereſt that the right Owner had, ſhould remain perpetual: The Words of the Law are theſe, *Quod ſurreptum eſt, ejus rei Æterna auctoritas eſſet.* Where by *Auctoritas*, Authority, is meaned *Jus Dominii*, the Right of the Proprietor remains perpetual, tho' a Thing be ſtole.

CURIA JUSTICIARIA, *Supremæ Curiæ Admiralitatis tenta in Prætorio, vel nova Domo Seſſionis Burgi de* Edinburgo, *decimo tertio Die Menſis* Martii, 1705, *per Judicem dictæ Curiæ, & per Honoratiſſimos Viros,* Joannem *Comitem de* Loudoun, Joannem *Dominum de* Belhaven, *Dominos* Robertum Dundas *de* Arneſtoun, Joannem Home *de* Blackadder, & Joannem Cockburn *de* Ormiſtoun *Aſſeſſores.*

Curia Legitimè Affirmata.

Intran.

Captain *Thomas Green*, Commander of the Ship called the *Worceſter*, now in *Bruntiſland* Harbour.

Captain *John Madder*, Chief Mate of the ſaid Ship.

John Reynolds, ſecond Mate of the ſaid Ship.

Thomas Linſtead, Aſſiſtant to the deceaſed *Supercargo* of the ſaid Ship.

James Burn, Boatſwain of the ſaid Ship.

James Sympſon, Gunner.

Andrew Robertſon, Gunner's-Mate.

John Brucklie, Seaman.

George Kitchen, Seaman.

Henry Keigle, Carpenter of the ſaid Ship.

George Haines, Steward of the ſaid Ship.

Samuel Wilcocks, Chyrurgeon's Mate.

George Glen, Seaman.

Alexander Taylor, Seaman.

And *John Bannantyne*, Seaman in the ſaid Ship

All of them indicted and accuſed at the Inſtance of Mr. *Alexander Higgins*, Procurator-Fiſcal to the High Court of Admiralty, for the Crimes of *Piracy, Robbery* and *Murder*, in Manner mentioned in the two ſeveral Indictments raiſed againſt them torreanent, before inſert in the Court holden the Fifth of *March* Inſtant.

PURSUERS.

Mr. *Alexander Higgins*, Procurator-Fiſcal.
Sir *James Stuart*, her Majeſty's Advocat.
Sir *David Dalrymple*, and Mr. *William Carmichael*, her Majeſty's Sollicitors.
Sir *Patrick Home.*
Sir *Gilbert Eliot.*
Mr. *Alexander Macklead.*
Mr. *Francis Grant.*
Advocats.

Procurators in DEFENCE.

Sir *David Thoirs.*
Sir *Walter Pringle.*
Mr. *David Forbes.*
Mr. *George Alexander.*
Mr. *John Elphinſton.*
Mr. *John Spotſwood.*
Advocats.

The Libels and Informations for both Parties being read over in Preſence of the ſaid Judge and Aſſeſſors, and in Preſence of the Pannels and Aſſizers.

The Judge and Aſſeſſors having adviſed both the Indictments purſued by Mr. *Alexander Higgins*, Procurator-Fiſcal of the High-Court of *Admiralty*, againſt Captain *Thomas Green*, and the hail Pannels in both Indictments, with the foregoing Debate thereupon; they find, That *Keigle*, and the other Pannels in the firſt Indictment, cannot be delay'd in their Trial, on Pretence that Captain *Green*, as their Commander, ought to be firſt diſcuſs'd; and therefore repel the firſt dilatory Defence: And find that *Reynolds* being libelled againſt as *Socius Criminis*, a Fellow-Criminal; and there being no Speciality, or particular Ground of Exculpation proponed, why he ſhould be previouſly tried; therefore * repel the ſecond dilatory Defence proponed for Captain *Green*, and theſe in the Indictment with him; and repel the Objection again the * Generality of the Indictments, in regard of the Nature

* *reject.*

* *General Terms.*

of

of the Crimes; and find the Crimes of Piracy, or Robbery, or Murder, as libelled, being proven by clear and plain Evidence, † relevant to infer the Pains of Death, and Confiscation of Moveable: Reserving the Consideration of the additional Conclusion of the Libels, until the Verdict of the Assize be returned; and repel the other Defences proponed for the Pannels; and remit the whole to the Knowledge of an Assize.

† *sufficient.*

ROB. FORBES, I. P. A.

The Judge of the High-Court of *Admiralty* and Assessors, continue the Dyet at the said Mr. *Alexander Higgins*'s Instance, against the foresaid † hail Pannels, till To-morrow, being the 14th Instant, at Eight a-Clock in the Morning; and ordains the Assizers and Witnesses to attend then, ‖ ilk Person under the Pain of 200 Merks; and the Pannels to be carried back to Prison.

† *whole.*

‖ *each.*

CURIA JUSTICIARIA *Supremæ Curiæ Admiralitatis tenta in Prætorio, vel nova Domo Sessionis Burgi de* Edinburgo, *decimo quarto Die Mensis* Martii, 1705. *per Judicem dictæ Curiæ, & per Honoratissimos Viros*, Joannem *Comitem de* Loudoun, Joannem *Dominum de* Belhaven, *Dominos* Robertum Dundas *de* Arniston, Joannem Home *de* Blackadder, *&* Joannem Cockburn *de* Ormiston *Assessores.*

Curia Legitimè Affirmata.

Intran.

Captain *Thomas Green*, Commander of the Ship called the *Worcester*, now in *Bruntisland* Harbour.
Captain *John Madder*, Chief-Mate of the said Ship.
John Reynolds, Second-Mate of the said Ship.
Thomas Linsteed, Assistant to the deceas'd *Super-Cargo* of the said Ship.
James Burn, Boatswain of the said Ship.
James Simpson, Gunner.
Andrew Robertson, Gunner's-Mate.
John Bruckley, Seaman.
George Kitchen, Seaman.
Henry Keigle, Carpenter of the said Ship.
George Haines, Steward of the said Ship.
Samuel Wilcocks, Chyrurgeon's Mate.
George Glen, Seaman.
Alexander Taylor, Seaman.
And *John Bannantyne*, Seaman of the said Ship.

PURSUERS.

Mr. *Alexander Higgins*, Procurator Fiscal.
Sir *James Stuart*, her Majesty's Advocat.
Sir *David Dalrymple*, and Mr. *William Carmichael*, her Majesty's Sollicitors.
Sir *Patrick Home.*
Sir *Gilbert Eliot.*
Mr. *Alexander Macleod.*
Mr. *Francis Grant.*
Advocats.

Procurators in DEFENCE.

Sir *David Thoirs.*
Sir *Walter Pringle.*
Mr. *David Forbes.*
Mr. *George Alexander.*
Mr. *John Elphinston.*
Mr. *John Spotswood.*
Advocats.

* *Assize.*

* *Jury.*

Archibald Drummond, * Skipper in *Leith.*
John Findlayson, Skipper in *Borrostounness.*
Mark Stark, Skipper there.
James Jenison, Skipper in *Queensferry.*
John Mathie, Skipper in *Prestounpans.*
James Majoribanks, Merchant in *Edinburgh.*
Edward Majoribanks of † *Halyards.*
Sir *James Fleeming* of *Rathobyres.*
James Gordon, Senior, and
Robert Forrest, Merchants in *Edinburgh.*
Robert Innes,
Robert Walwood,
William Blockwood,
George Clark, and
William Neilson, Merchants in *Edinburgh.*

The Assize lawfully sworn, and no Objection of the Law in the contrary.

Mr. Alexander Higgins *the Pursuer, for Probation, adduced the Witnesses after deponing*, viz.

* COmpeared *Antonio Ferdinando*, Cook's Mate of the Ship the *Worcester*, which was commanded by Captain *Thomas Green*, aged twenty-four Years, or thereby, unmarried; with Captain *George Yeaman*, Merchant in *Dundee*, sworn Interpreter: And the said *Antonio Ferdinando* being solemnly sworn, ‖ purged of partial Counsel, examined and interrogate upon the Libels, or Indictments. And being interrogate if he believed in GOD, and if he was a Christian: Depones, That he believes in GOD, and that he was born of Christian Parents, and is a Christian himself. And being interrogate upon the Indictment, depones, That at *Callicoiloan*, upon the Coast of *Malabar*, the Deponent did come aboard the Sloop belonging to Captain *Green*'s Ship called the *Worcester*; at which Time the Deponent did enter to the Service of Mr. *Loveday*, Purser of the said Ship; and the Deponent cannot be positive of the Time of his coming aboard, but believes it was about two Years and a half since; and went in the said Sloop from *Callicoiloan* to *Keilon*, from thence to *Cocheene*, and from *Cocheene* to *Calecut*, and from that to *Tillicherry*: And depones, That upon the Coast of *Malabar* thereafter, he did see an Engagement betwixt the said Sloop, the Ship the *Worcester*, and another Ship sailed by *White-Men*, speaking *English*, and the said Ship did bear *English* Colours. And being interrogate by the Pannels, what were the Colours the said Ship did bear: Depones, That they were of White, Red and Black, like to these that the said Captain *Green*'s Ship did bear; and that first the said Captain *Green*, the Merchant, and Mr. *Loveday*, went aboard the said Strangers Ship,

* *Appeared.*

* *Prisoners.*

* *Master of a Ship.* † Of, *before a Place, in the* Scots *Dialect, denotes the Place to be the Estate of the Person nam'd.*
‖ i. e. *Solemnly sworn, that he would tell the Truth, and nothing but the Truth; that he had no Prejudice or ill Will against any of the Prisoners at the Bar; that he got no good Deed, or Promise of good Deed, for giving Evidence against them; nor was suborned, advised, or directed how to swear, or what he shall say in this Trial.*

and ſtayed for about the Space of a Glaſs, and then returned aboard the *Worceſter*, and then did man the Sloop of the ſaid Ship the *Worceſter*, with about 20 Men, whereof were Captain *Green* himſelf, Mr. *Loveday*, and the Supercargo, the Carpenter and Gunner, and that the Gunner's Name was *James Simpſon*, whom the Deponent knows, and points to at the Bar; and that there were four Guns and two Pattereroes aboard the ſaid Sloop; and thereafter Captain *Madder* came aboard of the Sloop, and that they did engage the ſaid other Ship for the firſt and ſecond Days, and upon the third Day the ſaid Ship was boarded by thoſe in the Sloop, who when they came aboard, did take up thoſe of the Crew of the ſaid Ship from under Deck, killed them with Hatchets, and threw them over-board, and that Captain *Green*, Captain *Madder*, and *James Simpſon* the Gunner, were three of theſe who went aboard and killed the Men: And depones, That the Ship the *Worceſter* came up during the ſaid Engagement, and did fire at the ſaid Ship, but theſe in the *Worceſter* did not board her: And the Deponent believes, that the Men who were killed and thrown over-board, as ſaid is, were about ten in Number; and depones, That there were but few Goods aboard the ſaid taken Ship, which were carried aboard the *Worceſter*, and amongſt the reſt he † minds of ſome *China* Root: And depones, That the ſaid Ship which was taken, was ſailed by ſome of the Crew of the *Worceſter*, and carried to *Callicoiloan*, and there ſold, and that the ſaid Ship was not tied with a Tow to the Ship *Worceſter*: And the Deponent knows not what Men were killed aboard the Sloop or *Worceſter*, or if any were killed, but the Deponent himſelf was wounded in the Arm, and which Wound he now ſhews to the View of all. Depones, That Captain *Madder* told the Deponent, that if ever he did tell any Perſon, either white or black, of the ſaid Engagement, that he the ſaid Captain would kill the Deponent, and heave him over board. Depones, That the Upper-Coat which the Deponent † preſently wears, was found aboard of the ſaid taken Ship, and which the Deponent has kept ſince that Time. Depones, That during the ſaid Engagements, *Haines*, *Bannantine*, *Bruckley*, *Wilcocks*, *Burn*, *Robertſon*, *Glen* and *Taylor*, eight of the Pannels, were aboard the Ship the *Worceſter*; and that *Keigle*, *Kitchen* and *Linſeed* were aboard the Sloop with Captain *Green*, *Madder* and *Simpſon*; and believes that *Reynolds* was then aſhore at *Callicoiloan*: And depones, That the ſaid Ship was ſold to a King in *Malabar*, and that the Man who bought the ſaid Ship bears a *Malabar* Name, whoſe Servant is called *Coge Commodo*: And depones, That the ſaid Engagement happened between *Tillicherry* and *Calecut*, upon the Coaſt of *Malabar*: And depones, That he cannot poſitively tell how many Guns the taken Ship did bear, but thinks they were about twenty, ſmall and great: And the Deponent believes, That the Engagement happen'd about a Month after the Deponent went aboard of Captain *Green*'s Sloop; and cannot be poſitive when the Ship the *Worceſter*, did engage the ſaid taken Ship, whether firſt, ſecond, or third Day. Depones, That the Engagement was by way of a running Fight. Depones, That he knows not who did ſail in the ſaid taken Ship to *Callicoiloan*. *Cauſa Scientiæ*, the way how he came to know this, the Deponent was aboard the ſaid Sloop during the Time of the ſaid Engagement, and ſaw and heard, as he has deponed; and this is the Truth, as he ſhall anſwer to GOD. Depones, He can write after the *Malabar* Character; and this Depoſition is alſo ſigned by the ſaid Captain *George Yeaman*, the ſworn Interpreter.

† *remembers.*

† *notes.*

Antonio Ferdinando.
Geo. Yeaman.
ROB. FORBES.

COmpeared *Charles May*, Chyrurgeon of the Ship the *Worceſter*, commanded by Captain *Green*, aged twenty-ſix Years, or thereby, unmarried; who being ſolemnly ſworn, purged of partial Counſel, examined and interrogate upon the Libel: Depones, That he was aboard of Captain *Green*'s Ship the *Worceſter*, and went from *England* with her; that when the ſaid Ship went to the Coaſt of *Malabar*, the Deponent was ſet aſhore at the *Ibeck*, which is the Landing-Place, and from thence went up ſome Miles to *Callicoiloan*; and ſome Time thereafter, about a Fortnight, the Deponent did hear the Firing of Guns as at Sea, and did meet with *Coge Commodo*, who was Merchant to the ſaid Ship, and bought ſome Things from them, with *Franciſco de Olivera* the Linguiſter of the ſaid Ship, who had come that Day from the *Ibeck*, and that the Deponent aſked him what mean'd the Shooting; and that the ſaid *Coge Commodo*, and *Franciſco de Olivera*, anſwered the Deponent, *That the* Worceſter *had gone out, and was fighting at Sea with another Ship*: And depones, That the next Morning the Deponent came to the Shore, where he did ſee the Ship the *Worceſter* riding in her Birth, that is, much about the ſame Place where ſhe had lyen before, and that the ſaid Place was about four Miles from the Shore. Depones, That there was then another Veſſel riding with the *Worceſter* at her Stern. Depones, That about ſome Time thereafter, in the ſame Morning, the Deponent did ſee the Long-Boat of the *Worceſter* coming to the Shore in a great Haſte; and that when the Boat landed, the Deponent aſked the Men what was the Matter that brought them aſhore, it not being ordinary for Boats to come over the Bar, by reaſon of a great Sea: And the Men anſwered, That Captain *Madder* had ſent them aſhore for a *Pinguetta* (which is the Name of a certain kind of Boat) with Water, becauſe they had ſplit and ſtaved all their Water aboard, and that there had been Baſking all Night, which the Deponent underſtood meant, that they had been at ſore Labour and Fatigue, as if their Ship had been driven from her Anchor, and bearing up again. Depones, That he did not ſpeak at that Time with the Men in relation to any Fight, but that the ſaid Men told him, they had brought a Ship in with them; and that the Deponent made no ſtay at the Shore, but returned immediately to *Callicoiloan*, where his Patients were. Depones, That five or ſix Days thereafter, the Deponent went aboard the *Worceſter* for ſome Medicines which he wanted for the Uſe of his Patients; and that when he came aboard, the Deponent ſaw the Deck of the *Worceſter* lumber'd with Goods, and five or ſix Cheſts alſo, and ſome Bales of Goods; and that the Deponent did then ſay to Mr. *Madder* Senior, What have you got there? You are full of Buſineſs. And that Mr. *Madder* did then curſe him, and bid him go mind his Plaiſter-Box. And depones, That the Deponent was afterwards informed, that the Ship which was riding at Stern of the *Worceſter*, was ſold to *Coge Commodo*, the Ship's Merchant at *Keilon* River;

River; and the said Ship was brought there by a Part of the *Worcester*'s Crew who immediately left her so soon as they had brought her to an Anchor, or otherways fixed her. Depones, That the * Linguister likewise told the Deponent, That *Coge Commodo* complained, he had bought the Ship too dear; and that he said, he had bought one the Year before cheaper, tho' four times the Value. Depones, That some time thereafter, the Sloop came down the Coast; and that *Antonio Ferdinando* was sent ashore to the Deponent at the *Ibeck*; and that the said *Antonio Ferdinando*, the *Black*, was wounded in the Arm: And that the Deponent did take off the * Dressing of the said Wound, and found it to be a Fracture; and that it look'd as if the Wound had been occasioned by a Gun-shot. And that the Deponent asked the said *Antonio Ferdinando*, the *Black*, who had dressed the Wound, or set his Arm? And that the said *Black* did tell the Deponent, That he was set ashore at *Cochin*, and there dressed by a *Dutch* Chyrurgeon. And depones, That some Time thereafter he went aboard the *Worcester*, and called for the said *Black*, and any other Persons that were ill; and there came to him to his Chest, *Duncan Mackay*, and another (which the Deponent thinks was *Edward Cuming*, but cannot be positive) and that these Persons were also wounded; and that the said *Black* was likeways there. And Depones, That he did ask his said Patients how they came by their Wounds? And that Mr. *Madder* hearing the Deponent ask Questions, he came to the Deponent, and bid him ask no Questions; and likewise charged the Patients to answer the Deponent any Questions upon their Peril. And the Deponent then said to Mr. *Madder*, that he had no Command over him; and that Mr. *Madder* answered, That he would go to one who had Command over the Deponent: And that the said *Madder* went up accordingly; and thereafter returned, and ordered the Deponent immediately ashore; and the Deponent was accordingly carried ashore in the *Pinguetta*, that was lying by the Ship's Side. Depones, That all this which the Deponent has before deponed upon, did fall out about the Months of *January* or *February*, 1703 Years. Depones, That while the Ship the *Worcester* was going up the Coast of *Malabar*, Mr. *Linsteed*, one of the Crew was left at *Keilon*, which was near seven Leagues, or about twenty one Miles from *Callicoiloan*; and that the said *Linsteed* was left there with one *Hammond*, to take care of some Part of the Cargo which was to be put aboard of the Ship. Depones, That he did not see the the said Mr. *Linsteed* at *Keilon*; but only heard that he was left there, and remained there, as the Deponent heard, till the Ship came back. And Depones, That the Shooting which the Deponent heard, was before the Ship came back, as he has already deponed. And Depones, That thereafter, during the Voyage, he never heard the Crew, or any of them, talk of their taking a Ship. Depones, That whilst the Deponent heard the said Shooting, Mr. *Loveday* and Mr. *Otlay* were ashore at *Callicoiloan*: And depones, That when the *Worcester* sailed from *England*, the Crew was about 35 or 36 in Number. Depones, That while the Deponent was aboard, the Ship went no further up than *Callecut*: And depones, That the Reason how he knows Mr. *Hammond* and Mr. *Linsteed* were ashore at *Keilon*, was, that he heard the *Supercargo* desire the said Persons to go ashore, and take care of some Part of the Cargo. And depones, That he was but two or three Hours aboard after he heard the *Supercargo* give the said Order; and saw not the said two Persons (*Hammond* and *Linsteed*) go ashore. And depones, That it was in the Ship the *Worcester*'s going up the Coast of *Malabar*, that the Deponent heard the Shooting. Depones, That upon that Coast the Ship sprung a Leak, and did from thence sail to *Bengal*, in order to have the same helped: And depones, That he knows not how many Leagues there was, betwixt the Place where the Leak sprung, and *Bengal*; but that it was about five Weeks Sailing. Depones, That he knows not the Reason, why the Ship was not brought into some Place on the Coast of *Malabar*, for being refitted. Depones, That when the Deponent came aboard at *Callicoiloan*, that the Ship weighed Anchor, and sailed to *Cochin*, and from that to *Callecut*, and thereafter came back the same Way. Depones, That there were some Goods put aboard the Ship from *Callicut*, but none at *Cochin*, as the Deponent remembers. And further depones, That when the Deponent returned, he found Mr. *Hammond* and Mr. *Linsteed* ashore at *Keilon*. *Causa Scientiæ patet*. The Way how he comes to know this is evident. And this is the Truth, as he shall answer to GOD.

* *Interpreter.*

* *Plaister.*

Charles May.

ROBERT FORBES.

COmpeared *Antonio Francisco*, Servant to Captain *Thomas Green*, Commander of the Ship the *Worcester*, aged 22 Years, or thereby, unmarried; with Captain *George Yeaman*, Merchant, in *Dundee*, his Interpreter: And the said *Antonio Francisco* being solemnly sworn, purged of partial Counsel, examined and interrogat upon the Libel pursued by the Procurator-Fiscal, against the said Captain *Green*, and the other Pannels; depones, That the Deponent believes there is a GOD; and his Mistress at *Pegu* caused baptize him a Christian; and he owns the Christian Religion: And he came to the Service of Captain *Green*, at *Delagoa*. Depones, That upon the Coast of *Malabar*, while the Deponent was aboard of the *Worcester*, he heard some Shooting of Guns from aboard the *Worcester*, to the Number of Six, or thereby: And that the Deponent, in the mean time, was chained and nailed to the Floor of the Fore-Castle in the said Ship; and he heard no other Shooting from any other Ship. Depones, That two Days after the Deponent heard the said Shooting, he saw some Goods brought aboard the said Ship the *Worcester*; and which *Antonio Ferdinando*, the other *Black*, told the Deponent, were brought from another Ship which they had taken: And likewise the said *Black* told the Deponent, that at the same Time Captain *Madder* had given some Rack, *id est*, Brandy to the Men. And at the same time, the other *Black* told the Deponent likeways, That there were ten Men of the Crew of the taken Ship kill'd, when she was taken. And that the said *Black* did let the Deponent see a Plaister on his Arm, upon which he said he had got a Wound by a Shot, while in the Sloop taking the other Ship: And that he told the Deponent, that the said Ship was taken by the Sloop belonging to the *Worcester*: And that the Deponent neither heard of, nor did see any other wounded Men. Depones, That he does not know where they were sailing, after he heard